



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

VIA ELECTRONIC MAIL

August 28, 2015

The Honourable Yasir Naqvi
Minister of Community Safety and Correctional Services
18th Floor, George Drew Building
25 Grosvenor Street
Toronto, ON M7A 1Y6

Dear Minister Naqvi:

Re: Ontario Proposed Regulation for Street Checks Consultation Discussion Document

Thank you for consulting with the Office of the Information and Privacy Commissioner of Ontario regarding the proposal of the Ministry of Community Safety and Correctional Services (“the Ministry”) to develop a regulation governing street check practices in Ontario.

Over the past two years, my office has actively participated in discussions with the Toronto Police Services Board and the Service’s PACER Advisory Committee, which have focused primarily on street check-related information handling policies, procedures and practices. Our involvement in this issue is based on our statutory authority in privacy matters, as set out in the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* and its provincial counterpart. Our experience has shown that street checks can infringe on personal privacy, and may result in discrimination and stigmatization. Without appropriate restrictions on street checks, sensitive personal information about individuals may be collected, used, retained and disclosed by police services in violation of individuals’ privacy and other rights.

We agree there is a need for consistency in police practices across the province and that a regulation may address this need. However, if the proposed regulation will allow police to continue to conduct street checks, the regulation must ensure that street checks are conducted in a manner that protects the privacy and other fundamental rights of Ontarians.

Based on what we learned at our meeting with the Ministry on August 11, 2015, we understand that the Ministry is in the process of consulting with various regulators, stakeholders and community groups, as well as the general public, on the proposed regulation. Following these consultations, the Ministry will publish a draft regulation.

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To facilitate this consultation process, on July 30, 2015, the Ministry published a discussion document entitled *Ontario Proposed Regulation for Street Checks Consultation Discussion Document* (“Discussion Document”) on its consultation website. The Discussion Document poses a number of questions, for which responses were requested by August 31.

Attached please find our responses to the questions posed in the Discussion Document. As our responses indicate, we recommend that the proposed regulation address the following in order to ensure privacy, transparency and accountability in any street check program in Ontario:

- the definition of the term “street check,”
- rights notification,
- rules restricting the collection, retention, use and disclosure of personal information,
- the collection of de-identified data for all street checks in order to ensure that the Ministry, police services and oversight bodies are in a position to evaluate the impacts of street checks on privacy and other rights and on public safety, and
- an appropriate framework for the secure destruction of personal information collected in contravention of the new regulation, as well as unlawfully collected personal information contained in legacy data.

We look forward to reviewing the draft regulation and to further opportunities for dialogue on these important issues. We commend the Ministry for undertaking an open consultation on this issue. Consistent with the Government of Ontario’s commitment to open engagement, we will be posting this letter and our responses to the Discussion Document on our website.

Sincerely,

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

Brian Beamish
Commissioner

Encl.

Response to the Ontario Proposed Regulation for Street Checks Consultation Discussion Document

Introduction

The Office of the Information and Privacy Commissioner of Ontario (the IPC) is pleased to participate in the Ministry of Community Safety and Correctional Services' (the Ministry) consultations on police street checks.

The IPC is responsible for overseeing the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* and the *Freedom of Information and Protection of Privacy Act (FIPPA)*. These statutes provide the people of Ontario with rights of privacy in relation to personal information held by institutions, including the police. This submission addresses the significant privacy and other impacts of police street checks and includes recommendations aimed at minimizing those impacts.

Based on the evidence offered to date, it is not clear that street checks are effective in reducing crime and contributing to public safety. If street checks are to continue in the province, it is critical that a governance framework, as proposed by the Ministry, be put in place and an evidence-based review be conducted to evaluate the framework's effectiveness.

Our experience has shown that police street checks can infringe on personal privacy, and may result in discrimination and stigmatization. Without appropriate restrictions on street checks, sensitive personal information about individuals may be collected, used, retained and disclosed by police services in violation of individuals' privacy and other rights.

The Ministry's proposed regulation governing police street check practices in Ontario must include a clear legal framework that ensures consistency across police services and protects the privacy and other fundamental rights of Ontarians.

Below you will find our responses to the questions posed by the Ministry in its discussion document entitled *Ontario Proposed Regulation for Street Checks Consultation Discussion Document* ("Discussion Document"). We look forward to participating in further discussions with the Ministry as it moves forward in its efforts to prepare and finalize the draft regulation.

Defining street checks

a. How would you define a street check?

The precise definition and scope of a police "street check" is critical to the successful regulation of street check practices and to the protection of privacy and other rights implicated by these encounters between police officers and members of the public.

With respect to the description of a street check provided in the Ministry's Discussion Document, we agree that a street check should be understood as a voluntary, in-person encounter between a police officer and an individual, the purpose of which is to elicit information. The

underlying purpose of a permissible street check program should be to enhance public safety, community wellbeing and public confidence in policing.

The regulation should define a “street check” in such a manner so as to clearly inform both police officers and members of the public that street checks may not be conducted in a manner that is random, arbitrary, discriminatory, clandestine or unduly intrusive. Accordingly, the regulation must ensure that police practices associated with street checks are carefully controlled rather than open-ended, and that they are marked by the judicious exercise of discretion rather than the unfettered use of intelligence gathering tactics.

More specifically, we recommend that the term “street check” be defined in terms of a list of specific and concrete activities that encapsulate the police functions that drive police officers’ legitimate decisions to stop, engage and question members of the public in the community. The circumstances in which personal information may be collected, the type of information to be collected, the length of time it may be retained, and the purposes for which it may be used and disclosed, should be rationally connected to the definition and scope of permissible street checks. As a result, we recommend that subcategories of permissible street checks be established to allow for the provision of specific and concrete rules relating to the subcategories and any information that is collected, retained, used and disclosed as a result of permissible street checks.

The subcategories of permissible street checks may include investigating a specific offence or a series of offences, responding to specific and credible reports of suspected criminal activity, or intervening to assist a person who appears to be vulnerable and at risk of serious harm. We recommend that any residual discretion under which police officers may stop, engage and invite members of the public to answer questions should be restricted to circumstances where an officer suspects on reasonable grounds that the stop, engagement and questioning is necessary to preserve the peace, prevent the commission of an offence or protect life or property.

b. When should a police officer be allowed to question a member of the public and then record that information in a database?

The regulation should require that a police officer’s decision to stop, engage and question an individual be justified on the basis of an officer’s reasonably held belief. The officer’s decision should be based on an articulable public safety purpose, as defined in the regulation, that is concretely tied to one of the specific police activities or functions set out in the regulation and the individual circumstances at play *at the outset of the encounter*.

In addition, we recommend that when a police officer decides to record personal information gleaned from a street check in his or her memorandum book, as well as in a database within the applicable service’s records management system (RMS), the officer should be required to articulate the public safety purpose in more concrete and granular terms than initially required when the officer was determining whether to stop, engage or question an individual. Requiring such increased specificity and granularity will help to improve the quality of street check records, reduce the risk of racial profiling and promote accountability.

In creating a street check record, the police officer should be required to tie the public safety purpose concretely to one of the specific police activities or functions set out in the regulation and to the individual circumstances at play *during the encounter as a whole* in order to account for the possibility that the circumstances may have evolved. Again, we recommend that the officer's decision to record personal information be justified on the basis of the officer's reasonably held belief.

c. Are there unique issues to consider when addressing street checks of young people under the age of 18?

As reflected in the *Youth Criminal Justice Act (YCJA)*, police have a responsibility to ensure that young persons are treated in a manner that respects their age and vulnerability. The vulnerability of minors has long been recognized by legislators, courts and tribunals, including by the IPC.

We recommend that police officers initiating a street check be required to notify minors of their right not to provide information and their right to disengage from an encounter at the outset of that encounter. This duty should only be relaxed in circumstances where the officer has reasonable grounds to believe that the provision of rights notification is likely to result in imminent and serious harm to the young person or to another person. For more on our views on rights notification, please see our response to question 2(d)(i).

The Ministry should also be mindful that the *YCJA* limits the authority of police to access, use and disclose street check-related personal information associated with a minor who has been "dealt with" under the *YCJA*, for example, where an officer decides to caution or warn rather than charge a young person in relation to events associated with a street check (see Part VI of the *YCJA*, including section 110). The regulation should reflect and support these limits.

Standards for conducting street checks

a. What type of training should police officers receive in order to conduct street checks? How often should police officers be required to take this training? Who within a police service should receive this training (for example, new recruits, front-line officers, supervisors)?

The regulation should require new recruits, current officers, investigators and supervisors to receive periodic (e.g., bi-annual) training relating to the standards for conducting a street check established by the new regulation, such as when to conduct a street check and when and how information, including personal information, should be recorded. Additionally, these individuals should receive periodic training on privacy and other rights impacted by street checks. Training should explain how, properly understood, the protection of these rights aligns with core police objectives, including objectives relating to maintaining and building community trust and those relating to effective crime prevention and investigation.

To prevent discriminatory profiling and reduce privacy and other rights intrusions, it is further recommended that the training also inform these individuals about recent profiling-related case law and teach officers to recognize discriminatory profiling in the performance of their day-to-

day activities. Police officers and community members have indicated that a significant portion of this training should be scenario-based. We agree.

With respect to privacy training, we recommend that topics for training should include:

- the duty to protect personal privacy,
- the meaning and definition of personal information,
- the difference between collecting personal information and recording it,
- the authority and purpose for the collection, use and disclosure of personal information,
- the requirement to provide notice of collection and to provide other rights notification,
- the right of individuals to access their own information,
- the requirement to issue receipts or business cards, and
- privacy best practices (e.g., data minimization, accuracy, completeness, openness, etc.).

b. Should police officers be required to collect personal and demographic information during a street check (such as name, date of birth, address, race)?

Police officers should not be required to collect personal information. Instead, their collection of personal information should be governed in the manner outlined in our response to question 1(b).

On the other hand, police officers should be required to record and retain de-identified demographic data. In particular, we recommend that the regulation require officers to record sufficient *de-identified* data with respect to each street check, including with respect to those checks that do not lead to the recording of any personal information in either an officer's memorandum book or a police service's RMS. We further recommend that the regulation require police services to retain this de-identified data in electronic format. The de-identified data should include information about the sex, estimated age and apparent race or ethnicity of the individual stopped during a street check, as well as information relating to the time, location, rationale for and performance of each street check.

The recording and electronic retention of de-identified data relating to each street check will help to ensure that police services and oversight bodies (e.g., police services boards, the Ministry, etc.) are in a position to evaluate the impacts of street checks and personal information gathering activities arising from these checks on privacy and other rights, and on public safety. We would be pleased to assist the Ministry in ensuring that proper safeguards are in place to minimize the risk of re-identification while maximizing the utility of this de-identified data in evaluating and assessing street check practices.

c. Should there be limitations on the types of information police officers are permitted to collect during a street check? Please describe.

In accordance with *MFIPPA* and *FIPPA*, personal information collected and recorded during a street check should be limited to personal information relevant to the legitimate purposes of a street check. Only information that is relevant to these purposes should be recorded. As noted at the outset, the precise definition and scope of a street check is critical to the regulation of street check practices and to the protection of privacy and other rights implicated by such encounters

between police and the public. As a result, the definition and scope of the street checks that will be permitted by the proposed regulation will impact the nature and type of information that police officers ought to be permitted to collect. Once the Ministry develops a preliminary position on the definition and scope of a street check, we would be pleased to assist the Ministry in defining the nature and type of information that police officers should be permitted to collect in respect of each of the subcategories of permissible checks.

d. What information should be communicated by a police officer to an individual during a street check? When should that information be communicated? Are there any challenges in communicating this information during a street check?

(i) Rights Notification

It is vital that the regulation require officers to acknowledge, respect and uphold the rights of an individual not to participate in a street check. If the provision of personal information and the engagement itself are both to be truly voluntary, it must be clear that the individual has the right not to provide information and the right to disengage from the encounter at any time.

We strongly recommend that the regulation require police officers to provide clear rights notification with respect to all street checks at the earliest opportunity, unless there is a compelling reason justifying an exception or delay in informing the person of his or her right not to provide information and to disengage.

We recommend that the only compelling reasons justifying an exception or delay are where the police officer has reasonable grounds to believe that the provision of rights notification is likely to result in either significant impairment of the officer's ability to investigate a specific offence, or imminent and serious harm to the person being stopped, or to another person. Despite these compelling reasons, the regulation should instruct police officers to provide the individual with clear rights notification as soon as the individual asks about his or her rights and obligations, or expresses any discomfort at providing information or continuing with the contact.

The form of rights notification may be as simple as the officer stating: "You are free to decide whether or not to answer any of my questions. You are also free to leave." A police officer should be entitled to encourage, but not coerce, cooperation.

We recommend that the regulation require police officers to create a record in both their memorandum books and the applicable RMS fields in relation to when rights notification was provided, how it was provided and, if rights notification was delayed, the reason for the delay. It is further recommended that these data elements be recorded with respect to every check, including checks in which the officer does not identify the affected individual, for example, by name, address and date of birth.

In addition to the requirement to notify an individual of his or her right not to provide information and to disengage from the encounter, the regulation should require police services to provide individuals with notice of the collection of personal information. Section 29(2) of *MFIPPA* and section 39(2) of *FIPPA* require individuals to be informed of the legal authority for

the collection of the personal information, the principle purpose(s) for which the personal information will be used, and the contact information of a public official who can answer the individual's questions about the collection.

While section 29(3) of *MFIPPA* and section 39(3) of *FIPPA* state that the notice of collection requirements do not apply in limited and specific circumstances, including where a police service may refuse to provide access to personal information under the law enforcement-related exemptions of those statutes, we nonetheless recommend that all police services be required to provide a form of notice of collection.

We make this recommendation for two reasons. First, the law enforcement-related exception to the requirement for notice may not apply in various kinds of street checks that may result in the collection of personal information (e.g., in some street checks that involve encounters with vulnerable persons). Second, the provision of notice will support the goals of privacy protection, transparency and accountability.

We recommend that the form of notice include an online, web-based component that provides information to the public, including that set out in section 29(2) of *MFIPPA* and section 39(2) of *FIPPA*. In addition, receipts or business cards issued to individuals following a street check encounter, addressed below, should direct individuals to the applicable website. Both of these elements should be supported by periodic public education campaigns that, for example, make use of local media, social media and Ministry and police services' websites.

(ii) Receipts or Business Cards

We recommend that the regulation require police officers to offer to provide a receipt or business card to each individual subject to a street check and to provide such a receipt or business card whether or not personal information is collected. The receipt or card should include the officer's name, badge number and contact information, as well as information indicating when and why the street check occurred, and whether information collected during the check will be recorded in a police database in an identifiable form. In our view, providing individuals with written notice of the reason for the street check and information regarding whether their personal information was recorded will enhance police accountability and support the right of access to one's own personal information.

The receipt or business card should also direct individuals to a link within the service's website where they can find detailed information about the regulation, the police service's street check program, the legal authority for the collection of personal information, the principle purpose(s) for which the personal information will be used, and the contact information of a public official who can answer the individual's questions about the collection. Providing individuals with this information will support the protection of privacy, promote transparency and accountability, and enhance public trust.

Oversight

a. If police services are required to report on their compliance with a regulation concerning street checks, who should receive the report? What details should be included in those reports?

The Discussion Document provides the following examples of oversight:

- Reports by the chief of police to the police services board.
- Analysis and reporting on information obtained through any street checks to identify trends or establish how the practice is impacting particular groups (for example, race, gender or age).
- A ministry audit or review of a police service that is engaged in the practice of street checks.

We recommend that the regulation include all of these oversight mechanisms. More specifically, the regulation should require a chief of police to provide a detailed street check report to his or her police services board on an annual basis. Those reports should provide statistics on street check practices, including information about the frequency and nature of the checks, and their impact on fundamental rights and liberties and on public safety. The report should be tabled publicly, as well as sent to the Ministry. The Commissioner of the Ontario Provincial Police should be required to provide a comparable report to the Ministry and that report should also be made available to the public. In addition, the Ministry should conduct periodic audits of street check practices. The Ministry's audit reports should be made public. Further, if the Minister is of the opinion that a police service's street check program may be operating in contravention of the regulation, the Ministry should ensure that a review of that service's street check program and practices is conducted and that the results of that review become the subject of a public report.

While it is crucial that all these reports be issued publicly, we recognize that limited and specific elements in a report may contain personal or confidential information, which may need to be redacted from the public version of a report.

These reports should generally also examine and analyze the de-identified data collected on each street check, report on that demographic data, and reflect on trends, challenges, and positive outcomes of street check practices. Finally, to promote transparency and accountability, police services and the Ministry should also publish de-identified data with respect to street check practices on an annual basis in Open Data formats to facilitate research.

b. How should the requirements of a regulation concerning street checks be enforced? Who should be responsible for ensuring compliance?

The existing system of oversight and accountability should be sufficient to enforce the new street check regulation, particularly to the extent that the Ministry institutes the necessary standards and reporting requirements. Independent offices such as the Office of the Independent Police Review Director, the Ontario Human Rights Commission and the IPC would be well positioned to augment the oversight provided by police chiefs, police services boards and the Ministry.

Public complaints

a. Should police officers be disciplined if they act improperly while conducting a street check?

A fair approach to discipline for breach of street check standards would incorporate informal resolution, remedial training and progressive discipline up to and including termination in accordance with established practices. The goal should be to foster continuous improvement in policing, enhance the protection of privacy and other rights, and ensure accountability.

Management of information collected

a. Should information collected from the public be stored for future investigative purposes?

Under *MFIPPA* and *FIPPA*, police are permitted to collect, retain, and use personal information for legitimate law enforcement purposes, to ensure accountability and to allow individuals to access their own information. However, once these purposes have been accounted for in the design of an appropriate retention framework, personal information can and should be destroyed. The indefinite retention of personal information on the basis that it may be relevant at some point in the future cannot be justified. Accordingly, as discussed in our response to question 5(c), a proper regulatory framework must come with appropriately limited retention periods.

b. Should information be collected during a street check be reviewed before the information can be stored in a database? If so, who should conduct this review and what criteria would need to be met before the information could be stored?

Personal information collected during a street check should be reviewed before it is stored in a police service's RMS. That review should be performed by supervising officers against the criteria outlined in our response to question 1(b). In the course of reviewing this information, supervisors should be required to ensure that personal information that does not satisfy the criteria is not recorded in the police service's RMS.

A different approach may be required if a police service subsequently discovers that its RMS contains personal information that was collected in the course of a street check that contravened the regulation or other Ontario law. The limited retention of any improperly collected information will be necessary to ensure accountability, for example, by providing the individual with a right of access to his or her personal information. At the same time, the regulation should require that strict access controls be put in place to restrict access to and use of information submitted in contravention of the regulation or other Ontario law. These restrictions should be enforced using appropriately tailored access, audit and security controls, including passwords and access logs.

c. How long should police be able to keep information collected through a street check if the information is not being used for a specific investigation?

We recommend that the regulation establish retention periods with respect to personal information collected as a result of street checks and that these retention periods be between two and five years long. Under this approach, street checks conducted for purposes associated with criminal activity could be retained for up to five years. Street checks conducted for non-criminal purposes would only be retained for two years. Other retention periods might be established within this two to five year range in a manner that reflects the nature of the police activity and the impact of retention on the public's right to be left alone.

The regulation should also require that at the end of each retention period, street check information be securely destroyed or expunged unless the further retention of a specific record could be justified in relation to its relevance to an ongoing investigation or proceeding. This approach would help to limit the scope and scale of street check generated surveillance. It would also ensure compliance with data retention requirements designed to help ensure that individuals are in a position to exercise their right to access their own personal information.

d. How might police services address historical collection of information (i.e., information already stored in databases prior to any provincial rules being put in place)?

With regard to historical collections of personal information associated with street checks (legacy data), please note the following. Privacy legislation does not prevent the destruction of personal information at the appropriate time. Police services should retain personal information to fulfill their mandate, ensure accountability and allow individuals to access their own information. However, once these purposes have been reasonably accomplished, personal information can and should be securely destroyed.

However, practices that have resulted in the excessive collection of personal information presumptively contravene Ontario privacy legislation. Police services should not be permitted to retain street check information that they were not entitled to collect in the first place. It is not enough to say such legacy data may be relevant at some point in the future. Unless an institution is able to demonstrate that a particular record or set of records should be disposed of differently (i.e., retained for a further period on the basis that the record was, in fact, collected lawfully), any record obtained or compiled under a contravening collection practice should be securely destroyed as soon as it is no longer needed for accountability-related purposes. This approach was followed by our office in Orders MO-2225 and PO-2826.

With respect to excessive street check-related collection practices and the related legacy data, public notice of the destruction should be widely circulated and should clearly indicate that, after a narrowly defined period of time, the data will be securely destroyed. This notice and this time-limited retention period will allow individuals to exercise their right of access to their own information in the legacy data. Then, subject to the following qualification, the legacy data must be securely destroyed. Specific records may be retained and used for a further period, but only to the extent that the records are determined to be relevant to an ongoing investigation or

proceeding. If a police service fails to satisfy this threshold for justifying further retention of excessive collections of legacy data, all such records must be securely destroyed.

Other issues

a. Are there any additional key areas the government should consider regulating that relate to the practice of street checks? Please describe.

(i) Secondary Uses and Disclosures

We recommend that the regulation restrict the use of personal information collected during the course of a street check for secondary purposes. The regulation should require that personal information collected during the course of a street check should generally only be used for the purpose for which it was originally collected or for a consistent purpose. Since the information collected during a street check will generally be collected directly from the individuals to whom the information relates, pursuant to section 33 of *MFIPPA* and section 43 of *FIPPA*, street check information should generally only be used for purposes that might reasonably be expected by the affected individuals. The regulation should contain similar restrictions on the disclosure of street check information, including with respect to any subsequent disclosure of this information to other law enforcement agencies.

(ii) Evidence-Based Review

We recommend that the regulation require the Ministry to conduct a comprehensive evidence-based review of the regulation and its impact on privacy, human rights and public safety, three years after the regulation has come into force. As part of this review, the Ministry should analyze the street check data collected by police services to determine whether there is a justifiable reason for continuing the practice.