

# *The International Councilor*

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The Newsletter of the Council of International Investigators

Issue 1

## **CII Member Defies New Canadian Privacy Guidelines on Covert Surveillance**

*By Norm Groot and Ken Cummins*

CII member Brian King's firm, King-Reed & Associates Inc. became one of the first targets of the Office of the Privacy Commissioner of Canada (OPC) new guidelines requiring investigators to edit (depersonalize) out faces and identifying features of people in covert surveillance tapes who are not the subject of the investigation.



But in this first test of the new guidelines on conducting covert surveillance in the private sector, the Office of the Privacy

Commissioner (OPC) blinked, and did not push enforcement of the guidelines against King's Toronto-based firm. OPC

officials, however, have indicated to Canadian investigators that the dispute should not be viewed as a test case of the new guidelines, and that OPC

might take stronger action in the future against investigators who defy its decrees.

In defying the guidelines, King-Reed responded to the OPC through counsel advising that the investigative firm was refusing this request in hopes the

OPC would forward this to the Federal Courts where a constitutional challenge to the guidelines could be made. But the OPC did not take further action in the face of King-Reed's refusal.

Both sides are prohibited from publicly discussing specifics of this case -- known as the Personal Information Protection and Electronic Documents Act Case Summary #2009-007 -- beyond the findings issued by the OPC. King's firm is not identified in the OPC's public pronouncements. State Farm had contested the OPC's authority to impose these new guidelines on private sector investigations.

The Privacy Commissioner ruled that the complaint brought by the third party (sister of the subject of the investigation) was well founded. But King's firm, with the backing of its client, disputed this, defied the ruling and refused to blur faces in the video. Investigators argue that compliance would require an enormous amount of time and would cost more than the cost original covert surveillance required to obtain the video footage. Estimates of the cost of pixilation of video tapes range from a conservative 18 hours for 60 minutes of video to twice that amount of time, depending on the number of faces to be blurred.

King and his attorneys also contended that the compliance with the guidelines would have required tampering with evidence that may need to be presented in court later on. No action was taken against King-Reed for its noncompliance and the deadline for the OPC's appeal of this passed without comment from the Privacy Commissioner.

When contacted for comment by the Councilor, King staid there are a number of reasons that this case and similar ones need to be challenged.

"Basically, the OPC is signaling that we would not be allowed to take photos of anyone in a public place with out their permission," said King, third vice president of CII.

“This is not a case of where someone’s privacy was invaded,” he added. “The woman who was photographed was walking in and out of a shopping mall in plain view. The video captured a woman who was the sister of the subject of the investigation walking with (the subject), and was not shown in any type of public setting. It was evidence in a civil litigation.”

King said his firm’s stand against the OPC has the backing of several industry associations and the legal bar. “This delves deep into the principles of civil litigation and the tampering of physical evidence, which, it appears, the OPC has not considered in any type of detail,” King said.

A second case currently weaving through the Canadian Court system that was initiated by State Farm Mutual Automobile Insurance Co. involves very similar issues with respect to the constitutional authority of the OPC to insert itself into the litigation processes. This case is expected to be heard later this Year.

The present firestorm over the OPC’s action erupted last May when the proposed guidelines were first posted on OPC’s website, just days after the King firm’s refusal to agree to the third-party masking. The proposal drew stiff opposition from investigators and professional associations across Canada, including the Canadian Association of Private Investigators (CAPI). Opponents stressed in submissions to the Office of the Privacy Commissioner (OPC) that the guidelines would encumber the private investigation of fraud and failed to strike an appropriate balance between privacy interests on the one hand, and the public’s interest in security, crime prevention, and law enforcement on the other.

Investigators warn that if the guidelines prevail in Canada, European countries soon will be trying to impose similar restrictions on covert surveillance. Insurance fraud is estimated to cost Canada’s property and casualty insurance industry \$1.3 billion annually. The costs of employment-related fraud have never been quantified but they are known to be significant. Investigators have warned that there will be further cost implications as a result of the publication of the OPC’s guidelines. For example, the OPC’s suggestion that surveillance should be used only as a “last resort,” would arguably make private investigations less effective. Furthermore, the Guidelines’ onerous provisions, such as the pixilation of third party images, would ultimately increase the costs of providing goods and services, as compliance with the Guidelines would result in higher fraud insurance premiums throughout the marketplace.

“The impact on business has been hard to measure,” said CII member Paul Reid, vice president of Garda Investigation Services in Toronto. “After May (when the guidelines were proposed), there was no impact. By October, there was a chill in the insurance community that conservatively resulted in a 25 percent dip in business. That seems to be leveling out now.”

According to the OPC’s public statements in the State Farm case, “a woman and her daughter were surprised to learn that video images of them were taken in a public place during a covert video surveillance operation on the woman’s sister. The covert surveillance had been requested by the sister’s insurance company because of an ongoing legal dispute with her. The woman filed a complaint against the private investigation firm that the insurance company had hired to investigate her sister.

“After our investigation into the complaint, the Assistant Privacy Commissioner made several recommendations to the private investigation firm concerning the collection and use of personal information during covert video surveillance . . . While the firm agreed to implement some recommendations, it did not agree to implement all of them. It said that it would continue to collect, use and disclose personal information of third parties without their consent . . . It also refused to depersonalize or remove third-party information collected without consent.”

“The Assistant Commissioner concluded that the collection without consent of third-party personal information via covert video surveillance could be acceptable under the Act . . . in certain, specific situations. (For example, when the third-party collection could be shown to be relevant to the purpose of the collection of information about the subject of the surveillance.) However, the Assistant Commissioner did not find the particular circumstances of the complainant’s case to constitute one of these acceptable situations.”

One of the most effective tools in a private investigator’s arsenal is covert surveillance. Investigators have assured the OPC that covert surveillance can be conducted with minimal impact on legitimate expectations of personal privacy. Guideline opponents point out that organizations, such as insurers and employers, generally do not want to conduct surveillance, as it adds to the cost of claims adjudication and workplace management, and have no interest in collecting sensitive information extraneous to the purpose of the investigation. Rather, the joint objective of a private investigator and his or her principal is to obtain information that would assist in determining if a fraud, breach of contract, or other contravention of the law has taken place.

The Guidelines challenge the ability of businesses to determine the scope and methodology of their investigations. CAPI holds that insurers and employers should be permitted to exercise their discretion in selecting investigative options, including covert surveillance.

As a result of OPC’s inaction in the State Farm matter, Canadian investigators are united in their determination to ignore the guidelines when they interfere with the normal conduct of business.

“What is the net result of failing to comply? Nothing,” says Paul Reid. “As a result, I think things are beginning to turn north again.” “I think it’s another tempest in a teapot, but it did cost us some money for awhile,” Reid added.

(Footnote: Brian King commented to The Councillor that his firm collects and disseminates personal information of individuals with the highest regards to the laws of the country and has a very strict Code of Conduct when it comes to the handling of personal information. “But, sometimes, you have to draw a line in the sand,” he said. The firm’s Code of Conduct is posted on its website and provided to its clients. “We would love to see this issue heard in our Federal Courts to get a definitive ruling and will not allow the Privacy Commissioner to make up the rules as they go,” he said.

Norman Groot is counsel to the Canadian Association of Special Investigation Units, the Canadian Independent Adjusters Association and the Canadian Association of Private Investigators on privacy and investigation matters. He is also the author of the first comprehensive Canadian text on law and private investigations: Canadian Law and Private Investigations, available from Irwin Law Inc.

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## Foreign Corruption Enforcement Potential Growth Area for Investigators

By David Quinones and Ken Cummins



WASHINGTON, D.C. -- For all the criticism lobbed at the embattled American President for heavy spending and few results, there is one area in which the Obama administration could reap monetary returns and international good will, and investigators with unique skills could capitalize, as well, despite the continuing economic crisis.

President Obama intends to replace the Bush doctrine -- which sought to spread democracy through military might and regime change -- with a new movement to promote democracy by forcing exposure of corrupt government through tougher compliance and enforcement of the Foreign Corrupt Practices Act (FCPA).

Obama ordered key officials in the Pentagon, the State Department and other agencies to deliver new proposals by the end of January that would toughen FCPA compliance, increase prosecutions and promote democratic movements and the rule of law abroad by ratcheting up pressure on corrupt governments to clean up their acts.

Well-positioned investigators in places like New York already have seen an upturn in FCPA cases from the legal and corporate clients, and are sharing this business with investigators in countries where background investigations are needed. Investigators in the Middle East can expect to see a growth in FCPA cases during the Obama presidency.

Whenever a U.S. firm seeks business in a foreign country, that firm must conduct background investigations on the agents it enlists to help secure that business. These background investigations can no longer be pro forma, and must be thorough enough to convince the U.S. Justice Department that the American corporation made a serious attempt to avoid corrupt practices. Out of precaution, U.S. firms are also ordering background investigations on its American reps who act as liaisons in developing business overseas.

While the funding and focus of the FCPA have changed with the political climate since its enactment in 1977 in the post-Watergate era, its current incarnation and the corresponding enforcement arm under the Obama administration offer new opportunities for investigators. The history of the Foreign Corrupt Practices Act of 1977 has run the law enforcement gamut from headline-maker in the early-80s to being relegated to the Federal Bureau of Investigation's broom closet for most of the next two decades.

When properly wielded, FCPA cases deliver forfeited assets to help fund future investigations and enforcement. Some asset forfeiture cases under FCPA actually have the potential to yield that oh-so-elusive result for government agencies: a profit. But the Feds cannot do the job alone.

In 1981, six politicians were convicted of bribery and conspiracy for their roles in the high-profile federal FCPA sting dubbed "Abscam" (abbreviated from "Abdul Scam"). Under the umbrella of FCPA enforcement, the FBI in 1978 conjured up Abdul Enterprises and used the fake business as a means to offer bribes to 33 American politicians -- money to buy asylum and other consideration for a non-existent Middle Eastern sheikh.

In 1984, American auto industrialist John DeLorean argued that he was entrapped by the FBI after he was videotaped buying a case of cocaine during an FCPA sting. With heavy-handed techniques and other overly-zealous actions by agents bolstering his defense, DeLorean's counsel earned a not-guilty verdict without calling a single witness.

After that debacle, investigators specializing in avoiding procedural defenses became hot commodities for the federal government's pursuit of high-powered, high-dollar targets. These experts represented the first investigative contractors farmed out to ensure that FCPA prosecutions reaped the harvest.

But during the George W. Bush administration, the FCPA was used largely as a tool to try corrupt individuals for bribery while distancing the crooks from their firms. Such was the case in 2003 when the Department of Justice indicted James Giffen, who acted on behalf of oil giant Texaco to procure oil fields in Kazakhstan. Giffen was painted as a rogue agent. Texaco (and later Chevron-Texaco) was not implicated. This is where the new administration has shifted gears. Instead of targeting individuals as scapegoats for the wrongdoings of corporate giants, newly-minted Assistant Attorney General Lanny A. Breuer – an Obama appointee – has used individuals to implicate companies, and then pursue restitution.

Breuer's enforcement strategy creates a windfall of asset recovery, opening more cases and the justification of contracts for investigators with specialized skills in forensic accounting and international asset tracing. Investigators retained are able to spot red flags: inflated line-items in invoices, over-payment on commissions, and on-paper relationships between corporate agents and consultants and wire transfer sources to and from secrecy havens.

Now, Obama's Department of Justice sees the anti-bribery legislation as a potential revenue stream, with the added benefit of discouraging corruption rampant in emerging markets like Africa, the Middle East and Eastern Europe. Oil and gas industries, as well as the medical suppliers were targets of the Department of Justice in 2008 and 2009; but the weapons industry has become the industry du jour.

Such was the case when FBI agents executed the largest sting in FCPA history in January, arresting 22 gun industry executives who agreed to take kickbacks to arm a fictional African president.

"This is the first time we've used the technique of an undercover operation in a case involving foreign corporate bribery," said Breuer. "The message is that we are going to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals."

Already, Breuer's cases have netted vast sums. From 2004 to 2007, the Department of Justice handed out corporate fines averaging \$6.4 million. In 2009, that number jumped to \$86.4 million, bolstered by multimillion dollar rulings against international telecom agent Siemens and former Halliburton subsidiary KBR. (The 2008 Siemens case was tried under the auspices of the Bush administration.)

In another illustration of this new philosophy, Novo Nordisk was ordered to pay \$9 million because of its illegal kickbacks to the Iraqi government to secure contracts providing medical supplies. Breuer has deferred prosecution of individuals involved in the bribes, opting instead to give the Danish medical manufacturer three years to pay its way out of its criminal penalty.

In 2009, the Department of Justice awarded more than \$6.5 billion in contracts -- \$1.7 billion by the FBI -- including what officials call "more funding than ever" for contracted investigators who bring specific technical skills to federal operations. The \$1.7 billion figure -- far and away the most the FBI has ever spent on contract services -- represents a 70-percent increase in spending from 2008.



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At least 125 private investigation firms with expertise in specialized areas -- including forensics, foreign languages, asset-tracing and information services training – earned contracts ranging from \$42,500 to \$3.5 million for work last year, according to the website USASpending.gov. And this is only the beginning.

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Mr. Quinones is the Editorial Director of the International Association for Asset Recovery

Ken Cummins is Editor of The Councillor

## President's Report



*By Nancy S. Barber*

First and foremost, I want to wish a Happy New Year to all of our CII members. We live in exciting and dynamic times that challenge our profession as never before. It is our hope that CII can serve as an effective vehicle for our members to navigate the challenges presented to us by the on-going economic crisis, an increasing wave of privacy legislation and the continuing technological challenges presented by the arrival of the Internet as the primary means of communication and, indeed, global investigations.

As part of the need to keep abreast of technology, CII members will be seeing a new and improved web site this year. The board has conducted two electronic meetings so far this year, and we are using the CII web site to post board reports and updates. All of our members are encouraged to review reports posted on the board web site and keep abreast of board activity.

CII abolished holding Mid-Year meetings several years ago, and, in their place, we implemented regional meetings. This year, we have three regional meetings planned. CII owes a debt of gratitude to our Executive Regional Director, Alan Marr, along with assistance from our Third Vice-President, Eddy Sigrist, and the Membership Committee, especially Graham Dooley, for working to revive our Regional Director network. Our membership campaign is built on our Regional Director network. The Regional Directors serve as the heart and soul of our membership campaign.

The regional meetings are truly the most effective means for CII to reach out to new members, and this is especially true if we can schedule meetings in regions where we have few contacts. We are seeing much more activity from our Regional Directors. Two of our regional meetings this year are in locations where CII has never held meetings; Romania and Panama.

We have three regional meetings scheduled this year. Raul Fat will be hosting a regional meeting in Bucharest Romania from May 7 – May 8, 2010. Brett Mikkelson will be hosting a regional meeting in Panama from April 23 -25, 2010; and Glenn Eiden will host a CII regional meeting in Chicago on April 22, 2010. The Chicago regional meeting is scheduled to be held concurrent with the NCISS Conference in Chicago to take advantage of a networking opportunity.

As part of CII's advocacy on behalf of our members, we have joined three organizations that are dedicated to monitoring and lobbying on behalf of our profession. The organizations are based in Canada, Europe and the United States. CII is one of the first international members of NCISS (National Council of Investigators and Security Services, <http://www.nciss.com/>) which is one of several organizations in the US dedicated to legislative lobbying on behalf of our profession. CII is also a member of the European organization, IKD (International Federation of Associations of Private Detectives, <http://www.i-k-d.com/>), and the Canadian organization, CAPI (Canadian Association of Private Investigators, <http://www.capicanada.ca/>).

CII's membership in these organizations is a reflection of our dedication to protecting our profession and monitoring privacy legislation in all international settings. Those working under legislation such as the Data Protection Act will appreciate CII's keen interest in advocating for our members by maintaining membership in these organizations.

I would like to thank Trish Dehmel for serving as the editor of The Councillor for the last six years. CII is indebted to Trish for sweeping changes, including the transition from hard copy to electronic copy. Trish was awarded the Meritorious Service Award at the AGM in Australia in September, and she deserves acknowledgement for all of her many years of service – and continued service -- to CII. She was instrumental in both the design and delivery of the Councillor for the last few years and reflects the best of what CII has among its members.

I would like to welcome and thank Ken Cummins, who has volunteered to take over as editor of the Councillor. We are experimenting with a new look and working on using our upgraded web site for the layout and distribution of the Councillor.

I am pleased to announce that CII donated to the Red Cross for Haitian Earthquake Relief. Many worthy organizations are collecting funds for assistance to Haiti. I would urge CII members to reach into your hearts and pockets and contribute to your favorite charity to assist Haiti that has suffered an incomprehensible tragedy that will take years and years to overcome.

Finally, I would like to thank the Executive Board, CII's Officers and the Regional Directors for their support. We have a fantastic team in place, and our incoming president, Roy Whitehouse, is working along with our host, Laurence Brown, C.I.I., on organizing our September 2010 AGM to be held in Wales. I am very much looking forward to seeing you either at our regional meetings and/or our AGM.

## Preview of the 2010 AGM

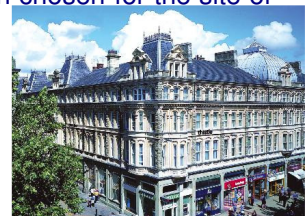


*Cardiff's not just a City it's an experience!*

Get ready for a bumper conference in 2010. We have arranged a great schedule of events for those attending -- from tours of ancient castles to rollicking good times at country pubs. The fun starts with registration and hospitality on Tuesday, Sept. 14, and continues through the Gala Dinner on Friday, Sept. 17. Saturday will be a free day to socialize, see some of the sights you missed earlier, or start the trip home.

Why Cardiff? Well, it is the capital city of Wales, and, although it has hundreds of years of history, it is not a sprawling city. Nothing is more than 15 minutes away, which means you can spend a more leisurely time exploring the city. Walking is a good way to get around.

[The Thistle Hotel \(www.thistle.com\)](http://www.thistle.com), which has recently been refurbished, has been chosen for the site of the conference. From its location in the centre of the city, you will step out immediately into the walking streets, which will allow you to visit the attractions, shops, bars and restaurants without having to use additional transport.



Fantastic events have been arranged for both delegates and guests, which will be detailed in upcoming issues of the Councillor. While the delegates are in conference, guests will have a guest agenda of their own visiting unusual places. Meanwhile, there is an impressive seminar day lined up for the delegates focusing on "Cyber crime." We have secured professional speakers drawn from a variety of



We vow to make this conference a truly memorable experience for all of you, from the welcome-reception cocktails in [Cardiff Castle](#) to the large male choir serenading you into the Gala dinner. For those who don't have to start the long trip back home on Saturday, Sept. 18, a golf day is being arranged on a first-class course.

The conference information will be coming to you in fuller detail very soon. You will be so excited at the great deal this is going to be, you will be booking immediately so as not to be left out! We plan to deliver a truly remarkable conference with hardly any 'On Your Own' time on the agenda. It is going to be action-packed and a truly "value-for-money" experience.

Cardiff is easy to get to. From London's Heathrow airport, it is about a two-hour drive. But, for those who can fly into Schiphol airport, Amsterdam, it is a short hop over to Cardiff Airport, which serves most major European cities. Members coming from European countries will find Cardiff a convenient location, as well. You can fly direct; or you can fly into Bristol -- which is only an hour's drive away -- or Birmingham, around two hours away by car. We also suggest that you stay longer and make this a holiday, as well. Wales is a fantastic country with something for everyone.

Go to:

<http://web.memberclicks.com/mc/community/eventdetails.do?eventId=197986&orgId=coii&recurringId=0> and register your attendance and book your hotel. Places are limited, and this being a great offer, rooms will go quickly.

See you all there in September.

Your AGM Conference Team (Roy Whitehouse and Laurence Brown)

A promotional graphic for the CII Regional European Meeting. It features three images of Romanian landmarks: a large modern building, a classical domed building, and a stone archway. The text on the right side of the graphic reads: "RE-DISCOVER THE EAST! Plan to attend the CII Regional European Meeting Bucharest, Romania May 21-22, 2010".

**RE-DISCOVER  
THE EAST!**

Plan to attend the  
**CII Regional European Meeting**  
Bucharest, Romania  
May 21-22, 2010



## Editor's Note

This is my first issue, and I welcome everyone's input and support. Former Editor Trish Dehmel set the bar pretty high, so it's going to take hard work, and a team effort, to live up to those standards. The Councillor is for, by and about CII members and our profession. In this first issue, we examine the impact of the new Canadian privacy guidelines on investigators. Future issues will be devoted to discussing similar laws and restriction in other countries. Please send your submissions. I promise that most will see publication, although a re-write may be required now and then. Joan Beach will be writing a regular column devoted to news about the Members. Send her your items about family, friends and fun at [Joanmbeach@aol.com](mailto:Joanmbeach@aol.com). All ideas and suggestions are welcome. *Ken Cummins*

## CII New Applicants

### **Yong Lu Liu**

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### **Ole Worm**

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**Michael McDonald**

*IAAR Executive Director*

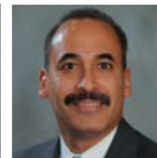
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