

VIA EMAIL: info@oipc.bc.ca

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Elizabeth Denham
Information and Privacy Commissioner for BC
PO Box 9038 Stn. Prov. Govt.
Victoria BC V8W 9A4

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Re: Invitation for Public Comment on Police Information Checks

Dear Commissioner Denham,

We were pleased to learn that your office is conducting an investigation into the use of police information checks. The extensive amount of information unrelated to criminal convictions included as part of these checks has long been of significant concern to our organizations; we first brought these concerns forward to your office in 2011. This submission reflects not only our expertise on privacy and police-related matters, but also our many years of experience struggling to assist individuals who are unable to secure employment and volunteer opportunities due to the disclosure of non-conviction information. These are individuals whose livelihoods are literally destroyed, despite the fact that in many cases they have done absolutely nothing wrong. We sincerely hope that you will recommend significant changes to current practices.

We have addressed each of your questions below.

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?*
 - i. *If your answer depends on the type of position, please break down the types of jobs and volunteer positions for which you believe collecting this amount of personal information is reasonable.*
 - ii. *If yes (or for the positions that you believe require a police information check), please explain why you believe employers need this amount of personal information.*
 - iii. *If no (or for the positions that you do not believe require a police information check, please explain why you do not believe employers need this amount of personal information and what elements of personal information you believe are not required.*

The information currently included in police information checks is so broad that it is almost impossible to imagine circumstances that would justify releasing it to potential employers or volunteer coordinators. We believe that those making hiring decisions should be limited to collecting information that directly relates to the tasks an employee or volunteer will be doing as part of their position. Currently the breadth of information provided vastly exceeds this threshold.

In our experience, the varieties of personal information included as part of a police information check can be considered in four broad categories. We have summarized our concerns with each one below.

1) Information related to incidents in which the police had no reason to suspect an individual was involved in criminal activity

The complaints that we have received include, among many others, inquiries from individuals in the following situations:

- An individual whose information was recorded by the police because they were a witness to a crime but were not suspected of being involved in the crime in any way.
- An individual whose information was recorded by the police when he was eating dinner at a restaurant with some friends. During the meal, one of his friends spoke in passing with another man who the individual had never seen before. The police recorded the individual's information as part of a 'street check', as the stranger with whom his friend had spoken was suspected of being involved in gang activity.
- An individual who was present at a house party about which a noise complaint was made.
- An individual who was caught with an open can of alcohol in a park as a minor and was released without charges into the custody of their parents, is now an adult and has had no further contact with the police.

In each of these situations, the individual discovered to their distress that their police information check included a notation of having had 'negative contact' with the police. They were denied employment or volunteer opportunities as a result. In the first two examples, the individuals did nothing that could be remotely considered 'negative'; in our view it is impossible to imagine a scenario in which this kind of information should be disclosed on a police record check. In the second two scenarios, the infractions committed are so

minor that again, it is virtually impossible to conceive of when they would be legitimately relevant to an employer.

2) Information about mental health-related incidents

Your investigation should take especially seriously the release of mental health information as part of police information checks. The stories that we hear about livelihoods destroyed when mental health information is disclosed to potential employers are truly devastating. We spoke to an individual, for example, who called 9-1-1 for assistance while feeling suicidal. The police attended and took her into custody under the *Mental Health Act*. She received treatment and, several years later, had had no further contact with the police. She was not aware that the incident would appear on a police information check until she finished her schooling and attempted to get a job for which a police record check was required. She has been unable to secure employment in a field for which she has trained for years.

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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.

Information recorded by the police about an individual's mental health status is also quite likely to be incorrect. A police officer's assessment that an individual is dealing with a mental illness is often based solely on his or her own perception; police officers are in no way qualified to diagnose mental health issues. Many individuals become stressed or agitated when dealing with the police for reasons that have nothing to do with mental health. When the police inadvertently mischaracterize an individual as mentally ill, the individual has no meaningful ability to get this information corrected.

Perhaps the most serious consequence of the police disclosing mental health information is the disincentive it creates for individuals to engage with the police. People have told us that knowing such disclosure is a risk, they will likely never call 9-1-1 for assistance again; the consequences of this are

potentially fatal. It is totally unacceptable that individuals are forced to risk becoming permanently stigmatized in order to get the emergency mental health assistance they need. Mental health incidents must be treated like any other health emergency: deeply private and non-criminal.

3) Information related to allegations of criminal activity that did not result in convictions

This category of information includes notations about situations as varied as individuals found in possession of small amounts of marijuana and those arrested and released with no charges, to individuals who have peace bonds, whose charges were dropped or resulted in stays and those involved in ongoing criminal proceedings.

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The right of individuals to be considered innocent until proven guilty in a fair trial is absolutely fundamental to the functioning of our justice system. When the police disclose non-conviction information related to allegations that have never been proven in court, this presumption is turned on its head. Employers frequently treat individuals with 'negative contact' notations on their record as if they have been involved in a criminal offence, even though the individual may never even have been charged, let alone convicted.

In rare situations, information related to unproven allegations of criminal activity may be relevant to a potential employer. Information about an individual involved in ongoing criminal proceedings, for example, or someone repeatedly involved in incidents that jeopardize public safety, may be appropriate to disclose in some circumstances when an individual has applied for a safety-sensitive position. While the responsibility for determining which particular incidents are relevant to an individual's suitability will likely continue to reside with the police, officers must be given strong guidelines to assist them in making fair judgments that respect individuals' right to be innocent until proven guilty. It is also crucial that individuals are given meaningful opportunity to challenge disclosure decisions once they have been made. This will be discussed further in our response to question #3.

Much of the information related to criminal allegations currently disclosed on police information checks, however, is much more benign. We have heard from individuals in the following situations who have had a 'negative contact' notation included on their police record check:

- An individual who was the subject of a malicious allegation by a neighbour found by the police to be entirely unfounded.
- Several individuals who were arrested for various petty reasons but never charged of any crime.
- Individuals involved in domestic disputes in which no charges were ever laid.

Releasing information related to these incidents as part of a police information check turns the presumption of innocence on its head, opening individuals up to potentially severe discrimination based merely on a vague, unsubstantiated association with criminality.

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4) Information about criminal convictions

For individuals who are applying for safety-sensitive positions, it may make sense for employers to access information about criminal convictions before making a hiring decision. As per our recommendations (see question #3), we believe that this information should be sought through a criminal record check. A criminal record check should be required only in situations where the position in question specifically warrants it, for example when an employee will be coming into contact with vulnerable individuals.

Ensuring that the punitive consequences of an individual's transgressions are proportionate to the transgression itself is a critical function of the criminal justice system; to this end, judges have a diverse suite of options available when determining the outcome of charges. The widespread and indiscriminate practice of disclosing information from police records means that even in cases where a judge has determined that leniency is appropriate (e.g. by granting a conditional or absolute discharge), the effective consequence for an individual is the loss of an ability to earn a livelihood when they are unable to gain employment, a vastly disproportionate consequence.

2. In some instances, employers and non-profit agencies require rechecks 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?

This situation would not change our answer to question #1. We believe that much of the information currently disclosed on police record checks is

irrelevant to the assessment of an individual's application for a job or volunteer position, or their continued employment.

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.)?

- i. Who do you believe should provide this guidance? The police? The provincial government? The Privacy Commissioner?*

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It is unlikely that the problems outlined above will be done away with simply by providing employers, non-profit agencies and citizens with guidance about when a police information check should be conducted. As long as non-conviction information is included on these checks in the first place, individuals will continue to be treated as if they have a criminal record when they may have done nothing wrong. Employers commonly perceive police information checks as analogous to criminal record checks, and any information disclosed on them will inevitably be interpreted prejudicially. We believe that although offering guidance to employers, non-profit agencies and citizens about when it is appropriate to do an employment-related check might be helpful in improving the situation, it is not in itself sufficient.

It is our position that police information checks are an unnecessarily invasive approach to employment-related record checks, and that in almost all circumstances a criminal record check should suffice. The disclosure of non-conviction information by the police should be prohibited by law, in the absence of a justifiable reason for such disclosure. The onus must be on the police to demonstrate that a particular piece of information is relevant to the specific job or volunteer opportunity before disclosure is considered.

In situations where the police deem that non-conviction information is sufficiently relevant to a position to justify its disclosure, a meaningful and accessible process must be available to individuals who wish to challenge the police's decision. Individuals must have a meaningful opportunity to argue that a particular piece of non-conviction information is not relevant to the position for which they are applying, or to request the correction of inaccurate information (e.g. when an individual has been mischaracterized as having a mental health issue).

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

Our years of experience attempting to assist individuals affected by the disclosure of non-conviction information has demonstrated that it is almost impossible to get this information removed from or corrected in police databases, or suppressed from police information checks. This is true regardless of how benign the disclosed information is, or how dramatically it is affecting an individual's life. Police detachments currently have total discretion over what incidents are included in police information checks and which are kept private, and in our experience usually refuse to change their minds once a decision to include a particular incident on a record check has been made.

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The practice of disclosing significant amounts of non-conviction information on police record checks presents a danger to effective policing. If people are aware that virtually any police interaction can turn into a 'negative contact' notation and may have the disastrous consequences outlined above, witnesses and tipsters will be far less likely to come forward. The effect on police efficiency is potentially disastrous. Individuals have told us that their experience with non-conviction records has led them to the conclusion that in the future they will not call 9-1-1 or cooperate with police investigations for fear of ending up with a non-conviction notation about which they are effectively able to do nothing.

This situation is completely unacceptable, and is costing innocent people their livelihoods. It is opening individuals up to illegal discrimination based on their mental health status, and disclosing deeply private – and sometimes incorrect – health information. We believe the situation is untenable, and sincerely hope that your office will take steps to address it as soon as possible.

Sincerely,



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