Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

Submission from the Information & Privacy Commissioner/Ontario on the Ontario Police Services Board's Review of a Proposed Policy Regarding the "Destruction of Adult Fingerprints, Photographs and Records of Disposition"

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Introduction

On January 29th, 2007, representatives of the Ontario Information and Privacy Commissioner's office (IPC), the Canadian Civil Liberties Association (CCLA), and the Metro Toronto Chinese & Southeast Asian Legal Clinic (the "Clinic") met with Toronto Police Services Board (the "Board") Chair, Dr. Alok Mukherjee, Board member Hamlin Grange, employees of the Board and the Toronto Police Service (TPS), and representatives of the Royal Canadian Mounted Police (RCMP). The purpose of the meeting was to learn about and discuss a proposed policy on the destruction of "Adult Fingerprints, Photographs, and Records of Disposition[1]" associated with non-conviction dispositions ("NCD records"). The proposed policy is now being reviewed by the Board. The Chair of the Board asked the IPC, the CCLA, and the Clinic to make submissions on the proposed policy (the "Policy") in anticipation of bringing a revised policy to the full Board for its approval.

Efforts to review and finalize a new records destruction policy have engaged 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 29th was robust and informative and we commend the Board for its leadership role in pursuing a comprehensive public debate on this important subject.

At the same time, the IPC is concerned that the proposed Policy 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* (the "*Charter*") 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*.

Accordingly, we are providing submissions that identify particular concerns and ten recommendations. Together, these recommendations provide a *Record Handling Blueprint* that outline the principles and framework for a policy which 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.

Before turning to these themes and recommendations, it is important to consider the role of police policies, to recall recent developments including those that led to the Board's policy reform efforts, and to set out the key elements of the Policy as proposed on January 29th, 2007.

1 For the purposes of these submissions, we assume that individuals charged with indictable offences when they were under 18 years of age are eligible to request destruction of their non-conviction disposition records under other appropriate TPS procedures once the periods set out in subsection 119(2) of the *Youth Criminal Justice Act* have elapsed. For the record, we also note that previous iterations of the TPS' draft record destruction policy referred to "criminal history" rather than "records of disposition."

The Role of Police Policies and Administrative Directives

Police service boards have the authority and responsibility to "make rules" and "establish policies for the effective management of the police force" pursuant to subsections 31(6) and (1)(c) of the *Police Services Act* (PSA). Police service boards also have the authority to give a range of "orders and directions" to the chief of police pursuant to subsections 31(3) and (4) of the PSA. Clearly, police service boards have a critical role to play in providing policy direction, for example, where there are gaps in the law. However, it is respectfully submitted that the responsibility to "give orders and directions", "make rules", and "establish policies for the effective management of the police force" does not provide authority to recast the scope of a discretion that is founded in the common law or a statute.

This reasoning is consistent with a decision of the Supreme Court of Canada released on January 31st, 2007 (*R. v. Beaudry*, 2007 SCC 5). In *Beaudry*, the Supreme Court held that "police directives … cannot alter the scope of a discretion that is founded in the common law or a statute." While policies promulgated pursuant to a general statutory authority enjoy greater authority than internal police department directives, neither can overwrite a particular responsibility as expressed in a higher authority as found in the common law or a statute.

A board's policy making authority with respect to police discretion is also subject to strict limitations when the exercise of that discretion impacts on fundamental rights. (Consider, for example the evolution of the police policies on searches incident to arrest prior to and following the Supreme Court of Canada's decision in *R. v. Golden*, [2001] S.C.J. No. 81.) At the same time, there are strong policy arguments in support of the proposition that boards may promulgate policies that enhance as opposed to denude fundamental rights and freedoms.

Recent Developments Relevant to the Current Policy

Privacy Rights and the Presumption of Innocence

In *R. v. Doré* [2002] O.J. No. 2845, the Ontario Court of Appeal ruled that individuals without a prior conviction have the right to request that the police destroy their fingerprints, photographs and associated criminal history records pursuant to the protections afforded privacy under section 8 of the *Charter*. The Court held that:

> [T]he "protective mantle" of s. 8 extends during the duration of the holding and retention of the thing seized in order to protect the privacy interest of the person from whom it was seized; and
>
> [Following an] acquittal, permanent stay or withdrawal of the charges … the original constitutional justification for taking and retaining … fingerprints no longer exists.

This approach was endorsed by two Quebec Superior Courts in decisions dated April 25th, 2006 and July 4, 2006 (*R. c. Panetta*, [2006] J.Q. no 4156 and *R. c. Small*, [2006] J.Q. no 8048). It is also consistent with the principles underlying two December 2006 Supreme Court of Canada rulings with respect to the handling of evidence respecting outstanding charges, uncharged offences and other police records during the course of a sentencing hearing (*R. v. Angelillo*, [2006] SCC 55 and *R. v. Larche*, [2006] SCC 56).

Larche and *Angelillo* stand for the proposition that individuals convicted of criminal offences continue to be protected by the presumption of innocence with respect to offences: never charged, admitted, or resolved by a finding of guilt beyond a reasonable doubt.

As the Supreme Court made clear in *Angelillo*, after the conviction of an accused person with respect to a particular offence or set of offences, the presumption of innocence continues to operate. Recalling authority established in *R. v. Gardiner*, [1982] 2 S.C.R. 368, the Court re-iterated a principle at the foundations of Canada's criminal justice system: While judges should not be denied an opportunity to obtain relevant information at a sentencing hearing by the imposition of all the restrictive evidential rules common to a trial, in order to protect the accused, the standard of proof to be applied in establishing aggravating circumstances is proof beyond a reasonable doubt.

In *Larche*, the Supreme Court stated that:

> **Offenders** are punished in Canada only in respect of crimes for which they have been specifically charged and of which they have been validly convicted. [Emphasis added.]

The critical question before the Board then is:

> How are **innocent people** treated in respect of crimes for which they have been specifically charged and of which they have validly received non-conviction dispositions?

The Right to the Destruction of NCD Records

In *Doré*, the Court of Appeal expressly ruled that the police discretion to retain 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." On this point, the Court held that the long standing Toronto and RCMP destruction policies provide "cogent evidence of where the constitutional balance is appropriately struck."

The approach in both of these policies, an approach defended and advanced before the Court of Appeal by the Attorney General of Ontario in *Doré*, is premised on "a reasonable balance between the privacy interests of the individual and the societal interest in the fair, effective, timely and accurate investigation of crime and the administration of justice."

The longstanding police approach examined in *Doré* may be summarized as follows: Where a person is acquitted of a charge or the charge is withdrawn or stayed, the police will destroy the person's records on a simple request unless the individual has a pre-existing conviction, faces outstanding criminal charges, or the police are in a position to demonstrate the existence of "highly exceptional circumstances" in the particular case.

Providing Individuals with Notice of their Rights

While the Court of Appeal held that "there is no constitutional requirement" that the "authorities advise a person of the right to destruction, the Court did provide that "it would be helpful and appropriate" to do so.

In *Doré*, the Court of Appeal did not appear to have the benefit of evidence and experience available to the Board. As a result, the Court's conclusion regarding the constitutionality of non-notification should be re-examined.

To begin with, the Court described the retention of fingerprints as "passive" in nature: "The intrusion is the retention of the person's fingerprints by the state in one or more police data banks following the lawful seizure of the fingerprints upon arrest for an indictable offence. The state takes no further action in respect of the fingerprints." The Court did not appear cognizant that police do not passively maintain records respecting individuals receiving non-conviction

dispositions. For example, such records are actively used by police in police record check and screening programs.

The Court also took the position that "the person is in the best position to know his or her record. Because it is a privacy interest that the person is exerting, one would expect that a person who is concerned about fingerprints would make an inquiry about the potential for having them returned or destroyed."

While it is true that, alongside the authorities, accused persons will invariably learn of a court's decision to acquit, quash, stay or dismiss charges, in other cases involving the withdrawal of charges, the Crown and police will often know of the disposition well before the affected individual. In any case, knowledge of a disposition will often not be accompanied by an innocent person's knowledge that the state will retain and use his or her NCD records following receipt of an NCD. Many individuals are simply unaware of such police practices.

In such circumstances, the Court would have us rely on the proposition that "most people who have been through the system will have had legal representation and therefore have access to this information through a lawyer." With all due respect, whether this account was accurate then, it must be questioned now. Many accused do not have any representation, others have inadequate representation. Limited resources play a significant role in determining the adequacy of legal representation. Perennial concerns about unrepresented litigants and under-funded legal aid systems continue to this day. As critical players in the administration of justice, police can and should play a role in safeguarding fundamental rights. There can be no question that "it would be helpful and appropriate" for the Board to require that the TPS do so.

"Double Offenders"

In *Lin v. Toronto Police Services Board*, [2004] O.J. No. 170], a judge of the Ontario Superior Court ruled that a police refusal to accede to a destruction request may attract damages including punitive damages. In that case, the Court rejected a particular element of the current Board policy; the so-called "double offender" provision:

> The logic of arguing that, because the Plaintiff had had two charges withdrawn, he was a 'double' "offender" is fatuous to say the least. Even using the defendant's concept of an "offender", once the first charges are withdrawn he is not a 'second offender' but is restored to "first offender" status. Therefore, when the second charge is withdrawn, he then resorted to a 'non-offender'. There was no reason at law or under an antiquated, pre-*Charter* bylaw to refuse the plaintiff's request.

Progress on Policy Reform

Following the decisions in *Doré* and *Lin*, the Board and the TPS began their efforts to reform the destruction policy. Early on in the process, the Board and the TPS both appeared to appreciate that a court disposition such as an acquittal should trigger a presumption in favour of record destruction. The Board has also 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 NCD on record.

The Involvement of the RCMP

In March of 2006, the RCMP advised the TPS that it had developed a new "destruction" policy. The Board voted to delay further reform work pending an assessment of the RCMP's new policy. At a July 13, 2006 meeting with the Board, the TPS, the RCMP, and the IPC, the RCMP revealed that, under its still evolving policy, the right to destruction would no longer be available. Instead, the RCMP would recast that right as a right to request that NCD records be archived subject to rules limiting the use and disclosure of archived records.

Following that July 13th meeting, the RCMP appears to have conceded that a constitutional right to destruction cannot be simply overwritten by way of police policy. This concession is consistent with principles discussed in *Beaudry* and emphasized by the Ontario Court of Appeal in *R. v. Jageshur*, [2002] 169 C.C.C. (3d) 225). In the latter case, the Court of Appeal ruled that:

> An officer's duties and hence his or her responsibilities cannot be equated with instructions as to how those duties and responsibilities should be carried out. Police policies speak to the manner in which police should carry out their responsibilities, but do not define or limit those responsibilities.

A representative of the RCMP's Canadian Criminal Record Information Services attended the January 29th, 2007 meeting. On the basis of discussions at that meeting, it would appear that the RCMP now advance an approach similar to that advanced in the proposed Toronto policy.

The Proposed Policy

The proposed Policy is directed at the "Destruction of Adult Fingerprints, Photographs and Records of Disposition."

Our review of the Policy indicates that it is premised on the routine and effectively permanent retention of fingerprints and associated NCD records with respect to all adults charged with a listed offence or, in other cases, for so long as the police take the position that "the public interest" calls for continued retention. This approach would apply with respect to the dispositions of charges by judges and/or juries in the form of acquittals, findings of not guilty, findings of not criminally responsible, absolute discharges, conditional discharges discharged absolutely, the withdrawal of charges following the fulfilling of a peace bond, stays of proceedings, the quashing of charges, the dismissal of charges, as well as the withdrawal of charges by the Crown or police.

Under the Policy:

> All persons receiving any NCD will be required to wait five months from the date of their last court appearance before a destruction application will be accepted.
>
> Applications must be in writing and signed by the individual even if submitted by a person's lawyer or other representative.

The TPS will *refuse* an application for destruction from a person who has never been convicted of an offence and who has no outstanding charges or conditional orders against him or herself if:

> S/he has one or more non-conviction dispositions in regards to a listed primary or secondary designated offence; or
>
> "There are compelling reasons in the public interest to refuse destruction."

The list of primary and secondary offences is tied to section 487.04 of the *Criminal Code of Canada* (the "*Criminal Code*") as it may be amended from time to time. It is noteworthy that section 487.04 sets out the list of offences which may attract a *judicial* order for the taking and retention of DNA from a person *following a conviction*.

The Policy does not attempt to define "public interest" reasons, rather it sets out five categories the TPS will employ while assessing whether the TPS has a "public interest" reason for refusing an application. Each of those five categories is expanded on by way of a list of very broad and open-ended indicators, each of which concludes under the heading "other". As if to emphasize the breadth of discretion to be accorded police, the column of indicators is set out under the heading "**EXAMPLE (Including, but not limited to …)**" (emphasis in original).

The initial refusal decision will be issued in writing by way of a form that will employ 'tick' boxes on a single page document with 16 options most of which provide a one or two line generic description. A person who receives an initial refusal decision will have sixty days to write the TPS to ask the Manager of Records Management Services to review the initial refusal. That review will be conducted in consultation with TPS legal services. The onus will be on the applicant to provide further information such as court transcripts at the applicant's initiative and expense. The onus will be on the individual to "substantiate" the existence of "mitigating factors."

The Policy provides that "mitigating factors may include, but are not limited to:"

i. The seriousness or triviality of the alleged offence;

ii. Mitigating or aggravating circumstances; and

iii. The age, intelligence, physical or mental health or infirmity of the applicant.

The review decision will be conveyed in writing. It is not clear whether written reasons will be provided. The Policy indicates that a person refused destruction "may seek redress through the Courts." We also understand that an individual who does not file a timely review or who is otherwise refused expungment will be permitted to re-apply to the TPS for destruction at any time.

According to the materials provided by the TPS and the discussions of January 29th, a TPS decision to grant destruction at the local level does **not** mean that fingerprints will be expunged by the RCMP – the RCMP reserves the right to retain or destroy NCD records at their discretion bearing in mind similar but not necessarily identical guidelines. It appears that, from the RCMP's vantage point, a TPS decision will be treated as, at best, a recommendation. In fact, before conveying their decision to the applicant, the TPS will consult with the RCMP and will consider "whether to proceed with local destruction in spite of [an] RCMP refusal."

Finally, we note that, in the aftermath of a police decision to grant an NCD Record destruction request, the TPS will nonetheless retain "other records pertaining" to that arrest pursuant to the *Toronto Police Service Record Retention Schedule, City of Toronto By-law 689/2000*. According to the TPS, these other arrest-related records may be used during a police "reference check" or "vulnerable persons screening" program *irrespective* of the disposition.

While we support a record handling approach that is transparent, concerns about the fairness of these reference check/screening programs warrant further and careful consideration. In light of the Board's focus on its 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 purposes.

The Fundamental Flaws in the Proposal

As indicated above, the Ontario Court of Appeal has held that individuals without a prior conviction have the right to request that the police destroy their NCD records pursuant to the protections afforded privacy under section 8 of the *Charter* and that police have a limited discretion to retain NCD fingerprints, photographs and associated records following an NCD. In exercising that discretion, police must respect constitutional principles including those derived from section 8 of the *Charter*. These principles apply to police forces across Ontario. In our view, they also apply at the federal level, at the very least with respect to arrest records generated in Ontario. Conformity with these principles requires that all such police services assess each individual destruction request in light of all the relevant circumstances and a decision to retain should only be made in "highly exceptional circumstances".

Rather than following the law set out by the Ontario Court of Appeal in *Doré*, the proposed 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.

Retention of NCD Records in Respect of Listed Offences

In our view, it is clear that an initial refusal to expunge an NCD associated with a listed offence is not the careful exercise of discretion in light of all the relevant circumstances. Rather, it is an automatic response to the title of a charge and the checking of a box. While we appreciate that people properly *convicted* of a listed offence may warrant inclusion in an *offender* registry, those in receipt of a final NCD should not have their fingerprints and photographs permanently retained by the police simply because of the nature of the disposed charge. As it was expressed in *Doré*, "when the precondition for seizure and ongoing retention is removed by acquittal, withdrawal or permanent stay of the charge, the person's right to be left alone springs up again." Unless the authorities can demonstrate the exceptional circumstances in the particular case, regardless of the charges, the original constitutional basis for seizing the NCD records is at an end and they must be destroyed.

Retention of NCD Records "in the Public Interest"

Equally, we submit, an initial refusal to expunge an NCD on the basis that "there are compelling reasons in the public interest to refuse destruction" is not the careful exercise of discretion in light of all the relevant circumstances. While it may involve an assessment of some of the circumstances, it also inevitably allows for the sweeping exercise of an unfettered discretion that violates the doctrine of vagueness as articulated under section 7 of the *Charter*.

In this regard, the Board should be aware that, in *R.v. Morales*, [1992] 3 S.C.R. 711, the Supreme Court of Canada rejected – in no uncertain terms – the use of the phrase "in the public interest" as a constitutionally intelligible term to ground a decision to deny an accused bail:

> The term "public interest", as currently defined by the courts, is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way. Nor would it be possible to give that term a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention but creates no criteria for defining these circumstances. **No amount of judicial interpretation of the term "public interest" would be capable of rendering it a provision which gives any guidance for legal debate. Such unfettered discretion violates the doctrine of vagueness. This doctrine applies to all types of enactments and is not restricted to provisions which define an offence or prohibit certain conduct.** [Emphasis added.]

In our submission, these reasons apply with equal vigour to the use of the phrase "in the public interest" in the circumstances at issue; circumstances involving the retention of sensitive personal information and the perpetuation of the stigma of criminality at the unfettered discretion of law enforcement officials in respect of innocent individuals.

Nor is the vagueness of the phrase "the public interest" cured by the addition of the list of categories or indicators that *might* shape but will *not* confine an effectively open-ended discretion to retain. To begin with, these categories and indicators are not "prescribed by law." It is not even clear whether they will be creatures of a policy as approved by the Board or merely guidelines subject to administrative change pursuant to police department decision making.

Regardless, each category includes an explicitly open-ended category of "other." Quite apart from this aspect, there is no indication as to:

> How the listed categories and indicators will be evaluated or weighted (for example, what "number" or "frequency" of NCDs are significant for these purposes,
>
> Whether they will be treated as aggravating or mitigating factors (for example, when or how will "elapsed time" act as a aggravating as opposed to a mitigating factor), or even

What several of these categories and indicators are intended and capable of encapsulating (for example, "staleness", "deception involved", and "technicality").

In this regard, questions arise as to the apparent overlap between the list of primary and secondary offences and the "public interest" factors listed next to the heading "Nature of circumstances." In interpreting indicators such as those related to "vulnerable persons (seniors, children, etc.)," "offence against person," and "violence involved, level of violence," would a decision maker assume that these indicators are meant to apply to circumstances *not* involving "listed offences"? If this is not a duplication of a "listed offence refusal", one is left to wonder what is intended.

In our view, the already vague and broad discretion discussed above is further widened under the final heading "Where facts of original circumstances which resulted in non-conviction disposition are of public concern". It is not at all clear what fact finding process is implied. What of the fact of the disposition? It is also submitted that "circumstances" of "public concern" only compounds the vagueness problem in a "public interest" test. The range of indicators accompanying this heading only serve to shore up our conviction that the intended discretion is unbounded. In short, the proposed policy fails to provide concrete and proportionate limits regarding the police discretion to retain NCD records.

Internal Review, "Mitigating Circumstances" and the Imposition of a Reverse Onus

In our submission, the approach taken with regard to internal police review of "mitigating circumstances" is no less flawed than the listed offences and "public interest" grounds for refusal. Of course, we commend an approach where internal decision makers would seek legal advice before making a legal decision with significant consequences affecting fundamental rights. However, while such internal review may be necessary or even desirable, we submit that, on its own, it does not provide for rigorous, fair, or independent review.

In respect of the "mitigating circumstances" approach advanced in the Policy, we note the following. The first mitigating factor – "the seriousness or triviality of the alleged offence" – will simply be unavailable to a review applicant in relation to virtually any listed offences. Under the proposed Policy, the fact that the *alleged* offence was serious is enough to rule out this factor. Under the "mitigating circumstances" approach only the very old, those demonstrably disabled or incapacitated or those in a position to affirmatively prove their innocence will be considered eligible for record destruction.

Moreover, with the exception of mitigating factors related to disability or incapacity, it is not clear whether either of the other two "mitigating factors" will be available to a review applicant following a police determination that there are "compelling reasons in the public interest" to retain NCD records. In refusing to destroy NCD records under the "public interest" heading, it seems reasonable to anticipate that the police will take the position that they have already

considered the nature of the alleged offence and the surrounding circumstances. The proposed Policy appears to allow this.

Finally, the proposed Policy is premised on the imposition of a reverse onus on innocent individuals. Long established principles require that, save in exceptional circumstances, the state must bear the onus of proof in our criminal justice system. More recently, the courts have held that, following an NCD, the police, not the individual, must be in a position to demonstrate the existence of "highly exceptional circumstances" in the particular case in order to justify a decision to retain NCD records.

Needless Procedural Burdens

In addition to these fundamental flaws, the Policy would impose:

> A five month wait period following the "last court appearance" before a destruction request will be accepted; and
>
> A written application signed by the applicant even if submitted by the individual's lawyer.

Neither of these requirements appears sensible or necessary. Affected individuals should not have to take any additional steps or suffer any delays that are not necessary. If the process is to be request driven, applications should be accepted from an applicant's lawyer of record without the requirement of any additional paperwork. Eligibility for destruction should commence on the date on which a non-conviction disposition becomes final.

The Presumption of Retention Appears to be Unconstitutional

Under the proposed approach, the presumption of innocence and the section 8 right to destruction are transformed into a presumption of retention.

At the first instance, destruction will be denied automatically on the basis of the title of the charge or under the unfettered discretion provided for by the phrase "in the public interest." This will be the case whether the person receives an acquittal, a finding of not guilty, or sees the charges withdrawn or permanently stayed.

Thereafter, 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. The cost of obtaining transcripts and other evidence can be very high, the proposed onus effectively insurmountable. Innocent persons should not be required to bear either.

In our view, there cannot be a constitutional retention of NCD records within the parameters set out in *Doré* where:

1) Retention is automatic rather than exceptional,

2) The criteria for denying a request is vague and overbroad, **or**

3) The police onus to demonstrate the existence of "highly exceptional circumstances" in the particular case is shifted from the state onto the affected individual.

Recommendations for an Appropriate Destruction Policy

The IPC urges the Board to pass a destruction policy that would both provide for the important police responsibilities to public safety and the equally important constitutional responsibility to protect fundamental rights to privacy and the presumption of innocence. In our view, the critical features of an appropriate and balanced policy would provide for: responsible record handling, limited and focused retention decisions founded on fair and appropriate procedures, and accessible, independent, and impartial review.

1) Responsible Record Handling

Police have expressed concern about the cost and complexity of administering request based destruction policies. While we maintain support for the Board's position that these costs must not be imposed on innocent individuals, concerns about cost, the presumption of innocence and the right to privacy may jointly be addressed by requiring that the record holder – the police – *routinely and periodically* review all NCD records.

Consistent with the constitutional principles discussed in these submissions, we recommend that, following each routine review, all NCD records on hand must be destroyed unless the individual has a pre-existing criminal conviction, faces outstanding criminal charges, or, in the particular circumstances of the case, police have reasonable grounds to believe that the individual will commit a "serious personal injury offence" as defined in section 752 of the *Criminal Code*.

In order to comply with fair information practices, we also recommend that the Board require the TPS to notify all individuals that their records have been destroyed, which records have been destroyed, which records, if any, have been retained, and for what specific purposes.

While there will be costs associated with routine review, destruction, and notice, these expenditures will also serve the public interest in safety. In reviewing NCD records and identifying individual's who pose a substantial risk of committing a serious offence involving violence, police will very likely be in a better position to safeguard themselves and the public.

Even if this were not the case, any costs associated with maintaining accurate and up-to-date NCD records can and should be born by police. The police have an interest and a duty to retain legally obtained information where it is relevant to the performance of their duties. Police have an interest in, a duty to, and are in a position to maintain up-to-date and accurate files regarding cases in which they have laid criminal charges. Police maintain related databases that refer to criminal charges, including those that result in both non-conviction and conviction dispositions. And, critically, the recommended approach would comport with the constitutional jurisprudence governing police discretion and the protection of privacy.

Recommendations:

1. *The Toronto Police Services (TPS) must routinely and periodically review all NCD records upon finalization of a disposition and destroy the records unless, the individual has a pre-existing criminal conviction, faces outstanding criminal charges, or, in the particular circumstances of the case, the Chief of Police or his or her delegate (hereafter "the Chief") has reasonable grounds to believe that the individual will commit a "serious personal injury offence" as defined in section 752 of the Criminal Code.*

2. *The TPS must notify all individuals that their records have been destroyed, which records have been destroyed, which records, if any, have been retained, and for what specific purposes.*

2) Limited and Focused Retention Decisions Founded on Fair and Appropriate Procedures

More recently, the courts have held that, following an NCD, the police, not the individual, must demonstrate the existence of "highly exceptional circumstances" in the particular case in order to justify a decision to retain NCD records.

As indicated above, long established principles require that, save in exceptional circumstances, the state must bear the onus of proof in our criminal justice system. More recently, the courts have held that the police discretion to retain NCD records must be exercised in conformity with constitutional principles. In order to comply with the protection of privacy and the presumption of innocence, the police must be in a position to demonstrate the existence of the "highly exceptional circumstances" in the particular circumstances of the individual case.

Fair and appropriate procedures are critical when the state is making a decision with significant consequences related to the imposition of criminal stigma. While legitimate concerns about public safety and administrative constraints must be borne in mind, they can not be used to excuse procedures that are fundamentally unfair. This principle applies even when the state is pursuing a policy designed to protect national security (*Charkaoui v. Canada* (Citizenship and Immigration), 2007 SCC 9). In our view, the proposed Policy is fundamentally unfair. In our view, proper procedures governing the discretion to retain NCD records would provide innocent individuals with the right to know the case against them and the right to answer that case.

Recommendations:

3. *Where the Chief asserts that s/he has a valid basis for retaining NCD records, the Chief must provide the affected individual with written notice of this preliminary finding. The affected individual must be provided disclosure of the information and evidence relied on by the police and a fair and full opportunity to reply to that information and evidence.*

4. *The onus is on the Chief to establish that the individual has a pre-existing criminal conviction, faces outstanding criminal charges, or, in the particular circumstances of the case, there are reasonable grounds to believe that the individual will commit a "serious personal injury offence" as defined in section 752 of the Criminal Code.*

5. *Having considered and addressed the affected individual's reply, the Chief must provide his or her decision in writing with reasons. The decision must provide notice as to which records, if any, have been destroyed, which records, if any, have been retained, and for what specific purposes.*

3) Accessible, Independent and Impartial Review

As indicated above, however necessary or even desirable internal review may be, it can not, in our view, ensure fairness and command public confidence. Recourse to the courts, while necessary, is also insufficient. The costs alone are likely to act as a significant bar to justice for innocent individuals whose resources will typically have been exhausted in facing the criminal charges just disposed of by way of an NCD.

Accordingly, we recommend that the Board provide early access to independent and impartial review. An impartial expert advisor should hired by the Board in manner that ensures, to the greatest extent possible, an arms-length independent relationship.

Where the Chief refuses to destroy the NCD records of innocent individuals, they should be entitled to seek review of a destruction refusal to a body or person independent of the police service, its legal department, and indeed, its civilian managers. The independent review would produce a written opinion as to whether the Chief has sufficient grounds to justify the exceptional decision to retain NCD records. The opinion would be provided to the affected individual, the Chief, and the Board.

In order to provide the affected individuals, the TPS, the Board, and the public with a rigorous, fair and transparent process, the Board should require that the independent advisor provide an annual public report to the Board regarding the functions of the advisor and any issues or individual cases that raise matters of policy or procedure that, in the opinion of the advisor, warrant the Board's attention. The independent advisor's public report would not include information capable of identifying the affected individuals who sought its review. An annual reporting function would also help ensure that the advisor's functions were performed rigorously and fairly.

Recommendations:

6. *In cases where the Chief continues to assert a right to retain a person's NCD records, the affected individual must have a right to have the case reviewed by an independent and impartial expert advisor hired by the Board. Having heard from the affected individual and the Chief, the independent advisor would provide a written opinion as to whether the Chief has sufficient grounds to justify the exceptional decision to retain NCD records.*

7. *The independent advisor must provide his or her opinion to the affected individual, the Chief, and the Board.*

8. *The Chief must reply to the independent advisor's opinion in writing. Copies of the Chief's reply must be provided to the affected person, the independent advisor, and the Board.*

9. *An affected individual who is unsatisfied with the Chief's reply may seek further redress from the Courts.*

10. *The independent advisor will provide an annual public report to the Board regarding the functions of the advisor and any issues or individual cases that raise matters of policy or procedure that, in the opinion of the advisor, warrant the Board's attention. The public report would not include information capable of identifying an affected individual.*

Conclusion

The IPC appreciates that the Board's efforts to develop a new destruction policy have been ongoing since 2004. Throughout this period, the Board has demonstrated its leadership in pursuing a comprehensive public debate on this important subject.

Following the decisions in *Doré* and *Lin*, the Board and the TPS both appeared to appreciate that a court disposition such as an acquittal should trigger a presumption in favour of record destruction. The Board has also 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 NCD on record.

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.

Police policies cannot alter the scope of a discretion that is founded in the common law, a statute, or *Charter* jurisprudence. While policies promulgated pursuant to a general statutory authority enjoy greater authority than internal police department directives, neither can overwrite a particular responsibility as expressed in a higher authority.

In our view, fair and proper procedures governing the discretion to retain NCD records would provide for: responsible record handling; limited and focused retention decisions founded on fair and appropriate procedures; and accessible, independent and impartial review. In this regard, the recommendations we have made provide a *Record Handling Blueprint* that would both protect fundamental rights and allow for the appropriate retention of NCD records.

In aid of the Board's efforts to move quickly to 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.