



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

February 28, 2007

HAND DELIVERED

Dr. Alok Mukherjee, Chair
Toronto Police Services Board
40 College Street
Toronto, Ontario
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Dear Dr. Mukherjee:

**Re: The Toronto Police Services Board's Review of a Proposed Policy Regarding the
"Destruction of Adult Fingerprints, Photographs and Records of Disposition"**

Thank you for arranging the meeting of January 29, 2007, facilitating a vigorous discussion, and issuing the invitation to make submissions regarding a proposed policy on the "Destruction of Adult Fingerprints, Photographs, and Records of Disposition" associated with non-conviction dispositions (the "Policy").

Efforts to review and approve a new records destruction policy have engaged the Toronto Police Services Board (the "Board") since 2004. The Board has received a number of deputations on the matter. Consistent with previous discussions, we note that the exchange on January 29, 2007 was robust and informative and we commend the Board for its leadership role in pursuing a comprehensive public debate on this important subject.

With regard to the records destruction policy being proposed to the Board, the Ontario Information and Privacy Commissioner's office (IPC) is concerned that it does not comport with constitutional principles recognized by the Ontario Court of Appeal and the Supreme Court of Canada. In our view, the Policy derogates from rights protections in sections 7, 8, and 11 of the *Canadian Charter of Rights and Freedoms* and significantly undermines the privacy rights of individuals with respect to personal information about themselves held by institutions bound by the *Municipal Freedom of Information and Protection of Privacy Act*.

Consider, for example, that in *R. v. Doré* [2002] O.J. No. 2845, the Ontario Court of Appeal ruled that, following an "acquittal, permanent stay or withdrawal of the charges ... the original constitutional justification for taking and retaining ... fingerprints no longer exists." In *Doré*, the Court of Appeal expressly ruled that the police discretion to retain non-conviction (NCD) records must be exercised in conformity with constitutional principles. The Court ruled that constitutional conformity requires that police assess each individual destruction request in light of all the circumstances and a decision to retain should only be made in "highly exceptional circumstances."

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Rather than following the law set out by the Ontario Court of Appeal in *Doré*, the Policy creates a presumption in favour of retaining NCD records of individuals who have neither been convicted nor face outstanding charges. The Policy then imposes a nearly insurmountable burden of proof on them; innocent individuals will bear the onus and expense of providing evidence to the police in an effort to substantiate that: they have never been involved in wrongdoing, they are not involved in wrongdoing, and they are incapable of future wrongdoing.

Such a policy sets the stage for the creation and maintenance of a large and ever-expanding police databank containing the fingerprints of innocent individuals. Such a database raises concerns about secondary misuses and security problems. Quite apart from these significant concerns, the proposed policy appears to be unconstitutional.

To clarify our concerns, we enclose our submissions. These submissions consider the role of police policies in our legal system, recall recent developments including those that led to the Board's policy reform efforts, and set out and discuss the key elements of the Policy as proposed on January 29th, 2007.

The Board appears to appreciate that a court disposition such as an acquittal should trigger a presumption in favour of record destruction. The Board has recognized that innocent individuals should not be put to expense to secure their destruction rights or treated as ineligible simply because they have more than one non-conviction disposition on record.

Bearing the above in mind, our submissions on the proposed policy include ten recommendations. Together, these recommendations provide a *Record Handling Blueprint* that would both protect fundamental rights and allow for the appropriate retention of NCD records. The recommendations are tied to three themes derived from jurisprudence under the *Charter* and fair information practices. The three themes are: 1) responsible record handling, 2) limited and focused retention decisions founded on fair and appropriate procedures, and 3) accessible, independent and impartial review.

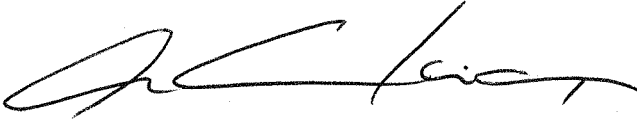
In aid of the Board's efforts to move quickly to review and finalize a new policy, we enclose the *Record Handling Blueprint* as a separate document. The purpose of the *Blueprint* is to demonstrate that the important goals of the Toronto Police Service can be operationalized in a policy which recognizes the equally important principles of privacy and civil liberties.

The IPC supports a record handling approach that is transparent. In this regard, we note the Policy contemplates efforts to provide the public with notice that the police will retain arrest records following the destruction of "Adult Fingerprints, Photographs, and Records of Disposition" associated with a NCD and that these arrest-related NCD records may be used during a police "reference check" or "vulnerable persons screening" program irrespective of the disposition. The IPC has concerns about the fairness of these reference check/screening programs which warrant further and careful consideration.

In light of the Board's focus on its records destruction policy, we do not propose to attempt to discuss these other important matters at this time. The Board's final destruction policy should, however, be transparent about which records are destroyed, which records, if any, are retained, and for what specific purposes.

We anticipate hearing from you as the Board works to conclude its efforts to update its record handling and destruction policy.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Ann Cavoukian', written in a cursive style.

Ann Cavoukian, Ph.D.
Commissioner

Enclosures (2)

cc: Bill Blair, Chief of Police, Toronto Police Service
Alan Borovoy, General Counsel, Canadian Civil Liberties Association
Ms. Avvy Yao-Yao Go, Clinic Director, Metro Toronto Chinese and Southeast Asian
Legal Clinic