



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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INVESTIGATION REPORT F14-01

USE OF POLICE INFORMATION CHECKS IN BRITISH COLUMBIA

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Information and Privacy Commissioner

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Commissioner's Message

This is one of the most important investigation reports, if not the most important, that I have issued in my role as Information and Privacy Commissioner of British Columbia.

This report examines the increasing use of employment-related record checks, specifically what are known as “police information checks”. These checks can disclose sensitive personal information including mental health illnesses, suicide attempts, and allegations or investigations that did not result in charges or convictions; information that is untested and unproven in court. The current record check system in British Columbia permits the release of more mental health information and other non-conviction information than the vast majority of other jurisdictions we studied.

This investigation report clearly demonstrates that police information checks, issued by BC's police forces, have a significant, real-world impact on British Columbians. These checks can affect an individual's ability to successfully obtain employment and can have lasting negative effects on their dignity and self-esteem. This reality is reflected in the stories that British Columbians shared with me and that appear in this report.

I believe the current release of personal information in police information checks does not achieve the appropriate balance between an individual's right to privacy and an employer's right to obtain relevant background information on potential employees.

Through police information checks, non-conviction information is routinely disclosed to employers without any evidence that these checks result in better hiring decisions.

Since the current system of police information checks has been developed in a legislative vacuum, my primary recommendation is that the provincial government should develop legislation to achieve the appropriate balance. Until that legislation is developed, it is vital for government and police boards to direct police agencies to change their policies and practices to be consistent with the recommendations in this report.

In the course of this investigation, we received dozens of personal accounts from individuals who have first-hand experience with police information checks in the hiring process. I would like to thank each and every one of them for their honesty, courage, and willingness to share their stories with this Office. Some of their personal accounts are included in this report; names have been changed and specifics have been altered to protect their privacy.

Executive Summary

This investigation report examines the use of employment-related record checks issued by police as an employment screening tool in both the public and private sector, and the impact these record checks have on British Columbians.

The three types of employment-related record checks we consider are:

- **Statutorily-required record checks** – Pursuant to BC’s *Criminal Records Review Act* (“CRRA”), those who work with children or vulnerable adults and who are employed by, licensed by or receive ongoing operating funds from the provincial government receive checks coordinated by a central agency. These checks start with a review of convictions and outstanding charges and can then include further information where appropriate;
- **Criminal record checks** – These checks include information on prior criminal convictions, other than summary conviction offences. These are no longer offered by police services in BC; and
- **Police information checks** – These checks include information about prior convictions, outstanding charges, and non-conviction information such as adverse police contact, investigations that did not result in charges, and apprehensions under s. 28 of the *Mental Health Act*. The main focus of this report is on the extensive information provided to potential employers in a police information check.

The issues in this investigation are:

- Whether private and public sector employers are able to collect the broad range of personal information contained in a police information check without being in contravention of the *Personal Information Protection Act* and the *Freedom of Information and Protection of Privacy Act*.
- Determining the appropriate framework for conducting employment-related record checks in BC.

As part of this investigation, we conducted interviews with municipal police departments and received written submissions from municipal police boards, employers, civil society groups and citizens to help us better understand the police information check process.

In the course of this investigation, we received dozens of personal accounts from individuals who have firsthand experience with police information checks in the hiring process. Their stories illustrate the impact police information checks have

on an individual's employment prospects and their lasting impact on feelings of human dignity, respect and trust.

We also looked at record check practices in other Canadian jurisdictions as well as in countries such as the United Kingdom, Australia, New Zealand and continental Europe. We observed that the information provided in a police information check in British Columbia is on the extreme end of the disclosure spectrum compared to other jurisdictions.

Because of the breadth of personal information included in a police information check, it is likely that most public and private sector employers who require a police information check from a prospective employee will be collecting more personal information than is authorized by provincial privacy legislation.

This report recommends a new design for employment-related record checks that balances the legitimate business interests of employers with the privacy rights of citizens. This new process should be legislated to provide clarity for British Columbians.

The Commissioner's recommendations are:

- 1) Government and police boards should immediately direct police to cease providing mental health information in a police information check;
- 2) Government should enact legislation to prohibit the release of non-conviction information for record checks for position outside the vulnerable sector;
- 3) Until recommendation (2) is adopted, government and police boards should direct police to stop releasing non-conviction information for positions outside the vulnerable sector;
- 4) Government and police boards should direct police agencies to implement a record check model that allows individuals to request only conviction information that is relevant to the position for which they are applying; and
- 5) Government should enact legislation to mandate that the centralized office currently operating under the CRRA undertake all record checks for vulnerable sector employees.

1.0 PURPOSE AND SCOPE OF REPORT

1.1 Introduction

In recent decades, British Columbians have been subject to a significant increase in requests for employment-related record checks by both public and private sector employers.

Although there is a lack of research demonstrating the usefulness of these record checks, some employers believe them to be a valuable screening tool for determining the suitability of a prospective employee or volunteer. Over the years, the breadth of information being collected has increased to the point that very sensitive personal information is being revealed.

Many of these record checks make use of information about an individual's criminal conviction history as well as non-conviction information, such as investigations or charges that have not resulted in convictions, or mental health issues. While these checks ostensibly rely upon the consent of the individual requesting the check, the reality is the individual is unlikely to still be considered for employment if they refuse.

As a result, it is important that the process for record checks achieves the correct balance between an individual's right to keep certain information private and an employer's desire for relevant background information about an applicant.

This appropriate balance is essential, given that employment is a fundamental aspect of an individual's life. It is a component of identity, self-worth, emotional and financial well-being.¹ As a result of this fundamental significance, my Office spends considerable time and resources examining the privacy issues that employees and employers commonly face.

Perhaps no privacy issue is currently of greater significance in the employment context than the frequent requests for and use of record checks.

It is important to note that I decided not to focus our investigation on any particular public body or organization. Instead, my focus is on the general issue of the compliance of police record checks with privacy legislation in our province and how these checks impact British Columbians.

On October 25, 2013, I informed the municipal police departments in British Columbia and the Royal Canadian Mounted Police ("RCMP") that I had decided

¹ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at para. 91.

to investigate the use of police information checks, which are the broadest form of employment-related record check and which are defined later in this report. The goal of this investigation was to gain a better understanding of how these police information checks are used and to evaluate their compliance with the privacy requirements of *the Freedom of Information and Protection of Privacy Act* (“FIPPA”) and the *Personal Information Protection Act* (“PIPA”).

For the assistance of readers, a glossary of terms is contained in Appendix A.

1.2 Investigative Process

As the Information and Privacy Commissioner for British Columbia, I have a statutory mandate to monitor the compliance of public bodies with FIPPA and organizations with PIPA to ensure the purposes of these statutes are achieved.

The purposes of FIPPA, as stated in s. 2(1), are to make public bodies more accountable to the public and to protect personal privacy. The measures to protect personal privacy include preventing the unauthorized collection, use or disclosure of personal information by public bodies.

Under s. 42(1)(a) of FIPPA, I have the authority to conduct an investigation to ensure compliance with that Act. While I am not investigating a particular public body in this instance, I am concerned about the effect the broader form of police information checks have on the ability of public bodies across British Columbia to comply with FIPPA. I am also concerned with the question of whether the use of individuals’ personal information for police information checks is compliant with FIPPA. Under s. 42(1)(f) of FIPPA, I also have the authority to comment on the privacy implications of a program or activity of a public body.

The purpose of PIPA, as stated in s. 2, “is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances”.

Under s. 36(1)(a) of PIPA, I have the authority to initiate an investigation to ensure compliance with PIPA provided I have reasonable grounds to believe that an organization is not in compliance. While I am not investigating a particular organization in this instance, I am concerned about the effect police information checks have on the ability of organizations across British Columbia to comply with PIPA. Organizations include businesses and other entities in the private sector, including non-profit agencies and political parties.

As part of this investigation, my Office conducted site visits in Saanich, Abbotsford and Vancouver to ensure an understanding of the process followed by these Police Departments in offering the various forms of record checks. We

then wrote to each of the other municipal police departments in British Columbia and to the RCMP to confirm that we understood the process they follow.

In addition to the practices followed by police forces, it is important to gain an understanding of the perspectives of groups and individuals who are impacted by the various forms of record checks. To facilitate this, I sent a consultation letter in January of this year to civil society groups, employer groups and other stakeholders to seek their comments. My Office also posted this letter on our website as an invitation to the citizens of British Columbia to either answer the questions it posed or to otherwise share their personal experiences.

My Office also reviewed the use of employment-related record checks in other Canadian jurisdictions and around the world.

1.3 Application of FIPPA and PIPA

As is stated in s. 3(1), FIPPA “applies to all records in the custody or under the control of a public body”.

PIPA “applies to every organization” other than in instances specifically excluded by parts of s. 3.

Police information checks result in the production of a record containing significant amounts of personal information, which individuals subsequently provide to their prospective employer. As such, FIPPA and PIPA apply to all public bodies and organizations who ask prospective employees or volunteers to provide them with a completed police information check.

FIPPA also applies to municipal police departments who conduct police information checks as they have various records in their custody or under their control that are used in conducting the check. They also disclose personal information, an activity that Part 3 of FIPPA governs.

While the RCMP is subject to the federal *Privacy Act* and not to FIPPA or PIPA, the record check process it offers is the only one available to many employers throughout the province who themselves must comply with provincial privacy legislation.

1.4 Policing in British Columbia

In British Columbia, policing is governed by the *Police Act*,² which provides for a provincial police force as well as for municipal police forces.

² *Police Act*, [RSBC 1996] Chapter 367.

The *Police Act* requires any municipality with a population over 5,000 to provide policing and law enforcement within the municipality.³ While most of this policing is carried out by the RCMP under contract, the following 11 municipalities have their own police departments:

- Abbotsford;
- Central Saanich;
- Delta;
- Nelson;
- New Westminster;
- Oak Bay;
- Port Moody;
- Saanich;
- Vancouver;
- Victoria (who also provides policing to Esquimalt); and
- West Vancouver.

There is one First Nations' administered police service, the Stl'atl'imx Tribal Police Service. It is a designated policing unit pursuant to the *Police Act*, and operates under an agreement between the province, Canada and ten Stl'atl'imx Nation Communities. Stl'atl'imx Tribal Police constables have the same powers as any other municipal police constable in British Columbia.

There are also several police agencies and integrated teams that provide supplemental or enhanced police services. For example, the South Coast British Columbia Transportation Authority Police Service is a designated policing unit in the Lower Mainland. These police agencies and integrated teams do not conduct police information checks for the public.

Each of the municipal police forces is governed by a municipal police board, which is responsible for appointing the Chief Constable and other constables, as well as for hiring civilian employees. The municipal police department operates under the direction of the board and the Director of Police Services,⁴ who is appointed by the Minister of Justice.

While there is a long-standing common-law principle that police officers are independent from political direction on core law enforcement matters, the provision of police information checks is not a core law enforcement function. When disclosing information for a police information check, a police department is not engaged in the investigation, arrest, or prosecution of any person. Nor does the provision of such checks engage the principles underlying police

³ The province has contracted with the RCMP to operate as the provincial police force and the RCMP also provides contract policing services for approximately 62 of the province's cities and municipalities.

⁴ *Police Act*, ss. 26(2) and 39(1).

independence, which are to prevent the use of the police for partisan political purposes and to recognize their unique expertise related to matters of policing and law enforcement.⁵

Police departments have moved into the business of providing record checks primarily because they are in possession of these records. In my view, this activity does not involve the exercise of their powers, duties or functions as police under statute or common law. It does not involve a law enforcement investigation, criminal intelligence activities, or the exercise of a discretion or power by police under statute or at common law.

The BC Association of Chiefs of Police (“BCACP”) has adopted a policy to provide what can reasonably be described as an information service; a service where police have a near monopoly on the information they supply. As discussed later in this report, the harm which this has caused to innocent individuals who have little choice but to make use of this process has profound public policy implications. The responsibility for policies guiding the provision of this information lies more appropriately with government than with police agencies.

1.5 Types of Employment-Related Record Checks

There are three types of employment-related record checks offered in British Columbia that are important to understand in this investigation: those that are required by statute, criminal record checks, and police information checks.

Statutorily-required record checks

BC’s *Criminal Records Review Act* (“CRRA”) applies to individuals who work with children or vulnerable adults and who are employed by, licensed by, or receive regular ongoing operating funds for core programs from the provincial government. In addition, not-for-profit organizations can opt into the CRRA for their volunteers, but are not required by legislation to do so.

Under the CRRA review process, a central provincial agency under the supervision of the Registrar for the Criminal Records Review Program conducts the checks. That office determines whether the individual it is reviewing has any relevant convictions or outstanding charges. If it finds a conviction or outstanding charge, the Registrar conducts a risk assessment to determine whether the individual is suitable for hiring.

⁵ P. Ceysens, *Legal Aspects of Policing* (looseleaf updated March 2012) (Salt Spring Island, B.C.: Earls court Legal Press Inc, 1994), ch 1 at p. 27; Ontario, Ipperwash Inquiry, *Report of the Ipperwash Inquiry*, vol. 2 at p. 327; D. Walsh and V. Conway, “Police governance and accountability: overview of current issues” (2011) 55 *Crime Law Soc. Change* 61 at p. 71.

This risk assessment could include review of such things as police files, the conduct of a police information check (defined below), or interviews of the individual or victims. There is also the ability of the individual to participate and provide input for the risk assessment.

If an individual does not have a prior conviction or outstanding charge for a relevant offence under the CRRA, the employer will be notified that the person has passed the screening. If a relevant offence is found, the criminal record is not sent to the employer. Instead, the actual risk posed is determined by trained staff, who ultimately send a letter to the employer that discloses only whether the individual is suitable to be hired or not.

The CRRA is balanced legislation that sets out a privacy sensitive background check process for provincially-funded entities who deal with the vulnerable sector in British Columbia. Trained staff in a centralized office make risk-assessment decisions based on criminal records and non-conviction information in relation to specific positions. For these and other reasons the CRRA is an appropriate approach to employment-related record checks in the vulnerable sector. It is an illustration of a legislation-based alternative to the police information check approach adopted by police agencies in this province. The process in place under the CRRA was not a subject of this investigation nor will this report make recommendations for changes to that process.

Outside of the CRRA program, police agencies in British Columbia currently offer two types of background checks, which I will now describe.

Criminal record checks

A criminal record check is a search of an RCMP database to determine whether an individual has prior criminal convictions. The search is performed by checking information such as an individual's name, date of birth and gender against the national repository of criminal records maintained by the RCMP. Summary conviction offences⁶ are not included within the scope of a criminal record check. Municipal police departments and the RCMP no longer offer a stand-alone criminal record check, and instead only offer the broader police information checks.

Police information checks

This type of employment-related record check is the subject of this report. Police information checks include a search of the Police Records Information

⁶ Summary conviction offences are considered less serious than indictable offences. As per s. 787 of the *Criminal Code of Canada*, summary conviction offences can be punished by a maximum of six months imprisonment, a \$5,000 fine, or both. Some examples of summary conviction offences include causing a disturbance, shoplifting and trespassing. Fingerprints are not taken for those convicted of a summary offence.

Management Environment (“PRIME”), which is British Columbia’s police records management system, and of CPIC, the national repository of criminal records maintained by the RCMP. A police information check might also include information about convictions under the *Youth Criminal Justice Act*, a search of court records in BC, and records management systems in jurisdictions outside of BC.

In addition to disclosing whether an individual has prior convictions or outstanding charges, a police information check also discloses non-conviction records such as:

- warrants for arrest;
- peace bonds or restraining orders in effect;
- information about adverse police contact;⁷
- charges approved by Crown Counsel that do not result in convictions;
- investigations that do not result in charges; and
- information about apprehensions under the *Mental Health Act*.

Information about an individual who has been a witness to, or a victim of, an incident is recorded in PRIME, but is not released as part of a police information check.

1.6 History of Employment-Related Record Checks In BC

The Legislature enacted the CRRA in 1996 “to help protect children from individuals whose criminal record indicates they pose a risk of physical or sexual abuse”.⁸

In 2009, the CRRA was amended to mandate checks for individuals working with vulnerable adults. In 2013, it was amended again to encompass the volunteer sector by providing free criminal record checks to volunteers working with children or vulnerable adults in public or non-profit organizations that decided to opt into the Criminal Records Review Program.

Over this same time there has been a quiet and significant shift from criminal records checks to the more expansive police information checks in BC. Since the CRRA was first enacted, there has been a significant increase in the number of employers that choose to require employees and volunteers to provide a

⁷ Adverse police contact is non-conviction information that may include events relating to a mental health incident, an investigation into a possible criminal offense, municipal bylaw or *Motor Vehicle Act* infractions.

⁸ See Ministry of Justice website at <http://www.pssg.gov.bc.ca/criminal-records-review/who-qualifies/>. It was not passed without concern about the necessity for these checks and the privacy implications of the law. See Hansard from June 20, 1995, at p. 15769 at <http://www.leg.bc.ca/hansard/35th4th/h0620am.htm>.

police information check. This includes employers who work within the vulnerable sector, but that do not receive funding from the provincial government. The result is that the majority of checks conducted in British Columbia are police information checks, which take place through a process that was developed by our province's police agencies rather than having been created by government and governed by appropriate legislation. This point will be discussed further in this report.

The evolution of the CRRA as it relates to vulnerable persons, demonstrates that government and the Legislature understood the significant policy implications raised by these employment-related record checks and the need to deal with them legislatively. The privacy implications of police information checks undertaken for individuals seeking employment outside of the vulnerable sector are just as profound—but to date government has not addressed these matters through legislation or policy.

In 2008, the BCACP requested that the Ministry of Public Safety and Solicitor General (now the Ministry of Justice) convene a working group to review the record check process in British Columbia that lies outside the scope of the CRRA. The working group had representatives from municipal police departments, the RCMP, the Ministry of Justice and PRIME-BC.

The working group's mandate was to provide a consistent standard for police information checks in our province. To this end, they created a document titled *Guideline for Police Information Checks* ("Guidelines"). In November 2010, the BCACP endorsed the recommendations of the working group and changes to the procedure for conducting record checks were implemented in the spring of 2012 consistent with the Guidelines. The working group and various municipal police departments provided my Office with a copy of the Guidelines as part of this investigation.

1.7 Efficacy of Employment-Related Record Checks

There is a lack of evidence indicating that employment-related record checks are an effective employment screening method. The primary purpose of these checks is to assist an employer in determining the suitability of an employee, by looking at past conduct as a means to address possible workplace safety and security issues. Proactively safeguarding workplaces from safety and security issues is a laudable intent that one hopes every employer brings to their workplace. However, evidence shows that employers are driven by assumptions, rather than evidence, that conducting record checks on prospective and current employees is an effective means by which an employer can prevent subsequent work-related incidents.

Research shows that indicators for the likelihood of an individual engaging again in criminal activity are ineffective for examining the likelihood of an offence

perpetrated at the expense of an employer. One study tracked re-offending in the context of employment and found that “variables which normally predict subsequent criminal activity made no impact in trying to predict offenses against an employer.”⁹ This study shows a decided lack of evidence as to the efficacy of employment-related record checks for employers, additionally raising the question as to whether employer resources may be better spent on other measures that ensure a safe and secure work environment.

What is clearly demonstrated by evidence and academic research is that the income, stable housing, and social networks that are fostered by employment are significant predictive factors against an individual with a criminal record re-offending.¹⁰ Therefore, record checks that prevent citizens from obtaining work may actually result in a burden on society as a whole that is significantly greater than any perceived benefit to the employer.

2.0 ISSUES IDENTIFIED

The issues in this investigation are:

1. Do employers in the *private* sector have authority to collect personal information contained in a police information check? [s. 11 of PIPA]
2. Do employers in the *public* sector have authority to collect personal information contained in a police information check? [s. 26 of FIPPA]
3. What is the appropriate framework for conducting British Columbia’s employment-related record checks?

3.0 INVESTIGATIVE STEPS

My investigators interviewed representatives from the Saanich, Abbotsford and Vancouver Police Departments to ensure we understood the process that municipal police departments follow in offering police information checks. We confirmed our understanding of this process with other municipal police departments across the province as well as with the RCMP in order to identify any discrepancies. My investigators also spoke with the Stl’atl’imx Tribal Police

⁹ See Soothil, K. I et al, “Middle-Class Offenders as Employees – Assessing the Risk: A 35-Year Follow-Up” (2013) 52 *Journal of Offender Rehabilitation* 407.

¹⁰ See: Giffiths et al. 2007. “The Social Reintegration of Offenders and Crime Prevention.” Ottawa: National Crime Prevention Council; Human Resources and Social Development Canada. 2006. “When Working is not enough to Escape Poverty: An Analysis of Canada’s Working Poor”; Uggen, C. 2000. “Work as a turning point in the life course of criminals: A duration model of age, employment and recidivism.” *American Sociological Review*, 65(4), 529-546.

Service about the record checks they offer and interviewed representatives from the Canadian Corps of Commissionaires (“Commissionaires”)¹¹ and BackCheck¹² to determine whether non-police organizations offer police information checks.

A summary of the evidence my investigators collected follows.

Municipal Police Departments

All of the municipal police departments that we visited, or received written responses from, follow the Guidelines and provide police information checks rather than (narrower) criminal record checks. Each department only provides checks to individuals who are residents of the area in which the police department is based.

In conducting a police information check, the police cross-reference an individual’s name and date of birth against various databases, including:

- Canadian Police Information Centre (“CPIC”) – an RCMP database that includes information about criminal convictions (summary and indictable);
- PRIME – an information system that connects every municipal police department and RCMP detachment throughout the province;
- Police Information Portal (“PIP”) – a national database that provides access to local databases of police agencies across Canada;
- Police Information Retrieval System (“PIRS”) – provides access to historical RCMP records that are not available via CPIC;
- Police Reporting and Occurrence System (“PROS”) – this database records occurrence information for the RCMP and some non-RCMP police forces in Canada; PROS is essentially the RCMP version of PRIME; and
- JUSTIN – a court records database.

Municipal police departments offer two types of police information checks—one for individuals who are not working or volunteering with children and vulnerable adults and a second for people who are.

Police information check with no vulnerable sector screening element

This check is for individuals who are seeking a volunteer position or employment in a capacity that does not involve children or vulnerable adults. According to the Guidelines, police departments will release the following information in a police information check:

¹¹ The Commissionaires is a non-profit agency that employs retired police officers and armed forces veterans in a variety of security enforcement roles. It also offers background screening, which includes a criminal record check.

¹² BackCheck is a private company that offers a variety of background check services for employers, volunteer agencies, and landlords.

- Criminal convictions (summary and indictable) and findings of guilt under the *Youth Criminal Justice Act*;
- Outstanding judicial orders, such as charges and warrants, peace bonds, probation and prohibition orders;
- Absolute discharges for a period of one year from the date the applicant was discharged and conditional discharges for a period of three years from the date the applicant was found guilty;
- Charges recommended or processed by other means such as diversion;
- Non-conviction dispositions including, but not limited to, withdrawn, dismissed, and cases of not criminally responsible by reason of mental disorder;
- Information recorded in a local police database (such as PRIME) documenting the applicant to have been a suspect in an offence (whether or not charged); and
- Information from police databases obtained under s. 28 of the *Mental Health Act* as a result of a police apprehension where an individual is “acting in a manner likely to endanger that person’s own safety or the safety of others” and the individual is “apparently a person with a mental disorder”. If disclosable, the applicant will be referred to as “subject” and the incident will be referred to as violent and/or threatening behaviour towards self or others.

The following information is not released by police as part of a police information check:

- Convictions where a pardon has been granted, including for sexual offences;
- Convictions under provincial statutes;
- BC Motor Vehicle Branch information, such as traffic violations or roadside driving suspensions;
- Suspect information that would hinder an ongoing investigation or where the suspect has not been spoken to (note: these may also result in the delay or termination of a record check by the police);
- Information from the “Special Interest Police” category of CPIC;
- Any reference to contagious disease;
- Victim or complainant information; and
- Information from foreign law enforcement agencies.

Police information check with a vulnerable sector screening element

Municipal police also offer a vulnerable sector check that goes beyond the basic police information checks described above. This check is distinct from the CRRA process, which only applies to individuals working with children or vulnerable adults in programs that receive provincial funding.

This broader vulnerable sector check applies to individuals who work in the vulnerable sector, but do not work for employers that receive government funding. This includes positions such as nannies, babysitters and some summer camp leaders.

The vulnerable sector check includes everything in a police information check as well as certain sexual offence convictions for which a pardon has been granted.

Release of information

The Guidelines include an appendix titled “Information Check Release Chart”, which sets out the various types of information that police departments will release as part of a police information check. The Guidelines also set out how long police departments will release this information from the date of its occurrence.

An example is that police departments release information regarding mental health apprehensions other than suicide attempts for a period of five years from the date of occurrence. In the case of suicide attempts, or threat of suicide, police departments will release that information if incidents occurred in the previous year. If there have been multiple threats or attempts of suicide where the police took action, they will release such information covering the previous five years.

Reconsideration process

Police departments offer a reconsideration process through which an individual can raise concerns about the results of their police information check. From our interviews and from the written responses from police departments, it does not appear that applicants commonly use this process.

The reconsideration process is limited to correcting factual errors in the release of information. For instance, police will look to see that information was correctly classified as a category that is releasable under the Guidelines (*i.e.*, if the individual was a witness, the information should not be released) or if it was incorrectly released outside of the release dates set out in those Guidelines. The reconsideration process does not, however, address concerns by individuals that more personal information—notably sensitive information about mental health—is included in a police information check. This touches on a central concern

raised in this report, namely that police information checks necessarily result in an over-broad disclosure of personal information in almost all circumstances.

This point is illustrated by statistics provided by Vancouver Police Department which does a thorough job of keeping statistics relating to its conduct of police information checks. In 2013, this Department completed 18,250 checks and released information on 797 (4%) of these checks. Interestingly, only 224 of the 797 checks (28%) involved criminal convictions. That is to say 72% involved the release of non-conviction records only. This is clearly a significant number. Mental health information was included in 6% of the 797 checks where information was released.

RCMP

The RCMP stated that it is transitioning its process throughout the province to align with the Guidelines. The current process is already largely in line with that of the Guidelines and municipal police departments. The RCMP will not offer a stand-alone criminal record check.

Stl'atl'imx Tribal Police Service

The Stl'atl'imx Tribal Police Service also only offers individuals two types of checks: a police information check and a police information check with vulnerable sector screening.

Commissionaires and BackCheck

The Commissionaires in Victoria and BackCheck informed my Office that they do not conduct police information checks, but instead only offer employment-related criminal record checks. These checks are conducted through the RCMP, with the Commissionaires and BackCheck acting as facilitators. This is consistent with my Office's understanding from discussions with government about the types of checks offered by organizations who are not involved in policing.

4.0 CONSULTATION WITH STAKEHOLDERS

An important part of this investigation was a consultation process with citizens and interested stakeholder groups. To facilitate this, I posted a letter on my Office's website advising that I was conducting this investigation and asking for submissions from the public as well as from municipal police boards on this issue. I encouraged respondents to either address the specific questions I had posed or share their own views or personal experiences with respect to police information checks.

British Columbian's significant interest in this issue was demonstrated by the over 100 submissions from a variety of interested stakeholders, including individuals, municipal police boards, civil society groups, employer groups and lawyers. What follows here is a summary of the submissions that my Office received. These submissions were consistently of very high quality and contributed greatly to my Office's understanding of this issue and to this report.

Responses to OIPC questions

Twenty three responses specifically addressed each of the questions I asked in my consultation letter.

1. 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?

No individuals or groups who responded to this question believed that all employers and non-profit agencies require the amount of personal information involved in a police information check. A few responses did state that a police information check may be justifiable for individuals who will be working with children or vulnerable adults. Two responses specifically set out other positions where a police information check might be justifiable, namely where a person is responsible for a significant amount of money or the position has significant political ramifications.

2. In some instances, employers and non-profit agencies require re-checks of an individual's criminal record every five years. 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? If yes, how would it change?

One response felt a re-check every five years was appropriate for positions that could justify a police information check in the first instance. The other 22 responses felt that a police information check on an individual who was already employed or volunteering was not appropriate.

3. 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.)?

and

Who do you believe should provide this guidance? The police? The provincial government? The Privacy Commissioner?

The majority of submissions on this question believed that government needed to bring forward legislation in this area after consultation with my Office. In some instances, responses specifically stated that such legislation should make the use of any non-conviction records illegal in all or the vast majority of instances.

Others suggested that policy was an appropriate solution. In these instances, the general belief was that policy should clearly set out when it is, and when it is not, appropriate for an employer to request a police information check from a prospective employee or volunteer. Those who believed policy was the correct solution felt it appropriate for both my Office and government to play a role in its creation.

Two responses emphasised the point that the problems with police information checks would not be resolved through legislation or policy without excluding non-conviction information in almost all instances.

Other issues raised in the submissions

Almost every response commented on the inappropriateness of the inclusion of non-conviction information in a police information check in all, or nearly all, circumstances. There was not a single response that made an argument for why non-conviction information should be included as part of all checks.

Many of the submissions offered thoughtful discussion regarding the problems that result from including non-conviction records as part of a record check. Numerous responses noted that this practice is in direct contradiction to the presumption of innocence – a long-standing and fundamental element of the Canadian criminal justice system and Constitution. One particularly compelling submission made this excellent point:

It is trite that the presumption of innocence is a core value and principle in our system of criminal justice. It is enshrined as a constitutional right in the Canadian *Charter of Rights and Freedoms* under s. 11(d):

Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

(...)

It is not merely the formal penal consequences of a criminal allegation that represents the punishment for criminal behaviour. Often, it is the social stigmatization and public condemnation that are the worst implications for a convicted criminal.

To disclose the status of an individual as having been a suspect, charged or acquitted of a criminal offence is to heap on them much, if not all, the suspicion and wariness the public feels towards those convicted.

A category of non-conviction information that police agencies release as part of a police information check is information from that was obtained in relation to apprehension of an individual under the *Mental Health Act*. Police collect this information when they are involved in situations where an individual is “acting in a manner likely to endanger that person’s own safety or the safety of others” and the individual is “apparently a person with a mental disorder”. Of all the non-conviction information involved in a police information check, this category drew by far the most submissions. Nearly 30 submissions commented only on this issue, while more than half of all submissions addressed mental health apprehensions directly.

Numerous submissions expressed the view that it was highly inappropriate for police agencies to release anything relating to mental health, and in particular about suicide attempts. A common theme was that police agencies’ inclusion of mental health information results in the ongoing stigmatization of mental health issues. One submission noted that mental illness “is not a crime. It is an illness or medical issue, just as having a broken arm is a medical issue.” Another noted that mental illness “should be treated with the same privacy considerations as physical illness.”

Another submission noted that “it is often by pure chance or circumstance that an individual will receive assistance from the police instead of from medical personnel, the B.C. Ambulance Service, or directly from the hospital. If the individual received care without the presence of police, that care would not be subject to disclosure. It is only where the police get involved that disclosure becomes a reality.”

A danger noted by many regarding this practice of disclosure by police agencies is that it may cause some individuals to reconsider seeking assistance during a mental health crisis out of fear about how police agencies will record such information and subsequently use it to the individual’s detriment.

One of the many articulate submissions we received noted that:

When an individual involved in a mental health incident poses no threat to others, it is difficult to imagine a scenario in which this information would be legitimately relevant to employers. Both British Columbian and Canadian human rights law forbids discrimination on the basis of mental health status, and the disclosure of such private health information vastly increases the likelihood that individuals will face such discrimination. In addition, the inclusion of mental health incidents in background checks reinforces the unacceptable and discriminatory association between mental illness and criminality. It contributes to the insupportable stereotype that those with

mental health issues are a danger to society, despite the fact that the majority of these individuals never pose any threat to others.

It is significant, and indeed telling, that no submissions whatsoever argued in favour of the inclusion of mental health information in a police information check.

Individuals' experiences with police information checks

About 20 individuals shared their personal experience of how police information checks have affected them. These examples, and other experiences shared with us demonstrate the profound impact that broad police information disclosures have on British Columbians.

Shannon's story¹³

Shannon shared a story with us about police arresting her for theft a few years ago relating to an incident with another individual. She vigorously disputed the legitimacy of the allegation and felt vindicated and extremely relieved when Crown Counsel did not approve charges. Upon applying for a job some time later, Shannon's prospective employer asked her for a police information check. Shannon went to the police and her results showed this allegation. Shannon explained the situation to her prospective employer, but the employer chose not to hire her because of the concern that she had previously been suspected of theft, even though she had never been charged with an offence and did not have a criminal record. This example shows that an allegation by one individual, for whatever motivation and however baseless, can linger and inappropriately stigmatize someone despite not having been tested in a court of law.

Greg's story

Greg recounted an experience of going through a very difficult time in his life where there were marriage problems as well as health issues for his spouse. In the midst of these problems, he contemplated suicide and called the suicide hotline for help. Members of the police were sent to assist and took Greg to the hospital.

About six months after this incident, Greg was approached to help coach his child's youth sports team. He was required to provide a police information check, which came back with a result noting "Harm to Self". Greg elected not to provide the results of the check to the sports association, which meant he did not volunteer for this valuable community activity.

¹³ We have changed the names of the individuals who shared their stories with our Office.

Kim's story

Kim was applying for her first professional job and had to supply a police information check. She had no criminal convictions and the police had never charged her with anything. Nonetheless, when Kim received the results of her check, it came back with an indication of a problem.

The incident in question arose out of an argument at a party where police had been called. Kim alleged an individual had assaulted her and he, in turn, alleged that she had assaulted him. Kim never spoke to the police again about the incident and had no idea it would be caught by an employment-related record check. It was now left to Kim to explain this incident to her prospective employer as she attempted to begin her career.

Eileen's story

Eileen went to the police to get a record check completed as a requirement for an office job she was seeking. She did not appreciate the distinction between a criminal record check and a police information check and was very surprised to see that information about her suicide attempt was included in the results. Eileen had experienced bouts of depression and had attempted suicide, but is doing well now.

The results of Eileen's police information check place her in the very uncomfortable position of having to explain a prior suicide attempt to prospective employers, even though this suicide attempt should be of no relevance to work she is seeking. Eileen has yet to be hired.

Jim's story

Jim works two jobs and is a couple of years away from retirement. About five years ago, Jim was suffering from depression. He received treatment for this problem and did spend a small amount of time in hospital. Jim has had one of his jobs for many years and did not wish to share his problems with his employers. He has had no problems in recent years and continues to successfully work at both his jobs.

One of his employers, where Jim only works a small number of hours, recently decided to require its employees to submit police information checks. Jim joked with others that he was going to "fail" his check, but he did not believe that he had anything on his record. When he got the results back, however, it mentioned his prior *Mental Health Act* apprehension. Jim did not realise this was something that the police would even have a record of, much less choose to disclose. Jim felt like he could not take this to his manager because he feared having to

explain his episodes of depression. He continued with this job for a short amount of time without being asked for the results of the search. He has since left the job and does not believe he will go back because he does not want to explain the results of his police information check.

Conclusion

These are real examples of how real people have been affected by the current policy of police agencies. They bring home to me, as they should bring home to the public and to government, the serious and real implications of such broad information checks for ordinary British Columbians.

5.0 OTHER JURISDICTIONS

5.1 Canada

The amount and type of information released by police agencies in employment-related record checks vary considerably across the country. It is useful to survey practices in Canada and elsewhere to assess which approaches offer the best practices.

Ontario

The Ontario Association of Chiefs of Police (“OACP”) released a set of voluntary guidelines on police checks in 2011 that are similar to the Guidelines implemented in British Columbia in 2012. However, the Ontario guidelines provide for options of a criminal record check, a police information check, and a vulnerable sector check. In February 2014, the OACP agreed to update their guidelines to put in place a presumption against the release of non-conviction records on all employment-related record checks. The update provides for a narrow, public safety exception to allow for the release of non-conviction information where there is a risk to the safety of vulnerable community members.¹⁴ Further, there must be multiple non-conviction notations before the police will include any information. The OACP also intend to advocate for provincial legislation regarding police record checks.¹⁵

¹⁴ See <http://ccla.org/2014/02/26/ccla-applauds-ontario-police-chiefs-for-leadership-on-non-conviction-records/>.

¹⁵ See <http://www.oacp.on.ca/news-events/news-releases/oacp-learn-guideline-for-police-record-checks-statement>.

Alberta

The Alberta Association of Chiefs of Police has prepared voluntary guidelines for employment-related record checks. Two types of checks are described: non-vulnerable and vulnerable sector checks. A non-vulnerable sector check may contain conviction information, diversion programs, pending or outstanding charges, outstanding warrants, findings of Not Criminally Responsible by Reason of Mental Disorder, court orders such as peace bonds and relevant information from police files. The vulnerable sector check will contain the same information, but also include information about sexual offences for when a pardon has been granted. Certain areas such as the Calgary Police Service appear to only offer a police information check that may include information about non-conviction records as well as information about mental health apprehensions.¹⁶

Saskatchewan

Police services in Saskatchewan are bound by a provincial standard for employment-related record checks. The standard includes information about criminal convictions as well as the conditions imposed by any court orders such as peace bonds. A check will include a statement that there are “charges before the court” where criminal charges are currently before the court, a stay of proceedings has been entered in the past year, a diversion program is currently active, or a finding of Unfit to Stand Trial has been made. Police agencies do not disclose other adverse interactions with the police or orders under the *Mental Health Services Act*.

Newfoundland

The Royal Newfoundland Constabulary and the RCMP perform employment-related record checks according to a shared set of guidelines that provides for two types of checks. A criminal record check considers only information about convictions and discharges from convictions that are not yet expired. The other type of check is a combined police information check and vulnerable sector check, which considers outstanding charges and warrants, and pardoned sexual offences, as well as convictions and unexpired discharges. Mental health apprehensions are not considered in either of the checks.

Other provinces

Manitoba, Quebec, and Nova Scotia appear to operate without province-wide guidelines. Some jurisdictions, such as the Yukon Territory and Prince Edward Island, only offer basic criminal records checks. Halifax police do not release any non-conviction information, even for vulnerable sector checks.

¹⁶ <http://www.calgary.ca/cps/Pages/Public-services/Police-information-checks.aspx>.

5.2 International

United Kingdom

The UK has a longstanding practice of using criminal background checks when screening employees.¹⁷ In 1997, the UK government responded to growing concerns about the practice of local police forces providing records checks by enacting the *Police Act 1997*, which provided that record checks were to be performed by a centralized government body.¹⁸

Three levels of background checks are available in the UK: basic criminal record checks, a more detailed check for admission to certain professions which also includes warnings and reprimands, and an enhanced check for the vulnerable sector which includes non-conviction information.

Australia

In Australia, the primary type of screening is the National Police Check. This check contains information from each of the country's police services, which provide any information in their custody that is relevant to the check.¹⁹ Different state level checks are also available. For example, Queensland Police offer a "Criminal History" containing convictions, and a "Person History" which contains non-conviction information.²⁰ In New South Wales, the Office of the Children's Guardian provides a record check that results only in a result of "Clearance" or "Bar" for those who work with children.²¹

New Zealand

In New Zealand, two types of record checks are available. The Ministry of Justice provides a "Police Clearance Certificate" containing nation-wide conviction information. The New Zealand Police perform "vetting" checks that may contain non-conviction information and are available only for those working in the vulnerable sector. Rather than releasing sensitive details, the police may choose to place an electronic "red stamp" on the vetting check.

¹⁷ Chris Baldwin, *Necessary Intrusion or Criminalising the Innocent? An Exploration of Modern Criminal Vetting*, *The Journal of Criminal Law* (2012) 76 JCL 140–163p. 141.

¹⁸ *Police Act 1997*.

¹⁹ http://www.crimtrac.gov.au/national_police_checking_service/index.html.

²⁰ <http://www.police.qld.gov.au/services/purchase/default.htm>.

²¹ See <http://www.kids.nsw.gov.au/Working-with-children/New-Working-With-Children-Check/Working-With-Children-Check-results>.

Continental Europe

Historically, many European countries have sealed police records and have not allowed private sector employers to request or receive an individual's criminal record.²² However, in 2011, Directive 2011/92/EU of the European Parliament and of the Council of 13 required member countries to pass legislation allowing criminal records checks when screening for positions involving interaction with children.

Germany has significant legislated privacy protections regarding the use of criminal records and police information in employment screening.²³ Non-conviction information is only disclosed when the position involves interaction with children.

Sweden has traditionally not used record checks for employment screening purposes. Police records containing non-conviction information are generally only accessible for screening purposes in positions involving national security.²⁴ However, restrictions against individuals requesting their own records for the purpose of providing them to employers have been lifted,²⁵ and legislation now requires criminal record checks for positions involving the vulnerable sector.

6.0 ANALYSIS

6.1 Definition of Personal Information under PIPA and FIPPA

“Personal information” is defined in PIPA as “information about an identifiable individual and includes employee personal information but does not include (a) contact information, or (b) work product information”. Personal information is similarly defined in Schedule 1 of FIPPA as “recorded information about an identifiable individual other than contact information”.

At the completion of a police information check, police agencies provide an individual with a form that contains details about the individual's criminal record as well as adverse non-conviction history found in police databases. The details on this form may confirm that the individual has no criminal record or adverse police contact or it may confirm details to the contrary. Regardless, the completed form is personal information of the prospective employee as defined in PIPA or FIPPA.

²² Elena Larrauri, *The legal protections against criminal background checks in Europe*, Universitat Pompeu Fabra (unpublished).

²³ Morgenstern C (2011) Judicial rehabilitation in Germany: The use of criminal records and the removal of recorded convictions. *European Journal of Probation* 3(1): 20–35.

²⁴ Backman's 2012 thesis, p. 33.

²⁵ Backman's 2012 thesis, p. 51.

6.2 Current Police Information Checks are not Balanced

No one disputes that police agencies need broad authority to collect, use and disclose personal information in order to do their jobs safely and effectively. We depend on them to have accurate, complete and reliable information to investigate crimes, help prosecute criminals and protect the public. In many instances, a police investigation may turn on a seemingly irrelevant piece of information. This is why FIPPA gives police agencies considerable latitude to collect, use, and disclose personal information in performing their duties and functions.

Where police agencies use personal information to investigate and help prosecute offences, our criminal justice system contains checks and balances to ensure the accuracy of information. This includes the discretion of Crown Counsel to decide whether or not to approve charges and the right of legal counsel to cross-examine in court, to test the credibility and weight of evidence. Further, a judge or jury act as independent and impartial decision makers that will determine the credibility of information at trial.

By contrast, the current Guidelines allow police agencies to disclose personal information that they collect for their law enforcement duties using the near-fiction of individual consent. This is, in my view, not acceptable without appropriate checks and balances.

The importance of checks and balances is well illustrated by Shannon's experience, summarized earlier in this report. When Shannon was accused of theft, she vigorously disputed the allegation, which had been made by another individual. Upon reviewing the evidence, Crown Counsel decided not to approve charges, which involves a determination that a conviction was not likely to be obtained. Nonetheless, after considerable time had passed and Shannon understandably believed that the Crown decision had exonerated her of any suspicion of wrongdoing, her police information check revealed this allegation. As a result, she was denied employment. This kind of result is in direct opposition to the presumption of innocence that is a foundational element of the Canadian legal system.

In disclosing the results of a police information check in this way, police agencies are taking personal information that was originally collected for law enforcement and changing its use to employment-related decisions for private or public sector employers. This change in use removes safeguards provided by the criminal justice system and leaves the individual the information is about without any recourse to challenge the accuracy of the information.

It is not sufficient to expect individuals like Shannon to try to persuade a potential employer that the allegation was invalid and that she had been cleared. Many

employers will simply not listen nor will they take what they perceive as a substantial risk, especially if they have other equally-qualified candidates available. This is especially likely because an employer may wrongly assume the accuracy of the information seeing as it came from a source as trustworthy as a police agency. The lack of judicial testing of this information, however, can greatly impact its accuracy.

Public bodies have an obligation under FIPPA to ensure the accuracy of personal information that is in their custody or under their control. While the nature and breadth of information that is in a police database may be suitable for the law enforcement purpose for which it was collected, it may well not be sufficiently accurate for making decisions about an individual's eligibility for employment. For police agencies to disclose such information, regardless of whether they do so disclaiming responsibility for its accuracy, is not consistent with the fundamental privacy principle that personal information should be accurate and complete. This practice also is not consistent with the long-standing privacy principle that personal information collected for one purpose should not be used for another purpose without appropriate safeguards.

6.3 Consent for the Change in Use of Personal Information

In the vast majority of instances where an individual is requesting a police information check, he or she is requesting that information only because a prospective employer or volunteer organization requires it as part of an application process. I am concerned that although the individual has apparently consented to the use of his or her personal information in this way, the privacy harms associated with a change in use have not been mitigated. Nor, in most cases, will the individual have freely provided his or her consent. If they need or want a job, they have little choice but to consent. As a result, an individual will consent to broad information disclosures in many instances that are beyond what is reasonably necessary for the purpose. As discussed above, police agencies include information in police information checks that, while relevant to law enforcement and clearly important for a police officer to have access to, would likely not be useful or appropriate in the employment context.

Two examples illustrate this point. One is that police information checks include youth offender information. The *Youth Criminal Justice Act* limits the individuals who may have access to information about offenses committed by young offenders.²⁶ This protection is based on the recognition by government and society that young offenders lack the maturity of adults and that, because of the resulting diminished moral blameworthiness or culpability, we should not allow youth offences to follow an individual into adulthood.

²⁶ *Youth Criminal Justice Act* (S.C. 2002, c. 1), s. 118.

Nevertheless, young offender information is included in a police information check because it is technically being requested by the individual the information is about. However, this frustrates the policy intent of the *Youth Criminal Justice Act* because this information is disclosed despite the understanding by all involved that the information is actually being requested by an employer, not out of the applicant's own interest. In reality, the individual cannot request that this information be excluded from the check.

A second and more significant example lies in the concerns arising from the disclosure of mental health information. With regard to this kind of disclosure, it is a contravention of British Columbia's *Human Rights Code* to refuse to employ or to discriminate against an individual because of mental disability.²⁷ Yet information related to an individual's mental health is routinely included in a police information check, despite the understanding by all involved that it is the employer who is actually requesting the information and that the individual does not have the option of requesting a check that does not include this information.

I am concerned that there are significant privacy and public policy reasons to question the validity of an individual's consent in this process. The ability to seek employment, for most British Columbians, is not a discretionary choice; it is a fundamental part of an individual's participation in society and goes to the core of an individual's dignity and self-respect.

The Supreme Court of Canada has recognized this, where Chief Justice Dickson observed:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.²⁸

In light of the nature and importance of employment to an individual, there are significant privacy and public policy reasons to recommend changes to the current process followed by police agencies in providing police information checks.

6.4 Employer Collection under PIPA

Issue 1: *Do employers in the private sector have authority to collect personal information contained in a police information check? [s. 11 of PIPA]*

PIPA expressly deals with the collection of employee personal information without consent. However, given that we are addressing a situation where

²⁷ *Human Rights Code* (RSBC 1996, c. 210), s. 13(1).

²⁸ *Supra*, note 1 at para. 91.

employees consent to a check, our analysis must focus on s. 11 of PIPA, which states:

Subject to this Act, an organization may collect personal information only for the purposes that a reasonable person would consider appropriate in the circumstances and that

- (a) fulfill the purposes that the organization discloses under section 10(1), or
- (b) are otherwise permitted under this Act.

Under s. 11, even if an individual consents to the collection of their personal information, s. 11 of PIPA provides that an organization may collect it “only for the purposes that a reasonable person would consider appropriate in the circumstances.”

In Order P05-01, former Commissioner David Loukidelis described the reasonableness requirement in s. 11 and some of the factors relevant to a determination of reasonableness under that section:

Under s. 11 one has to decide whether the hypothetical reasonable person, knowing the purposes for collection and the surrounding “circumstances”, would consider the purposes for collection to be “appropriate”. Relevant circumstances may include the kind and amount of personal information being collected, the use to which it will be put and any disclosures the organization intends at the time of collection.²⁹

In addressing collection, I need to consider the kind and amount of personal information that organizations are collecting about prospective employees from whom they require a police information check. As I stated earlier in the report, an organization that requires a police information check from an individual is collecting information relating to criminal convictions and outstanding charges as well as information relating to various non-conviction records, including investigations that did not result in charges, charges approved by Crown Counsel that did not result in convictions and information about apprehensions under the *Mental Health Act*.

It is important that while an organization may not wish to collect this breadth of information, they are given little choice because police agencies in British Columbia will only perform checks that provide the level of detail I have described above.

I cannot foresee an instance where a reasonable person would consider it appropriate for an organization to collect this amount of personal information. Regardless of the results of a police information check, the search itself involves looking at such items as suicide attempts by an individual. This is not a question

²⁹ See para. 55 at <http://www.oipc.bc.ca/orders/1401>.

that organizations are authorized to directly ask an individual in an interview nor is it a question that organizations are authorized to ask as part of a record check. It is simply not reasonable for any organization to know this information. However, I emphasise again police agencies are not giving individuals who request a police information check any choice about whether to include this information. As a result, organizations are collecting it every time they require a police information check from a prospective employee.

It is also difficult to foresee many instances where it would be reasonable for an organization to collect most other non-conviction information. I will offer further guidance on this issue later in this report.

Similarly, the collection of some conviction records by organizations may not be reasonable. For instance, a recent conviction for theft may be a relevant consideration to the employer of a potential retail employee, but a drug or alcohol-related driving conviction likely is not. However, there is currently no ability for an employer to ask a prospective employee to request a more targeted and relevant check.

In each situation where an employer is seeking an employment-related record check, it must consider whether the information it is requesting is relevant to the position for which the prospective employee is applying. Each evaluation is therefore highly contextual, and were my office to receive a privacy complaint related to such a check we would have to consider the specific circumstances.

However, where the only option that an employer has is the police information check currently offered by police agencies, it is likely that in many cases the collection would be in contravention of PIPA.

6.5 Employer Collection under FIPPA

Issue 2: *Do employers in the public sector have authority to collect personal information contained in a police information check? [s. 26 of FIPPA]*

Section 26 of FIPPA sets out the purposes for which a public body may collect personal information. The relevant portion of s. 26(c) states:

A public body may collect personal information only if:

...

- (c) the information relates directly to and is necessary for a program or activity of the public body.

Unless specific statutory authority exists, public bodies that require prospective employees to complete a police information check are relying on this section as their collection authority under FIPPA. By introducing a requirement of necessity under s. 26(c), the Legislature has imposed a higher standard on a public body's collection of personal information than the reasonableness standard that it imposes on organizations under PIPA.³⁰

As with private sector employers under PIPA, each instance of personal information collection by a public sector employer is contextual, and a determination of compliance under FIPPA would have to take into account the specific circumstances of such a collection. With the higher FIPPA standard of necessity for information in mind, it is likely that public sector employers who require police information checks from prospective employees will also be forced into a situation where they are collecting more personal information than is necessary.

The public sector implications of this potential over-collection of personal information involves tens of thousands of public servants who work for public bodies in BC, including Crown corporations, universities, local governments, health authorities, colleges, and self-governing occupations and professions.

7.0 A BALANCED WAY FORWARD

7.1 A Look Back

Before I discuss what I believe to be a balanced solution to the problems I have described with police information checks, it is important to remind ourselves of how employment-related record checks began in British Columbia.

As discussed earlier in this report, the Legislature enacted the CRRRA in 1996 and has subsequently made amendments to ensure that individuals who work with children and vulnerable adults in the ordinary course of their employment and who are employed by or licensed by, or receive regular ongoing operating funds for core programs from the provincial government must first receive a criminal record check. Vulnerable sector volunteer agencies in the public or non-profit sector may also opt into these checks.

7.2 Where We Are Now

Separate from the province's CRRRA process, an extensive infrastructure of employment-related record checks has developed since the introduction of the

³⁰ See paras. 48-49 of Order F07-10 for a thorough discussion of the requirement of necessity under s. 26(c) of FIPPA at <http://www.oipc.bc.ca/orders/912>.

CRRA by which municipal police departments, the RCMP and non-police agencies such as the Commissionaires offer employment-related record checks. This includes the BCACP's Guidelines. To date, government has chosen to not offer legislative or policy guidance on how these checks should occur.

It is now common practice for an employer to ask an individual who is applying for any type of job or volunteer position to go to the police or RCMP and request a police information check before being hired. The police search a multitude of databases that they easily integrate to provide a check of not just conviction records, but also a wide array of non-conviction records, including records relating to apprehensions or incidents under the *Mental Health Act*.

As a result, many individuals who work in positions which are not nearly as sensitive as those covered by the CRRA are subject to significantly more invasive record checks. Police information checks force employers to collect far more personal information from prospective and current employees than provincial privacy legislation authorizes. These checks also raise serious concerns under the *Human Rights Code* about an individual's right to be free from discrimination from criminal convictions unrelated to employment as well as numerous *Charter* issues, including the presumption of innocence which is fundamental to a democratic society.

The process for employment-related record checks offered in British Columbia by municipal police departments and the RCMP is out of step with other jurisdictions in Canada and around the world. The amount and sensitivity of the personal information that police agencies routinely disclose is on the extreme end of the spectrum of employment-related record checks.

I am concerned that there is an almost complete lack of acknowledgement of the privacy, human rights and Charter interests of British Columbians in the current process taking place outside of the CRRA. From the submissions we received in this investigation, even employer groups do not actually wish to collect such an excessive amount of personal information about potential employees, but are not provided with a narrower option by police agencies.

In my opinion, the current process in British Columbia is broken and is not meeting the needs of citizens or employers.

7.3 The Way Forward

Issue 3: *What is the appropriate framework for conducting British Columbia's employment-related record checks?*

The time has come to find a new way forward in British Columbia that meets the legitimate business interests of employers while respecting the fundamental rights of our citizens, including their statutory privacy rights. The Government of

British Columbia and municipal police boards should take a leadership role in helping our province to develop this solution.

I propose the following model as a balanced solution, based on the process government already has in place for the CRRA as well as for the employment-related record checks it conducts on its own public service employees.

Legislation and policy

As has been done in the United Kingdom, I believe that government should introduce legislation that sets out a comprehensive record check process in British Columbia. This could be in the form of amendments to the CRRA or as a new piece of legislation. Legislation is needed to provide clear and enforceable guidance that is needed to regulate how employment-related record checks are conducted in British Columbia. This approach also would prevent a patchwork of inconsistent processes from developing around the province.

Government should also provide considerable policy guidance on how it intends this process to work. Extensive consultation with the numerous stakeholders in our province should take place at an early stage in this process.

The special case of mental health apprehensions

As mentioned earlier in this report, it is a contravention of British Columbia's *Human Rights Code* to refuse to employ, or to otherwise discriminate against, an individual because of mental disability. Despite this, information related to an individual's mental health is currently included in a police information check and put before prospective employers who are making hiring decisions. This practice greatly opens up the potential for routine discrimination by employers on the basis of mental disability.

From a privacy perspective, I simply do not believe that information regarding an individual's suicide attempts or other mental health information is ever relevant to an employer's decision on whether or not to hire an individual. Police are certainly entitled to collect this information as they are simply doing their job in attending situations that require their presence. But they are not doing so in a capacity that should ever result in police agencies disclosing mental health information to a prospective employer.

RECOMMENDATION 1:

Government and municipal police boards should immediately mandate that police apprehensions collected under the authority of s. 28 of the *Mental Health Act* should never be included in a police information check.

The non-vulnerable sector

When looking at record checks for all positions outside of those that involve working or volunteering with children or vulnerable adults, I must consider what amount of personal information should be included. In particular, I must consider when it is appropriate to include non-conviction information and whether all conviction information is relevant when an employer requires a record check.

The inclusion of non-conviction information as part of an employment-related record check has the effect of saddling an individual with the suspicion and stigma associated with having a criminal record. With the possible exception of the extraordinary lengths society will go to protect children and vulnerable adults, these suspicions and stigma have little merit and should not play a role in employment decisions.

With this in mind, I believe that non-conviction information should never be included in record checks outside of the vulnerable sector. In the numerous discussions my Office has had on this topic over the last two years, it is almost without exception that those who advocate for the inclusion of non-conviction information rely on examples from the vulnerable sector. Because it is at best highly doubtful that such record checks are at all effective for the employer's purposes, there is no justifiable reason to include this information in checks for any other types of employment.

It is also important to recognize that not all convictions are relevant to all employment. In fact, this position is legislatively enshrined in our *Human Rights Code*, which does not allow for discrimination on the basis of unrelated criminal convictions. As I discussed earlier in this report when considering the collection authority of employers, FIPPA and PIPA do not allow an employer to automatically collect all conviction information. Instead, for positions where a record check is justifiable, an employer is only authorized to collect conviction information that is relevant to the position in question.

One municipal police department provided my Office with a potential solution to this problem by suggesting that not all conviction information be treated the same. Instead, it suggested that employers should assess the broad risk categories that are relevant to the nature of the position being filled, and require prospective employees to request only those conviction records in the relevant categories. The example provided by the police department classified all *Criminal Code* and other statutory offences into four categories: drugs and alcohol; sex; violence; and theft, fraud and mischief.

I am in favour of this approach because it allows employers the flexibility to request materials they believe they require as part of their risk assessment, but does not automatically require them to collect all conviction records. As a result,

the employer is not obliged to collect more personal information than FIPPA or PIPA authorizes.

It is my view that municipal police departments and the RCMP are the appropriate agencies to conduct record checks that are not for the vulnerable sector. They have direct access to the databases necessary to provide a summary of convictions to an individual upon request.

RECOMMENDATION 2:

Government should legislatively mandate that non-conviction information cannot be used in record checks outside of the vulnerable sector.

RECOMMENDATION 3:

At the direction of government and municipal police boards, police agencies should implement a model for conducting record checks that will allow individuals to request only relevant conviction information for record checks for positions outside of the vulnerable sector.

The vulnerable sector

A key to looking at a comprehensive solution is that British Columbia already has a thorough and robust process governed by the CRRA for the provincially-funded vulnerable sector. Other jurisdictions in Canada do not have the benefit of such a model. Government has legislatively mandated this process, created policy on how it operates, and staffed the office with trained professionals who do an effective job of protecting vulnerable persons in our province.

It is my intention to make recommendations that are consistent with the CRRA process as I believe it to be a privacy-sensitive means of conducting record checks in the vulnerable sector. In fact, I believe the appropriate solution for British Columbia is to expand the reach of the CRRA to include the entire vulnerable sector and not just the portion of employers that receive provincial funding.

This could be achieved by legislative amendments that require vulnerable sector checks be processed by the same centralized office that is in place for the CRRA. Where an employer that is not currently subject to the CRRA chooses to require a prospective employee or volunteer in the vulnerable sector to undergo a record check, it would be processed by a centralized office in the same manner as required by the CRRA.

With this amendment, if an individual has a conviction or outstanding charge, trained professionals from a centralized office would conduct a risk assessment to determine whether the individual is suitable for hiring. This risk assessment could include such things as looking at police files and reviewing non-conviction information or interviews of the individual or victims in order to determine the relevancy and legitimacy of information to the employment an individual is seeking. This is a model that has been in place for nearly two decades in British Columbia and does not require a complete overhaul, but instead only a moderate expansion of resources that government could recover by requiring employers to pay a fee for the vulnerable sector record check.

RECOMMENDATION 4:

Government should legislatively mandate that the centralized office in place under the CRRA should conduct all vulnerable sector checks in British Columbia. The current process for mandatory checks under the CRRA for provincially-funded employers would remain the same. Where an employer or volunteer agency that is not currently subject to the CRRA chooses to require a prospective employee or volunteer in the vulnerable sector to undergo a record check, it would be conducted in the same manner as set out by the CRRA.

Reconsideration process

It is essential that individuals who ask for any type of record check be given the opportunity to request a reconsideration where they believe an error has been made with respect to the results. This is a fundamental aspect of an administratively fair process. The availability of this process should be clearly communicated to individuals who received completed checks and these individuals should be given the opportunity to make submissions as to why the decision should be changed. A staff member who was not involved in the initial process should conduct the reconsideration.

Payment

In my opinion, it is appropriate that employers incur the cost for any check that they require from a prospective employee. These checks are performed at the request of, and for the benefit of, the employer. It should not be left to the individual to have to pay for this process. An additional benefit of requiring employers to pay for checks is that it would likely result in employers taking the time to consider whether a check is in fact required for a position.

Interim solution

The legislative amendments that are clearly needed and that I have recommended for employment-related record checks in both the vulnerable and non-vulnerable sector will take time to implement. However, given the current problems with police information checks, it is vital that government and municipal police boards act immediately to direct police agencies to implement policy changes that address the problems these checks present. As a first step, I believe that police agencies should immediately stop releasing non-conviction records for record checks outside of the vulnerable sector.

On this point, as was discussed earlier in this report, it cannot plausibly be argued that this kind of policy direction from government and municipal police boards to police departments would somehow intrude into their independent operational sphere. Police information checks are not within that area of activity.

These changes are essential to prevent further harm to British Columbians and to allow employers who require record checks to operate in compliance with provincial privacy legislation. My Office is willing to be involved in these discussions at any point in the process.

My Office will follow-up with government, municipal police boards and the municipal police departments in 90 days to ensure they are taking the appropriate steps to effectively implement my recommendations.

Until a centralized solution for processing all vulnerable sector checks is implemented, municipal police departments may continue to provide non-conviction information for positions in the vulnerable sector in the manner that is currently taking place.

RECOMMENDATION 5:

Government and municipal police boards should direct municipal police departments to immediately stop releasing non-conviction information for police information checks not involving the vulnerable sector.

8.0 SUMMARY OF FINDINGS AND RECOMMENDATIONS

8.1 Summary of Recommendations

RECOMMENDATION 1

Government and municipal police boards should immediately mandate that police apprehensions collected under the authority of s. 28 of the *Mental Health Act* should never be included in a police information check.

RECOMMENDATION 2

Government should legislatively mandate that non-conviction information cannot be used in record checks outside of the vulnerable sector.

RECOMMENDATION 3

At the direction of government and municipal police boards, police agencies should implement a model for conducting record checks that will allow individuals to request only relevant conviction information for record checks for positions outside of the vulnerable sector.

RECOMMENDATION 4

Government should legislatively mandate that the centralized office in place under the CRRA should conduct all vulnerable sector checks in British Columbia. The current process for mandatory checks under the CRRA for provincially-funded employers would remain the same. Where an employer or volunteer agency that is not currently subject to the CRRA chooses to require a prospective employee or volunteer in the vulnerable sector to undergo a record check, it would be conducted in the same manner as set out by the CRRA.

RECOMMENDATION 5

Government and municipal police boards should direct municipal police departments to immediately stop releasing non-conviction information for police information checks not involving the vulnerable sector.

9.0 CONCLUSION

Employment-related record checks can play a role in assisting employers to determine the suitability of an individual for a specific position. However, other screening mechanisms such as interviews, written examinations and reference checks play a more important—and more reliable—role in this process. More importantly, once an individual has been hired, an employer should ensure that appropriate controls are in place to prevent and detect employee misconduct in order to reduce and manage risk within the workplace. A record check cannot make up for a lack of effective supervision or safeguards over personal information and other valuable assets of an employer.

In British Columbia, government has chosen to mandate record checks under the CRRRA for some individuals working with children or vulnerable adults. Outside of CRRRA, the increasing use of police information checks for employment-related record checks has resulted in a culture where prospective employees are required to disclose an excessive amount of personal information, irrespective of the sensitivity of the position for which they are applying. The current state of affairs in British Columbia is at the extreme end of Canadian and international practices with respect to the lack of sensitivity towards the privacy rights of citizens.

Because of the breadth of these checks, all employers who currently ask individuals for a police information check are likely forced to collect more personal information than is authorized by provincial privacy legislation. As a result, citizens are being wrongly denied employment opportunities and are being stigmatized and discriminated against on the basis of unproven and irrelevant non-conviction records as well as irrelevant conviction records.

Government and municipal police boards must take immediate action to correct this problem. For positions involving direct contact with children or vulnerable adults, government should introduce legislation that enables all employment and volunteer positions in the vulnerable sector to have the option of receiving the same check as currently occurs under the CRRRA, regardless of whether the employer receives provincial government funding. In addition, government and municipal police boards should immediately direct that non-conviction records will no longer be used for record checks outside of the vulnerable sector and that mental health information will no longer be included in any record checks.

Further, at the direction of government and municipal police boards, municipal police departments should allow employers to request only information about convictions that are relevant to the non-vulnerable sector position being sought by a prospective employee.

I believe that government should ultimately set out these changes through legislation to provide clarity on this issue. In the interim, government and municipal police boards must develop policy measures that ensure these changes take place and allow British Columbia's employers to abide by provincial privacy law requirements.

10.0 ACKNOWLEDGEMENTS

The Government of British Columbia and the various policing agencies across the province have cooperated fully with my Office's investigation. I also sincerely appreciate the efforts of more than 100 individuals and groups who shared their thoughts on this issue as part of our consultation process.

I would like to thank Troy Taillefer and Bradley Weldon, Senior Policy Analysts, who conducted this investigation and were major contributors to this report.

April 15, 2014

ORIGINAL SIGNED BY

Elizabeth Denham
Information and Privacy Commissioner
for British Columbia

OIPC File No.: F13-55121

Appendix A: Glossary

Adverse police contact – non-conviction information that may include events relating to a mental health incident, an investigation into a possible criminal offense, municipal bylaw or *Motor Vehicle Act* infractions.

Canadian Police Information Centre (“CPIC”) – an RCMP database that includes information about criminal convictions (summary and indictable).

Criminal record check – a search of CPIC to determine whether an individual has prior criminal convictions under the *Criminal Code*. Summary conviction offences are not included within the scope of a criminal record check. For the most part, municipal police departments and the RCMP no longer offer a criminal record check.

Criminal Records Review Act (“CRRRA”) check – a check that is mandated by the CRRRA, and is conducted by the Registrar for the Criminal Records Review Program to determine whether an individual may be employed in the vulnerable sector. The CRRRA applies to individuals who work with children or vulnerable adults and who are employed by, licensed by, or receive regular ongoing operating funds for core programs from the provincial government. Not-for-profit organizations can opt into the CRRRA for their volunteers, but are not required by legislation to do so.

The Registrar conducts a risk assessment to determine whether the individual is suitable for hiring. This risk assessment could include such things as reviewing police files, conducting a police information check or interviews of the individual or victims. The prospective employer is only notified whether the individual being assessed is suitable to be hired or not.

Employment-related record check (or record check) – a background check conducted in order to determine an individual’s fitness for employment. This term is used in this report to refer to all checks, including police information checks, criminal record checks, and vulnerable sector checks.

Mental Health Act apprehension – where police are involved in an incident arising from a concern with an individual’s mental health, and determine that the individual is acting in a manner likely to endanger that person’s own safety or the safety of others, the individual may be apprehended pursuant to s. 28 of the *Mental Health Act*. This includes instances where an individual has attempted suicide and police are involved.

Municipal Police Board – a board established under s. 23 of the *Police Act* to provide policing and law enforcement in a municipality. A board is subject to the

Freedom of Information and Protection of Privacy Act. A municipal police board employs the chief constable, constables, and civilian employees of a municipal police department.

Municipal police department – a police department established under s. 26 of the *Police Act*, governed by a municipal police board, and subject to the *Freedom of Information and Protection of Privacy Act*.

Non-conviction information – information in a police database that does not relate to a conviction under the *Criminal Code*. Non-conviction information can include information about investigations that did not lead to charges, charges that did not result in convictions, apprehensions under the *Mental Health Act*, warrants for arrest, peace bonds or restraining orders in effect, and adverse police contact.

Organization – a private sector entity that is subject to the *Personal Information Protection Act*, as defined in s. 1 of that Act. An organization includes a person, an unincorporated association, a trade union, a trust, or not-for profit organization, but not a public body or an individual acting in his or her personal or domestic capacity.

Police agencies – the term used in this report to collectively refer to all of British Columbia's municipal police departments and RCMP detachments.

Police information check – a search of various police records management systems, including PRIME and CPIC, for information about prior convictions and non-conviction information.

PRIME – an information system that connects every municipal police department and RCMP detachment throughout the province.

Public body – a public sector entity that is subject to the *Freedom of Information and Protection of Privacy Act* as defined in Schedules 1, 2, and 3 of that Act. A public body includes government ministries, crown corporations, local governments, hospitals and health authorities, universities, police departments, and governing bodies of professions.

Vulnerable sector check – a search of police databases which is offered by a municipal police department or the RCMP for individuals that work in the **vulnerable sector** (primarily with children or vulnerable adults), but whom are not subject to the CRRA. It includes everything in a police information check as well as sexual offence convictions for which a pardon has been granted. This is a different check than that which is conducted by the Registrar for the CRRA.