



Community Legal Assistance Society

providing specialized legal assistance to promote social justice since 1971

COMMUNITY LAW PROGRAM

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Via Email

Office of the Information & Privacy Commissioner
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Attention: Elizabeth Denham, Information and Privacy Commissioner for BC

Dear Ms. Denham:

Re: OIPC Investigation of Police Information Checks – OIPC File F13-55121

1. The following are submissions from the Community Legal Assistance Society (“CLAS”) with respect to the disclosure of information to employers through Police Information Checks (“PICs”).

I. Who We Are

2. CLAS was incorporated as a not-for-profit law office in 1971. CLAS is located in Vancouver, BC but it serves people in all areas of the province. CLAS’s mandate is to provide legal advice and assistance, and to use and develop the law, for the benefit of people who are physically, mentally, socially, economically or otherwise disadvantaged or whose human rights need protection. CLAS is registered as a charity under the *Income Tax Act*.

3. The issues raised in this investigation are relevant to many aspects of CLAS’s work. CLAS’s Mental Health Law Program (“MHLP”) represents approximately 800 patients each year who are involuntarily detained under the *Mental Health Act*. Many of these individuals are taken to hospital by police and the disclosure of their sensitive mental health information through a PIC is of great concern. The MHLP also represents approximately 300-350 patients each year who have been found not

criminally responsible on account of a mental disorder or unfit to stand trial with respect to criminal charges. Our clients' ability to find and maintain meaningful employment once they have recovered is a key factor in their rehabilitation and reintegration into society. CLAS also has a Human Rights Clinic, which has represented hundreds of clients before the BC Human Rights Tribunal with respect to complaints of workplace discrimination on the basis of a mental disability.

II. CLAS's Position on the Questions in the Consolation Paper

Do you believe that employers and non-profit agencies require the amount of personal information about potential employees and volunteers that is included as part of a police information check?

4. Employers and non-profit agencies do not require the amount of information contained in a PIC.

Mental Health Information

5. It is completely inappropriate for employers to access mental health information through a PIC. The notion that employers have an unrestricted right to demand access to mental health information, without any cause whatsoever, operates on a presumption that people with mental illness are a liability in the workplace. This reinforces stereotypes and stigma, rather than advancing the rights of people with mental illness as equally deserving and capable members of the workforce.

6. The historical mental health information disclosed through a PIC is irrelevant to the hiring process. The fact that the police, who are not experts with respect to the diagnosis and treatment of mental illness, observed an individual experiencing a mental health crisis several years prior tells nothing of the individual's present state of health or suitability for employment. To the extent that mental health information may be required by an employer (for example, to assess necessary workplace accommodations), the information requested by the employer should come from a qualified professional and should actually relate to issues the employer is trying to assess or address. The very serious prejudice a prospective employee may face as a result of the mental health information in a PIC

is completely disproportionate to any possible value or insight the information could provide employers.

7. The disclosure of mental health information through a PIC is especially problematic because it is very difficult to monitor an employer's use of this information or to hold the employer accountable if the information is used in an inappropriate or discriminatory fashion. Employers are not required to tell an applicant why he or she did not get the job. In a competitive job market where employers may receive dozens of applications for a single position, it is virtually impossible for an individual to prove that he or she was denied a position based on irrelevant information that appears in their PIC.

8. The disclosure of mental health information through a PIC is also arbitrary because the existence of the record depends entirely on who responds to the mental health crisis. If an individual with good community support experiences a mental health crisis, that individual may well receive intervention and care without police involvement, even if the individual is ultimately hospitalized. As a result, no police record will be created. However, if a person is homeless or simply does not have a meaningful support network, the first responder is more likely to be the police. In other words, citizens who are already the most vulnerable and face the most significant barriers to employment are more likely to come into contact with the police and have their employment jeopardized by the information in a PIC.

Other Criminal and Police Information

9. Employers should not be entitled to request any criminal information other than unpardoned convictions unless that access is authorized by statute. Criminal convictions have been proven in Court and are therefore a reliable source of information where the conviction might relate to the employment. However, disclosing unproven allegations to prospective employers runs completely contrary to fundamental principles of our criminal justice system, including the presumption of innocence and the right to a fair trial. Once again, the very serious prejudice a prospective employee experiences as a result of the disclosure of non-conviction information on a PIC is completely disproportionate to any possible value that unproven criminal allegation provides to the employer. As with mental health

information, this is especially problematic because it is very difficult to monitor the employer's use of this information or to hold the employer accountable if irrelevant material is used to deny employment.

10. Disclosing information concerning discharges also undermines the judge's sentencing decision. If a judge decides not to convict the individual, it is completely inappropriate to then turn around and release that information to employers. In fact, one of the criteria judges often consider when making a discharge is the impact that a conviction may have on the individual's ability to obtain and retain employment.

11. It is important to note that the government turned its mind to the unique concerns surrounding vulnerable children and adults when it created the *Criminal Records Review Act (CRRA)*. The CRRA establishes a deeper level of scrutiny for people working with these vulnerable individuals, but that access occurs within a regulated framework. It is difficult to imagine why employees who will not be working with vulnerable individuals should be compelled to release information that would not even be released under the CRRA.

Would your answer to question #1 change if instead of potential employees we were considering police information checks on individuals who were already employed or volunteering?

12. No. In fact, PICs in these circumstances are even more concerning because an employer evaluating a current employee can simply look at that employee's actual work product. There is no reason why an employer would need access to unreliable and irrelevant police information when the employer can simply evaluate the employee's actual job performance.

What type of guidance is needed for employers, non –profit agencies and citizens to inform them about when it is appropriate to do an employment – related record check and the appropriate type of check to choose in any particular circumstance (i.e., policy, legislation, etc.)?

13. There are several problems that must be addressed to ensure that the privacy of current and prospective employees is respected:

- Privacy legislation is effectively circumvented because, outside of vulnerable sector searches, the employer does not perform the check directly; rather the employer demands that the employee request their own information and then provide it “voluntarily” to the employer;
- If the employer is demanding a full PIC as a condition of employment, the employee has no meaningful way to withhold consent; and
- The police in British Columbia presently portray to the public that there is only one all-encompassing PIC, and there is no way for the employee to limit the information that is released.

14. A fulsome solution to this problem will likely require legislative amendments from the provincial government. Legislation should clarify exactly what information employers can obtain or not obtain from a current or prospective employee. In particular, legislation should clarify that employers cannot access criminal or police information other than unpardoned criminal convictions through the mechanism set out in the CRRA.

15. Efforts short of legislative reform could also be made at the policy level. Citizens already have the right to identify and limit the particular information they are requesting from the police. However, the police presently portray to the public that the only option is a full PIC. The police should change their policy to ensure that citizens understand that they can limit a criminal record check to unpardoned criminal convictions and then offer a reasonably simple and expedient way to make such a request.

16. Furthermore, many employers who request a “criminal record check” may not appreciate the full breadth of the information it will actually receive. The employer may believe it is only requesting criminal convictions, but then receive a wide range of other information. The OIPC should educate employers about the privacy implications associated with the information disclosed on a PIC. The OIPC’s existing guideline entitled “PIPA and the Hiring Process” already stresses that the collection and use of personal information must be reasonably required to determine the job applicant’s suitability for the position, regardless of whether the person consents to its disclosure. However, the guideline provides no specific guidance with respect to the information contained in a PIC. The OIPC should stress that information appearing on a PIC outside of criminal convictions is irrelevant to the hiring process unless the employee will be working with vulnerable individuals, in which case the CRRA

applies. If the police continue to release this information, employers should be encouraged to direct job applicants to sever or redact this additional information before the application is submitted to the employer.

Do you have any other thoughts on police information checks that we should consider as part of our investigation?

17. Simply that this is a very important issue and we thank the Commissioner for undertaking this investigation.

Yours truly,
COMMUNITY LEGAL ASSISTANCE SOCIETY

Kevin Love
Barrister and Solicitor

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