



File: PA-031594

JUN 06 2016

Mr. Josh Paterson
Executive Director
British Columbia Civil Liberties Association
900 Helmcken Street, 2nd Floor
Vancouver BC V6Z 1B3

Dear Mr. Paterson:

Please find attached the Report of Findings (the "Report") prepared by this Office with regard to the complaint you filed on behalf of Mr. Oscar Armando Mata Duran against the Canada Border Services Agency (CBSA) in relation to its participation in a television series entitled, "Border Security: Canada's Front Line" (the "Program").

Following our investigation, we have determined that the complaint is **well-founded**. In light of our findings, we made two recommendations to the CBSA pursuant to section 35 of the *Privacy Act*. In correspondence to the CBSA on April 1, 2016, our Office recommended that the CBSA cease its participation in the Program. In addition, we recommended that in the future, the CBSA undertake a Privacy Impact Assessment ("PIA") before embarking on any significant initiative involving the use of personal information, which may help to identify privacy risks and propose solutions to eliminate or mitigate these risks to an acceptable level. In its response to our Office received on May 5, 2016, the CBSA accepted our recommendation to cease its involvement in the Program.

For details on the investigation and the rationale for our conclusions, please see the attached Report. This now concludes our investigation of your complaint.

If you have any questions about this letter, please do not hesitate to contact Virginia Schwartz, Senior Advisor, Investigations, at (819) 994-6342.

Sincerely,

Daniel Therrien
Commissioner

Attachment



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Report of Findings

Investigation into the personal information handling practices of the Canada Border Services Agency (CBSA) in respect of its participation in a television series entitled, "Border Security: Canada's Front Line".

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Summary of Investigation

1. The Office of the Privacy Commissioner of Canada (the “OPC”) received two complaints under the *Privacy Act* (the “Act”) against the Canada Border Services Agency (the “CBSA”) regarding its participation in a television series entitled “Border Security: Canada’s Front Line” (the “TV Program”).
2. This Report of Findings (the “Report”) addresses one of those complaints, which was received from the British Columbia Civil Liberties Association (the “BCCLA”) on behalf of an individual (the “complainant”) in relation to the filming of the complainant in connection with the TV Program. The complainant alleges that the CBSA’s participation in the TV Program violates sections 4 and 8 of the *Act*.
3. The OPC issued a Preliminary Report of Findings (“Preliminary Report”) to the CBSA on June 18, 2015, in order to provide the CBSA with our understanding of the facts, to set out our preliminary views and to seek any additional representations in relation to this complaint.
4. In response to our Preliminary Report, the CBSA stated that while it has given due consideration to some of the OPC’s concerns, it respectfully disagrees with the views of this Office on several points. However, the CBSA stated that going forward, it will further strengthen what it deemed at the outset to be a solid process for protecting the privacy rights of individuals. It submitted that it views the TV Program as an effective tool to communicate the rules associated with its mandate to both Canadians and international audiences.
5. The OPC recognizes the important work of the CBSA and its front-line employees. However, after considering submissions from the parties and reviewing the facts, we are of the view that the CBSA cannot contract out of the application of the *Act*, and therefore has a responsibility for any personal information under its control. To this end, we are not satisfied that the CBSA meets the requirements of the *Act* in relation to its participation in the TV Program. In particular, we are not satisfied that the CBSA has demonstrated that it meets the requirements of section 8 for the disclosure of the complainant’s personal information to Force Four for the purposes of the Program. Accordingly, we find this complaint to be **well-founded**.
6. In light of our finding, our Office recommended to the CBSA pursuant to section 35 of the *Act* that it cease its participation in the TV Program, and that in the future, the CBSA undertake a Privacy Impact Assessment (“PIA”) before embarking on any significant initiative involving personal information, which may help to identify privacy risks and propose solutions to eliminate or mitigate these risks to an acceptable level.

7. In a response received on May 5, 2016, the CBSA accepted our recommendation to cease its involvement in TV Program. The CBSA also noted our recommendation to conduct a PIA before pursuing a television show in the future.
8. The rationale for our findings and recommendations is presented below.

Methodology

9. Our investigation examined the circumstances surrounding the filming of the complainant in the context of the TV Program, as well as issues affecting the Program more broadly. To this end, we reviewed representations received from the complainant and the BCCLA, the CBSA, as well as submissions received from Force Four. Our investigation also entailed a visit to the offices of Force Four in Vancouver, British Columbia, during which we viewed the raw video footage in relation to the complainant.
10. This Report serves to summarize the facts and the representations received from the parties, and it presents the findings of our investigation. For ease of reference, this Report is presented as follows: a summary of the complaint; the CBSA's initial representations to the OPC; representations submitted by Force Four; the OPC's findings and analysis; and our final conclusions and recommendations.

Summary of Complaint

11. The BCCLA's allegations stem from the circumstances surrounding a raid on a construction site on March 13, 2013, where the complainant was filmed as part of the TV Program. According to the complaint, the complainant was working at a construction site when a number of CBSA officers arrived on site. According to the complainant, he initially hid inside the building, but was found by CBSA officers. He was asked several questions by a CBSA officer, including his full name, his immigration status, how he came to Canada, how long he had lived in Canada, and how long he had been working at the construction site. The entire interaction with the CBSA officer was videotaped by Force Four Productions. The complainant states that he was later brought to the immigration detention facility for processing, at which time he was presented with a consent form and a cursory explanation by the CBSA that it was "for the video". According to the complainant, he signed the consent out of confusion and fear without reading it, and at no point was he provided a thorough explanation about the purpose for which the video footage would be used.

12. The BCCLA submitted that, based on the contractual relationship between the CBSA and Force Four Productions, the CBSA is an active partner in the TV Program and alleges that the CBSA is violating sections 4 and 8 of the *Act*.
13. The BCCLA further submitted that:
 - i. The information being collected at the CBSA's direction is not directly related to an operating program or activity of the CBSA.
 - ii. The information collected by the CBSA regarding the complainant is under the control of the CBSA as indicated by the terms of the contract – the CBSA has the power to review and approve all footage, and no footage can be broadcast without the CBSA's written approval.
 - iii. The CBSA is disclosing personal information under its control to a third party without informed consent. While the complainant signed the consent form, the BCCLA alleges that the manner in which the consent is sought is not truly informed or voluntary given the circumstances under which it is requested.

CBSA's Initial Representations

14. The TV Program is produced by BST 2 Media Inc., a subsidiary of the Vancouver-based television production company, Force Four Productions Ltd. ("Force Four").¹ The TV Program involves camera crews following and videotaping CBSA officers as they perform their official duties and undertake enforcement actions. The series is not scripted and the interactions with the public are not staged.
15. According to the CBSA, it was approached by Force Four in April 2011 with a proposal for the TV Program. The CBSA and Force Four signed a memorandum on June 7, 2011, and entered into negotiations regarding the TV Program.
16. The CBSA and Force Four subsequently entered into the *CBSA Multimedia Agreement with Force Four Productions* (the "Demo Reel Agreement") for the production of a full-length series. The CBSA later concluded the *CBSA Multimedia Agreement with BST Media Inc./Force Four Productions Ltd.* (the "Agreement") for each season of the TV Program.
17. The TV Program episodes are aired on the National Geographic Channel.² Season 1 of the TV Program premiered in Canada in September 2012; Season 2 premiered in August 2013;

¹ Force Four Entertainment: <http://www.forcefour.com>

² <http://www.natgeotv.com/ca/border-security/about>

and Season 3 premiered in September 2014. Each season featured episodes filmed at border crossings and other locations where the CBSA has an operational presence across the country.

18. According to the CBSA, the series is produced, owned and financed by BST 2 Media Inc. All editorial control rests with Force Four, and all film footage and associated material is held by, and is the property of, Force Four. The CBSA states that it is not paying to participate in the TV Program, and nor is the CBSA, or any of its employees, receiving monetary remuneration.

The Agreement

19. For each season of the TV Program, the Agreement sets out the terms and conditions under which the CBSA will assist Force Four with respect to the TV Program by authorizing access to CBSA facilities, offices and personnel, by providing technical and production assistance and by authorizing the use of the CBSA's name and insignia.
20. The Agreement provides that Force Four will not film without the permission of the CBSA. Specifically, the CBSA will have representatives present at all times while Force Four is filming, and Force Four will not film without the permission of the CBSA's designated representative. As well, any Force Four employee or contractor involved in the TV Program must be accompanied by a CBSA appointed escort on CBSA facilities at all times.
21. On CBSA property, all film production cast and crew, including producers and directors must contact the CBSA Communications Directorate representative for any and all requests, approvals, queries, questions, comments, or other forms of official communication or permission.
22. The Agreement also provides that:
 - i. Force Four must post prominent notices where filming will occur that will notify the public of the nature and purpose of the filming and provide alternatives to those persons who would be individually identifiable.
 - ii. It is the responsibility of Force Four to seek any consent necessary under the Agreement before filming. The CBSA will not be asked to seek permission on behalf of Force Four; however, the CBSA will assist Force Four in obtaining signed, on-camera releases from CBSA personnel who appear recognizable on-camera.
 - iii. The CBSA requires Force Four to conceal the identity of any person featured in the production that has not consented, or if the law dictates that a person's identity must be protected. In such cases, Force Four will use editing techniques to conceal

- the person's identity including obscuring an individual's face, distorting their voice and removing or blocking out any other information, film or material that may identify them.
- iv. Force Four will provide the CBSA with a viewing of roughly edited but essentially final version of the production at a stage when changes can be accommodated ("rough cut"). The rough cut must be sent electronically to the CBSA. The CBSA must provide comments to Force Four about the rough cut within 7 business days.
 - v. The CBSA may require the removal of footage that may infringe the law or compromise national security and/or the CBSA's working practices and/or current investigations, etc.
 - vi. The CBSA will be provided with a viewing of the final version of the production ("fine cut") – the fine cut will include all final editing. The CBSA must provide its comments to Force Four within 5 business days.
 - vii. Force Four retains ultimate editorial control of the production; however, this does not limit the CBSA's right to require certain specified changes to the production.
 - viii. Force Four agrees that the recorded material will only be used for purposes of the TV Program, including promotion, and will not be used for any other purpose without written permission from the CBSA.
 - ix. Force Four may, on a case-by-case basis, grant permission to the CBSA to use and reproduce vision from the camera of the demonstration DVD or video for training purposes at no cost to the CBSA.
 - x. Force Four is responsible for all expenses related to the production, including pre-production and post-production.
 - xi. The CBSA grants Force Four the right to enter upon, photograph, record, and bring personnel and equipment into and onto its facilities for the purpose of the production.
 - xii. The CBSA will facilitate the production by enabling reasonable access to CBSA facilities, archives, records and personnel necessary to assist Force Four in completion of the production.
 - xiii. The parties agree that the agreement will not create a joint venture or partnership, an agency relationship, or any form of binding relationship.

Release Forms

- 23. The CBSA confirmed that Force Four provides a document entitled *Voluntary Appearance Release Form* (the "Waiver") to individuals captured on camera during taping of the TV Program.

24. The Waiver suggests that one of the identified purposes for collecting, using or disclosing personal information is for the advertising, promotion and publicity of the TV Program.
25. The Waiver also provides that it is a legal document waiving the legal rights of the individual signing the Waiver. Further, by signing the Waiver, the individual expressly waives any privacy and confidentiality protections afforded by law, including the Act.
26. The CBSA confirmed that it had locally retained copies of the Waiver forms during the production and immediate post-production phase of the project in order for it to verify that written consent had been obtained by Force Four as required under the Agreement. The CBSA stated that it was not required to retain the Waivers, it neither used nor shared these copies with anyone, and it has since destroyed the copies. Should a requirement arise where these are needed, a request will be made to Force Four, where the originals are retained. Similarly, the CBSA was also retaining one copy of each final "master cut" episode for its own reference purposes. As these are the property of Force Four, they have since been destroyed. The CBSA further stated that, should a need arise for the CBSA to obtain an episode for a specific purpose, a request would be made to Force Four.
27. In addition, Force Four provides a document entitled *On Camera Release – CBSA Officers* (the "Release"). The Release requests the name, address, e-mail address and telephone number of the participant, as well as the date. According to the Agreement highlighted above, the CBSA will assist Force Four in obtaining signed, on-camera Releases from CBSA personnel who appear recognizable on-camera.

Filming Guidelines

28. In its submissions to the OPC, the CBSA provided a copy of the *"Border Security Television Series: Filming Guidelines"* (the "Guidelines"), outlining the conditions under which filming may occur.
29. The Guidelines provide that, at the outset of an exam, officers must seek the permission of the traveller to film the examination by stating, *"As you can see cameras are around and National Geographic are filming a documentary about us. Do you give permission to have this interview filmed?"* If yes, the camera crew proceeds to film from a distance, then closer as the exam proceeds.
30. The Guidelines also state that, if a CBSA officer determines it is better to establish a rapport with an individual before introducing the cameras, the crew can "silent film" the exam from a distance – meaning that no crew is listening. After approximately 4-5 minutes, the officer will then introduce the camera as noted above.

31. If an individual provides verbal consent before the examination, but chooses not to sign the Waiver, any aired segment of the examination would only depict blurred images of the individual.
32. The Guidelines state that the camera crew are always visible to the public and there is no surprise advance on an individual or an officer.

Filming Inland Enforcement Activities

33. The CBSA also provided a copy of a document entitled, "*Filming Inland Enforcement Activities*" which provides general guidance and assistance to the CBSA should it decide to authorize the filming of inland enforcement measures, such as removals. It is intended to identify areas of potential risks and possible options to mitigate these risks.
34. The document outlines when the disclosure of personal information may be authorized, including: 1) if the individual consents to the disclosure; 2) the information is publicly available; or 3) the information is not about an identifiable individual.

Episode Review Process

35. According to the CBSA, once a story is filmed, there is a review process in place before it is aired. From the raw footage, the production company creates episodes; each episode typically consists of five individual stories. Once the production company has the "rough cut" for an episode, an electronic link is then sent to the CBSA for its review.
36. The CBSA confirmed that only a limited number of CBSA personnel view the "rough cut". The link is provided electronically and directs to a restricted access third-party video-sharing website ("drop box"), with unique URLs and passwords for each episode, and is only active for a short time period (7 days for the rough cut and 5 days for the fine cut, as per the Agreement). At the end of the review period, the link is no longer available to the CBSA. CBSA comments are compiled and then emailed to the production company who then makes any necessary changes. The CBSA confirmed that it saves all feedback and comments that are produced by its employees. A fine cut of the episode is then provided to the CBSA, in the same fashion as the rough cut, to ensure that the requested changes were made. At this point there are fewer individuals who review this version.
37. This episode review process is a requirement under the Agreement. Section 5.4 of the Agreement outlines certain circumstances in which the CBSA may ask for changes, including the removal of footage. As an alternative to removing footage, Force Four can suggest edits to modify such footage to address the concerns of the CBSA.

38. The CBSA submitted that the episode review process is a legitimate government activity and allows the CBSA to monitor its image, protect its reputation, and ensure that any message disseminated to the public about the CBSA is accurate. In addition, this process provides the CBSA with the opportunity to ensure that sensitive information that could potentially compromise investigations or protected methodologies is not released.

Signage / Notices

39. According to the CBSA, prominent notices are posted where filming occurs at border crossings and alternatives are provided to individuals who do not want to be filmed.
40. During the investigation, Force Four confirmed that the following text is posted in English and French in areas where filming may occur:

***** Filming in Progress *****
Notice of Filming and Consent to Participate

Please be advised that BST Media Inc. is filming scenes and background material in this area, for use in a television documentary series about border security and the Canada Border Services Agency.

You will not be identifiable in the series without your permission. If you are in the background while others are being filmed, or if you do not agree to be identifiable in the series, your image will be altered so you are not recognizable.

If you see the crew filming in your area and do not wish to be filmed, please notify a crew member and we will accommodate you. If you don't see a camera crew, no filming is taking place.

Consent

41. According to the CBSA, individuals captured on camera provide informed consent. First, at the outset of an examination, individuals are asked by a CBSA representative if they consent to have their examination filmed, and filming only occurs if verbal consent is obtained. The CBSA stated that if an individual changes his or her mind at any time during filming, filming will stop. Second, at the end of the examination, the film crew director from Force Four obtains the written consent of the individual by requesting that they sign the Waiver. Third, prominent notices are posted where filming occurs and alternatives are provided to individuals who do not want to be filmed.
42. However, the CBSA stated that after an individual has provided the initial verbal consent and a story has been filmed, unless written consent is obtained by Force Four, the production company must conceal the individual's identity if the story is to be used. This

means that their face would be blurred and any identifying details would not be included. Accordingly, an individual is only seen without a blurred face in an episode if they provide both verbal *and* written consent. This process is provided for by the Agreement.

43. To this end, the CBSA submitted that the TV Program is strictly based on voluntary participation and will not identify individuals who have not directly agreed to participate. The individuals examined provide informed consent to participate in the documentary series, which allows for the disclosure of personal information and which is in conformity with the law.

Other – Briefing Note

44. During the investigation, the CBSA also provided a copy of a Briefing Note (BN) signed by the then President of the CBSA on October 9, 2013, wherein the President provided an update to the then Minister of Public Safety on the TV Program and sought a decision on the continued involvement of the CBSA for a third season.
45. The BN highlighted that the TV Program (seasons 1 and 2) exceeded expectations, offering a low-cost and effective means to demonstrate the daily efforts of the CBSA to protect Canada's safety and prosperity. According to the BN, the TV Program represented good value for money and an innovative way of informing Canadians and raising awareness about the CBSA.
46. However, the BN also highlighted that there continues to be some risk in participating in the TV Program, specifically in relation to privacy and the appropriateness of the CBSA to be supporting the filming of its activities. The BN confirmed that the dollar amount for Communications support expended by the CBSA for the project is approximately \$200,000/season, and that the project requires management oversight by regional and headquarters personnel in the review and screening process. The BN further states that, *"given that the project is not directly linked to our key priorities or our core business, the 'risk/reward ratio' for the project is questionable."* The President of the CBSA states in the BN that there are no measurable outcomes that can be readily attributed to the TV Program.
47. According to the CBSA, while consideration was given to not participating in a third season, after internal discussion it was subsequently concluded that the benefits of the TV Program warranted continued participation. The CBSA submitted that continued participation in the TV Program would continue to educate the public, both in Canada and around the globe, about the CBSA's contribution to keeping Canada safe and prosperous, and would demonstrate the challenges that CBSA officers face and the professionalism with which they carry out their mandate.

The Complainant

48. In its representations, the CBSA provided its chronology of events leading up to the filming of the complainant on March 13, 2013. According to the CBSA, the complainant was discovered hiding on the second floor of a building at the construction site. At this time, the film crew was still in the hallway. The CBSA officer began his questioning of the complainant and then asked if he would consent to having the examination filmed. The complainant provided verbal consent which the CBSA understands was captured on audio only, and that the film crew was not in the room. Once consent was provided, the film crew began filming the examination.
49. The CBSA submits that written consent was subsequently obtained from the complainant by Force Four at the detention centre. As per the Guidelines, the production company director approached the complainant away from CBSA officers in an attempt to minimize bias.
50. The CBSA submitted that at no time was any personal information or customs information in relation to the complainant disclosed to the film crew, nor was the crew provided with the address of the construction site. The CBSA contended that the complainant was provided two opportunities to consent to participate to which he agreed. According to the CBSA, translation services were available at both opportunities.
51. The CBSA also confirmed that it does not own or hold footage from the filming on March 13, 2013. It submits that Force Four confirmed that no footage from that day has been or will be used in any form. Therefore, the CBSA did not view either a rough cut or a fine cut in the context of the March 13, 2013 filming of the complainant.
52. The CBSA confirmed in its representations that there was no further filming of inland enforcement activities after March 13, 2013.

Force Four's Initial Representations

53. Our Office also received submissions from Force Four during our investigation, and visited the offices of Force Four in Vancouver, British Columbia, in order to view the raw video footage in relation to the complainant.
54. According to Force Four, no personal information regarding the complainant was disclosed to the film crew in advance of filming, either at the briefing on March 12, 2013, or the day of the raid at the construction site, March 13, 2013.
55. However, Force Four confirmed that at the briefing with the CBSA on March 12, 2013, the CBSA disclosed to its crew members that the Inland Enforcement team intended to arrest

an individual who was being sought on a Canada-wide warrant for working and living illegally in Canada. According to Force Four, its crew members saw the subject's photograph, learned his name, his nationality, and that he had been deported twice previously.

56. As a result of our review of the raw footage, we confirmed that the film crew (an individual operating a video camera, and an individual holding a microphone) were following and filming the activities of a CBSA officer as he entered the room where the complainant was subsequently located, and the entire interaction between the officer and the complainant was captured on video before the complainant was advised of the purpose of the filming or consent was sought. We note that this contradicts the CBSA's representations as to the process it followed to obtain consent in the circumstances.
57. In addition, we confirmed that the CBSA officer asked the complainant several questions before advising him that he works with Immigration enforcement and that they are doing a documentary on what he does for work. The CBSA officer then continued to question the complainant, and ultimately arrested the complainant.
58. Our investigation also confirmed that the Waiver presented to the complainant was provided in Spanish and signed by the complainant.

Findings

59. In issuing our findings, we applied sections 3, 4, and 8 of the *Act*.
60. Section 3 of the *Act* defines personal information as information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing: information relating to race, national or ethnic origin, colour, religion, age, marital status, education, medical, criminal or employment history, financial transactions, identifying numbers, fingerprints, blood type, personal opinions, etc.
61. Section 4 of the *Act* states that "no personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution".
62. The *Act* states that personal information can only be disclosed with an individual's consent – subsection 8(1) – or in accordance with one of the categories of permitted disclosures outlined in subsection 8(2) of the *Act*.
63. Further to paragraph 3 of this Report, we issued a Preliminary Report to the CBSA in June 2015 in order to set out our preliminary views and to seek additional representations in relation to this complaint.

64. In addition to raising general concerns regarding the CBSA's contractual Agreement with Force Four, we also invited the CBSA to demonstrate how the collection of personal information in connection with the TV Program is directly related to the CBSA's programs or activities, and presented our preliminary views regarding the CBSA's disclosure of personal information collected as part of its enforcement activities to Force Four for the purposes of the Program. Our Preliminary Report also highlighted our views regarding the disclosure of the personal information relating to the intended subject sought by the CBSA on its March 13, 2013 intervention on the construction site to Force Four, and our preliminary concerns with the blurring technique used in the TV Program.
65. The CBSA responded to our Preliminary Report in a letter received on September 18, 2015. We also note that Force Four provided supplementary representations to this Office in a letter received on September 25, 2015.

1) The Agreement

66. The CBSA has articulated the terms of its relationship with Force Four in an Agreement that expressly specifies how the CBSA can facilitate access to customs controlled areas for the purpose of filming the CBSA's enforcement operations. The CBSA has jointly planned with Force Four, as memorialized by the Agreement, how the CBSA can assist the production company in obtaining material for commercial television programming.
67. In representations to our Office, the CBSA stated that, while there is an Agreement between it and Force Four which authorizes Force Four access to customs controlled areas for the purpose of filming the CBSA's operational activities, it submitted that this does not create a partnership or agency relationship between the parties. The CBSA positioned that none of its activities have been contracted out, and are in fact carried out by CBSA officers. While the CBSA's participation is required, it is a Force Four initiative and is not produced on its behalf.
68. The CBSA submitted that it is not avoiding or attempting to avoid its obligations under the Act by virtue of the Agreement with Force Four. Rather, the CBSA stated that it is meeting its obligations under the Act by obtaining the consent of individuals for the disclosure of their personal information to Force Four before the production crew can carry on with its own commercial activities. This disclosure of personal information occurs by virtue of Force Four being present during the examinations and filming them.
69. The CBSA further positioned that the Agreement negotiated with Force Four permits access to customs controlled areas and to film in conditions that do not interfere with the management of border operations; any personal information captured by Force Four is liable to the privacy obligations imposed on Force Four by private sector privacy legislation.

OPC's Findings

70. While the *Act* itself is silent on this issue, we are of the view that, as a matter of principle, federal institutions cannot contract out of the application of the *Act*. In our opinion, the spirit and intent of the *Act* would be completely thwarted should federal government institutions have the authority to enter into agreements to facilitate the engagement of activities for which the institution itself may not be authorized. Furthermore, such a broad position could ultimately open the door to any federal institution to use personal information for various purposes, even if removed from its core mandate.
71. Similarly, in our view, the CBSA's Agreement with Force Four to facilitate access to customs controlled areas for the explicit purpose of filming the CBSA's interactions with individuals does not relieve the CBSA of its privacy obligations for the personal information it may collect to fulfill its mandate (i.e. customs and/or immigration enforcement).

2) Collection and Disclosure

72. Our investigation examined whether the CBSA is collecting or disclosing personal information as a result of its involvement in the TV Program through footage being filmed by Force Four – either at the time of filming, or through the CBSA's right to review episodes before they are finalized.
73. According to the CBSA, its officers collect personal information in the context of their enforcement powers granted under legislative authority and in accordance with the *Act*. It submitted that its interactions with the complainant would have occurred whether Force Four was present to film or not; therefore, filming by Force Four in these circumstances does not amount to a separate collection of personal information by the CBSA.
74. The CBSA is of the view that the collection of personal information by Force Four at the time of filming is entirely distinct from the program activities of the CBSA, and is carried out pursuant to Force Four's own activities. The CBSA reiterated its position that Force Four is liable for the personal information collected in the pursuance of its commercial activities under private sector privacy legislation.
75. With respect to its review of the rough cuts of the TV Program specifically, the CBSA argued that doing so falls within the reasonable realm of valid operating activities it may undertake to ensure that the broadcast is not inaccurate or misleading. It stated that the TV Program is a legitimate communication activity and an innovative platform for the public to be informed of border operations, particularly when public interaction is a fundamental part of its operations. It also stated that this innovative means of communication is akin to the CBSA's presence on social media and YouTube, and has also been adopted by other jurisdictions in the world, such as the United Kingdom and Australia. The CBSA noted that

the results of a survey commissioned by Shaw Media in 2013 support the conclusion that most viewers perceive Border Security as “informative” and “educational”.

OPC's Findings

76. From the outset, our Office took the view that the CBSA was collecting personal information in the context of its enforcement activities in the circumstances of this complaint. When the CBSA lawfully collects the information it needs to locate and identify individuals that may allegedly be in Canada illegally, or collects personal information from individuals at secondary inspection at a border crossing, it does so under its legislative authority (*Immigration and Refugee Protection Act (IRPA)*, *Customs Act*). In this context, such a collection of personal information would relate to an operating program or activity of the CBSA for the purposes of section 4 of the *Act*.
77. With respect to the complainant, our investigation confirmed that, on March 13, 2013, the CBSA entered a construction site to enforce its powers under the *IRPA*. While the complainant was not the primary target of the CBSA, he was nonetheless examined by the CBSA and taken to a detention centre for processing.
78. The information collected by the CBSA during the examination of the complainant – in this case, confirming his identity (his full name, his immigration status, how he came to Canada, how long he had lived in Canada, and how long he had been working at the construction site) – is personal information pursuant to section 3 of the *Act*. We are satisfied that the collection of the complainant's personal information by the CBSA in order to carry out its enforcement mandate is related directly to the CBSA's operating activities and therefore meets the requirements of section 4 of the *Act*.
79. Given the CBSA's role in providing the necessary conditions for filming to take place by Force Four for the purposes of the Program, there are indeed some indices that suggest that the CBSA has substantial control over the collection of personal information by Force Four and may be involved itself in collection for the purposes of the Program.
80. For instance, filming of the TV Program is not only facilitated by the CBSA, but it cannot occur without the CBSA's permission. As well, under the Agreement, the CBSA controls the circumstances under which Force Four can film. The CBSA's permission is required for Force Four to be physically present to film, and filming only occurs because the CBSA has organized and facilitated the means for such collection under the Agreement, be it at a land border crossing, an airport, or in the conduct of immigration enforcement activities. Moreover, while film footage may be the property of Force Four, the CBSA nevertheless maintains control over such footage by not only having control of when and how footage is collected, but through its right to review, comment and approve the footage, to obtain an episode upon request, and to use and reproduce the demonstration DVD or video for training purposes.

81. However, the question of whether the CBSA can be said to be participating in the collection of personal information for the purposes of the Program is not determinative of our finding in this case. In our view, the CBSA is first collecting personal information in the context of its enforcement activities and thereby has a responsibility under the *Act* for any subsequent disclosure of the information that is collected for, or generated by, such activities.
82. Following our investigation, we are of the view that there is a real-time disclosure of personal information by the CBSA to Force Four for the purpose of filming the TV Program. Under section 8 of the *Act*, unless the individual has otherwise provided consent, this personal information collected by the CBSA may only be disclosed for the purpose(s) for which it was obtained, for a use consistent with that purpose, or for one of the enumerated circumstances under subsection 8(2).
83. In our view, none of the exceptions under subsection 8(2) of the *Act* would apply in the circumstances. Therefore, our investigation examined whether the CBSA obtained the valid consent of the complainant in order to disclose his personal information to Force Four for the purposes of the TV Program.

3) *The Sufficiency of Consent*

84. In its initial representations to this Office, the CBSA stated that it recognizes that consent must be obtained from individuals filmed for the purposes of the Program in order to disclose their personal information, and in order to meet its obligations under section 8 of the *Act* and section 107 of the *Customs Act*.
85. The CBSA submitted that its Guidelines clearly state that where an individual indicates, either explicitly or implicitly, that they do not wish to be filmed, filming is to cease immediately if it has begun, or will not be conducted if not yet begun. A separate area is set aside in the secondary screening area for Force Four to film those individuals who have provided consent to be filmed during their examination. All other areas in secondary are off limits to Force Four to allow for the processing of travellers who do not want to be filmed.
86. At any time prior to or during filming a traveller can request that filming stop. The CBSA stated that its Guidelines further require that officers retain complete control over their examinations; therefore they can stop filming at any time if it is deemed that the traveller's frame of mind does not lend itself to understanding and freely consenting to the purpose of the filming.

87. In addition, the Waiver is available in multiple languages and is administered by Force Four. As such, Force Four bears the risk of using the individual's image based on the signed Waiver.
88. In response to the preliminary views of this Office, the CBSA stated that it has noted the concerns raised by this Office and intends to go forward by strengthening and monitoring the consent process in order to ensure valid and meaningful consent is given, and to assure adherence with its processes. In addition, the CBSA submitted that it will also ensure that the process for withdrawal of consent is made even clearer in the future.

OPC's Findings

89. Despite the measures outlined by the CBSA in its representations to this Office, we are of the view that, in large part due to the context in which filming occurs, individuals are not providing full and informed consent to the disclosure of their personal information, as would be required by the *Act*.
90. For the purposes of section 8 of the *Act*, consent must be meaningful and requires individuals to understand what they are consenting to. Consent must also be provided freely, absent from constraint, and as such, the circumstances in which consent is sought to be obtained are relevant. As well, the purpose(s) for which the personal information would be disclosed would generally have to be identified at or before the time of the disclosure.
91. To this end, our Office questioned whether such consent is given freely, and whether individuals who are the subject of an interaction with the CBSA are in the best frame of mind to provide valid consent. For instance, individuals from countries with different legal systems may feel that they have to comply with uniformed individuals and have no choice but to sign documents presented to them. Moreover, individuals being detained or facing the prospect of deportation may not be in the best frame of mind to provide informed and free consent.
92. As well, certain provisions of the Waiver purport to allow filmed individuals to waive their rights under the *Act*. There was no evidence that individuals signing the Waiver are made fully aware of the significance of waiving their rights under the *Act*, or that they have been given an opportunity to seek independent legal advice prior to signing the Waiver. For these reasons, we found that signing the Waiver did not demonstrate that an individual captured on film truly understood what they are consenting to in the circumstances.
93. Furthermore, the Guidelines allow the crew to "silent film" the examination from a distance in cases where an officer determines that it is better to establish a rapport with the traveller before introducing the cameras. In our view, there would be no valid prior consent for the disclosure of such footage.

94. With respect to the complainant, the CBSA stated that when the complainant was discovered on the second floor of the building at the construction site, the film crew remained in the hallway. Following the initial questioning by the CBSA officer, the complainant was then asked if he would consent to having the examination filmed. The CBSA understood that the complainant's verbal consent was captured on audio only, and that the film crew was not in the room. Only after consent was provided did the film crew begin its filming of the examination.
95. Upon viewing the raw footage in this case, our Office confirmed that the entire interaction between the CBSA officer and the complainant was captured on video *before* the complainant was advised of the purpose of the filming. The film crew followed and recorded the activities of the CBSA officer as he entered the room where the complainant was located, and continued to film during the initial questioning of the complainant. We confirmed that the complainant was asked several questions by the CBSA officer before he was advised of the general purpose of the video camera, and, in our view, at no time was he expressly asked for his consent to allow the filming of his examination.
96. In our view, there are many factors, including duress, that impact the validity of consent. Valid consent under the *Act* requires that consent be given freely, on a voluntary basis, with an appreciation of the consequences for doing so. There are a number of useful factors that are relevant to assessing whether consent under the *Act* is valid in any given case:
- i. the context in which consent is sought and provided;
 - ii. the sensitivity of the information at issue;
 - iii. the reasonable expectations of the individual; and
 - iv. whether the subsequent purpose(s) for which the personal information will be used or disclosed has been properly explained to the individual.³
97. In the context of this complaint, we note that a number of the above facts point to individuals not being able to provide valid consent for the use or disclosure of their personal information in connection with the TV Program. Moreover, there is no evidence that individuals are explained how their personal information could be disclosed at the time the CBSA seeks verbal consent. As well, due to the coercive nature of being detained by the CBSA, individuals that are detained may not have a clear frame of mind to provide truly voluntary consent.

³ OPC Guidance document: Determining the Appropriate Form of Consent under PIPEDA:
https://www.priv.gc.ca/resource/fs-fi/02_05_d_24_e.asp

98. This is echoed by our colleagues at British Columbia's Office of the Information and Privacy Commissioner (OIPC) following its investigation of a complaint against the Vancouver Police Department in relation to the Police Department's decision to blur the images of individuals portrayed in the television program, *To Serve and Protect*.
99. In its decision, the BC OIPC stated that, *"It would not be appropriate to seek the consent of persons under arrest before broadcasting their identities on television shows such as "To Serve and Protect". In my opinion, persons under arrest or in contact with the police cannot give informed and voluntary consent to the disclosure of their identities when they are under great stress and when they may be incapacitated or intoxicated. The presence of police and ride-along camera crews eliminates any possibility that informed and voluntary consent can be given by the persons shown in the videotapes"*.⁴
100. Following our review, we are not satisfied that, in the circumstances of this complaint, the CBSA obtained the valid consent of the complainant for the disclosure of his personal information in connection with the filming of his examination, as required by section 8 of the Act.

4) Disclosure in Advance of Filming

101. Our investigation also examined whether the CBSA disclosed any of the complainant's personal information obtained by the CBSA for operational reasons to Force Four in advance of filming.
102. The CBSA and Force Four both submitted that no personal information regarding the complainant was disclosed to the Force Four film crew in advance of filming, either on March 12, 2013, or on the day of the raid at the construction site, March 13, 2013.
103. Based on the representations received, as well as our viewing of the raw footage in relation to the filming of the complainant, we are satisfied that no personal information in relation to the complainant specifically was disclosed to the Force Four crew in advance of filming.
104. However, Force Four submitted to our Office that some personal information relating to the intended subject sought by the CBSA on March 13, 2013 was disclosed by the CBSA to the Force Four crew members. Such personal information included the subject's name and nationality, a photograph of the subject, that the intended subject was being sought on a Canada-wide warrant for working and living illegally in Canada, and that he had been deported twice previously – information which Force Four was then able to connect with a specific individual upon entering the location where filming occurred.

⁴ <https://oipc.bc.ca/investigation-reports/1251>

105. In its representations, the CBSA confirmed that it did in fact share specific personal information about this individual with the Force Four crew members prior to the raid on the construction site on March 13, 2013. However, the CBSA stated that information pertaining to the individual's criminal warrants and/or convictions was alleged to have been available in the public domain. The CBSA provided our Office with links to media coverage which, in its view, supported its claim that pre-existing warrants or convictions in relation to the individual were available to the public – specifically, an article dated March 17, 2013, and an article dated March 22, 2013. The CBSA argued that the individual's personal information was available in the public domain, and therefore, that no privacy breach occurred.
106. In a letter received on September 25, 2015, Force Four provided supplementary representations to our Office with respect to the specific information that was shared by the CBSA's Inland Enforcement Team with its production crew on March 12, 2013.
107. Force Four clarified that its production crew was informed that the subject of the operation was being sought on a Canada-wide warrant for serious criminality. The fact that the individual was the subject of a criminal warrant was the basis under which its crew was permitted to film the operation. The crew members were not provided with full, unrestricted access to the briefing, or to information about the intended subject; rather, Force Four submitted that the information was strictly limited to the subject of the operation – information regarding the individual's criminality and the tactical plans for the operation.
108. Further, Force Four confirmed that its crew members were never provided with any information regarding individuals being sought by the CBSA solely on immigration warrants, nor were its crew members given access to any such operations, or to information regarding refugee claimants or asylum seekers.
109. Force Four also reiterated that the production crew was not provided with any information regarding the complainant, and had no knowledge that he would be at the same location as the subject of the Inland Enforcement operation on March 13, 2013.

OPC's Findings

110. Following our review of both the CBSA's and Force Four's representations, we are of the view that the personal information pertaining to the intended subject that was being sought by the CBSA on March 13, 2013, was disclosed contrary to section 8 of the Act.
111. While the CBSA submitted that the information was available in the public domain, it has presented no evidence to support its argument that all of the specific personal information noted above was publicly available on March 12, 2013, in advance of the raid. In fact, the

media articles upon which the CBSA relied post-date the March 13, 2013 raid, and do not, in our view, provide supporting evidence of the pre-existence of warrants or convictions to demonstrate that the individual's personal information was publicly available at the time it disclosed this information to Force Four.

112. We note that, on September 25, 2015, our Office provided the CBSA with another opportunity to submit representations to support its position that the personal information of the intended subject was in fact in the public domain in advance of the raid. We requested a response from the CBSA by October 2, 2015; however, the CBSA did not follow-up with our Office on this question.
113. In our view, this individual's personal information was in the CBSA's records, and under the CBSA's control, and thus can only be disclosed with the individual's consent or in accordance with one of the permissible disclosure provisions found in subsection 8(2) of the *Act*. Consequently, we are not satisfied that this disclosure of the intended subject's personal information to Force Four was permitted under section 8 of the *Act*.
114. As for the complainant, we are satisfied that no personal information in relation to the complainant was disclosed to the Force Four crew in advance of filming in the context of the events of March 13, 2013. We also note that the footage from the events of March 13, 2013 was never aired for the purposes of the TV Program, and based on the CBSA's representations, there was no further filming of inland enforcement activities after March 13, 2013.

5) Facial Blurring

115. The Agreement between the CBSA and Force Four requires Force Four to conceal the identity of any individual who is identifiable, but who has not provided written consent to the use of their image and voice. The CBSA submitted that Force Four uses blurring techniques that are consistent with television industry standards, which fall under private sector Privacy law. This means that Force Four could proceed to air footage based solely on *verbal consent* even where written consent has not been obtained.
116. Based on our analysis of the facial blurring method used in the TV Program, we raised several concerns to the CBSA in our Preliminary Report regarding its overall effectiveness. In particular, we found that the treatment level most often used in the show is weak, and there is often an abundance of secondary information.
117. Following our review of several video sequences from the TV Program, we noted that the sequences depict more than just people – background and contextual information is often visible in the videos. For example, even where individuals had their faces blurred, other contextual details were plainly captured by Force Four's cameras, including individuals

other than the subject, with blurred or untreated faces, clothing, voices, vehicles, pets and luggage. Some of this contextual information, in our view, raises a serious possibility that individuals could be identified by viewers of the TV Program.

118. We also considered a number of criteria when viewing the video sequences and still images. In addition to an assessment of whether the person would be recognizable, we also considered what information can be determined from the images, such as gender, age range, skin colour, hair colour, hair style, presence of glasses, facial hair, and style of clothing. Some of our observations included the following:
- i. there is a high likelihood that someone who knows the person appearing in the video would be able to recognize them even with the blurring;
 - ii. facial and hair features are often visible despite the blurring – this includes the presence of facial hair, glasses, headwear, etc.;
 - iii. the level of face blurring is not consistent, with notably higher levels of blurring used in at least two of the sequences viewed;
 - iv. it is often not clear if the voice recordings are treated at all, and it appears that a treatment may have sometimes been applied only part way through a sequence;
 - v. many secondary characteristics are often visible, including body movements, clothing, luggage, etc.
119. Finally, we also raised concerns to the CBSA that the Agreement provides Force Four with the discretion to determine whether or not an episode will be aired in cases where an individual does not provide their written consent to participate in the TV Program, or where an individual withdraws consent. While the CBSA requires the individual's identity to be concealed in such cases, as noted above, we are of the view that the method of facial concealing used in the TV Program offers minimal privacy protection.

OPC's Findings

120. Following our review, it is our position that despite the facial blurring used in the TV Program, there is still a serious possibility that an individual whose face has been blurred and has not provided written consent could be identified by a viewer of the TV Program.
121. To this end, the CBSA has failed to demonstrate how the disclosure of the personal information of those individuals who have not consented to the disclosure of their image and voice for the purposes of the TV Program is done in a manner consistent with section 8 of the *Act*.

Conclusions

122. The following outlines the OPC's final conclusions with respect to the CBSA's participation in the TV Program and its compliance with the *Act*. The following also outlines our findings in relation to the complainant.
123. As a matter of principle, it is our view that federal government institutions cannot contract out of their obligations under the *Act*. Based on the Agreement between the CBSA and Force Four, the CBSA facilitates access to customs controlled areas for the purpose of permitting Force Four to film its enforcement operations. Given that the TV Program implicates the collection of personal information by the CBSA from individuals it detains in the context of its enforcement activities, it stands that the CBSA has a responsibility to ensure that it meets its obligations under the *Act* for any subsequent disclosure of this information.
124. Following our review, we are satisfied that the collection of the complainant's personal information by the CBSA in order to carry out its enforcement mandate was related directly to the CBSA's operating activities and therefore meets the requirements of section 4 of the *Act*. While there are some indices to suggest that the CBSA may be involved in collection for the purpose of the TV program, it is our view that it is not required to answer this question given our conclusions on the application of section 8 of the *Act* in this case.
125. Given that the CBSA permits Force Four to access customs controlled areas for the purposes of filming its operational activities, it is our view that there is a real-time disclosure of personal information by the CBSA to Force Four for the purpose of filming the TV Program. Following our investigation, we are not satisfied that the CBSA obtained the complainant's valid consent for the disclosure of his personal information to Force Four in connection with the filming of his examination, as required by section 8 of the *Act*.
126. We also find that the CBSA disclosed without authorization the personal information relating to the intended subject sought on its March 13, 2013 intervention on the construction site. The CBSA has not demonstrated how such a disclosure of personal information to Force Four is permitted under section 8 of the *Act*.
127. It is also our view that many factors influence the validity of consent in the circumstances. Given the context in which consent is sought, and the current processes under the Agreement with Force Four, we find the consent process problematic and certainly invalid in the circumstances of this complaint.
128. Moreover, despite the blurring technique used in the TV Program, we are of the view that there is a serious possibility that an individual whose face has been blurred and has not provided written consent could be identified by a viewer of the TV Program. Consequently,

we find it difficult to accept that the CBSA obtains valid and meaningful consent from these individuals for the purposes of section 8 of the *Act*.

129. Based on the above, we have determined that the complaint is **well-founded**.

Recommendations

130. In a letter dated April 1, 2016, our Office provided a Report of Findings to the CBSA pursuant to section 35 of the *Act*. This Report contained details of our investigation, the rationale for our conclusions, and our recommendations. The Report also offered the CBSA an opportunity to respond to and describe any actions it proposes to take in order to implement our recommendations.
131. Overall, we were not satisfied that the CBSA meets the requirements of the *Act* in relation to its participation in the TV Program. In particular, we were not satisfied that the CBSA meets the requirements of section 8 for the disclosure of personal information collected as part of its enforcement activities to Force Four for the purposes of the Program, given the context in which consent is sought, and the current processes under the Agreement with Force Four.
132. We also took the opportunity to highlight that the CBSA did not conduct a Privacy Impact Assessment (PIA) in relation to the TV Program. A PIA is a formal process that helps determine whether initiatives involving the use of personal information raise privacy risks; it identifies and describes these risks, and proposes solutions to eliminate or mitigate privacy risks to an acceptable level.
133. In representations to our Office, the CBSA submitted that a PIA was not conducted as the Border Security series is not a new program or activity created by the CBSA, nor does the project require a change to the collection or administrative use of information by the CBSA.
134. Given the findings of our investigation, we took the opportunity to remind the CBSA that, at present, a PIA is the most comprehensive process to evaluate the effects of a specific initiative on an individual's privacy, and represents a core component of an institution's privacy compliance framework. The consequences of poor privacy insight can have a profound impact on Canadians, particularly in the context of the TV Program given the potential consequences for the individuals filmed. PIAs are an important component of risk management and help to ensure that privacy issues of public concern are resolved or mitigated, ensure accountability for the use of personal information, and provide transparency to Canadians about how their personal information is treated when in the hands of government.

135. As a result, we made the following recommendations to the CBSA:
 - i. We recommended that the CBSA cease its participation in the TV Program; and
 - ii. We recommended that in the future, the CBSA undertake a PIA before embarking on any significant initiative involving personal information, which may help to identify privacy risks and propose solutions to eliminate or mitigate these risks to an acceptable level.
136. In its response to our Office dated May 5, 2016, the CBSA accepted our recommendation to cease its involvement in the TV Program. The CBSA also noted our recommendation that it conduct a PIA before pursuing a television show in the future.
137. However, while the CBSA accepted our recommendations, its response noted that our Report contained some factual errors. Further to a meeting with the CBSA on May 9, 2016, our Office provided a response to the CBSA's comments on May 17, 2016.
138. In particular, the CBSA disagreed with our findings in relation to the disclosure of the intended subject's personal information. To this end, we reminded the CBSA that it presented no evidence to date to support the fact that the intended subject's personal information was available in the public domain on the day before the raid on the construction site (March 12, 2013). While the CBSA submitted that criminal warrants and/or convictions were alleged to have been available in the public domain in relation to the intended subject, the media articles the CBSA referenced in its submission to our Office post-date the March 13, 2013 raid, and in our view, do not provide supporting evidence of the pre-existence of warrants or convictions. To this end, the CBSA did not present any evidence to demonstrate that the individual's personal information was publicly available at the time it disclosed the information to Force Four. We also reminded the CBSA that our Office followed-up on this question on September 25, 2015, providing the CBSA with an opportunity to submit additional representations to support its position that the personal information of the individual was in fact in the public domain in advance of the raid. We requested a response from the CBSA by October 2, 2015; however, there was no follow-up by the CBSA on this question.
139. While we have noted the CBSA's comments in this regard, in our view, the CBSA was provided with ample opportunities throughout the course of our investigation to make submissions and to provide evidence to support its case.

Comments

140. While we recognize that the CBSA's participation in the TV Program may be an innovative platform for the public to be informed of border operations, it raises an overarching question of whether there is a public interest to be served by a government institution televising its operational activities. We do not decide on this question here; however, we take this opportunity to remind government institutions that privacy protection must be a core consideration in the initial development and administration of these types of initiatives in order to protect the personal information of those individuals that may participate, in line with the spirit, intent and requirements of the *Act*.
141. We hope that the objective factors outlined in this Report provide some assistance to both the CBSA and other federal institutions in determining whether they are effectively obtaining valid consent under the *Act*.
142. Canadians value their privacy and the protection of their personal information. They expect government institutions to respect the spirit and requirements of the *Act* – this is an essential element in maintaining public trust in government.
143. The Supreme Court of Canada has characterized the *Act* as "quasi-constitutional" because of the role privacy plays in the preservation of a free and democratic society. Privacy protection in this sense means limiting government interventions into the private lives of Canadians to lawful and necessary purposes. It also means that government is to ensure a high standard of care for personal information under the control of government institutions.⁵
144. Moreover, the central and guiding objective for our Office in establishing our privacy priorities is to increase the control Canadians have over their personal information. This vision is supported by recognizing the privacy rights of individuals and supporting those rights through the effective and consistent application of the principles of the code of fair information practices embodied in the *Act* and the *Privacy Regulations*.

⁵ Treasury Board of Canada Secretariat: *Policy on Privacy Protection* - <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12510§ion=HTML>