



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

November 4, 2015

VIA EMAIL

Mr. Shafiq Qaadri, MPP
Chair, Standing Committee on Justice Policy
The Legislative Assembly of Ontario
Room 1405, Whitney Block
Queen's Park, Toronto, Ontario
M7A 1A2

Dear Mr. Qaadri:

Re: Bill 113, the *Police Record Checks Reform Act, 2015*

Thank you for the opportunity to comment on Bill 113, the *Police Record Checks Reform Act, 2015*.

The Office of the Information and Privacy Commissioner of Ontario has had a longstanding interest in police record checks. Our involvement is rooted in our statutory mandate under the *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act*. In fulfilling this mandate, we have conducted a number of privacy investigations into police record check practices. Our experience has shown that without proper standards in place, record checks can infringe on personal privacy and cause discrimination and stigmatization, particularly with respect to non-criminal information (e.g., mental health related information), non-conviction information (e.g., withdrawn charges), and *Youth Criminal Justice Act (YCJA)* related information.

On the basis of this experience, we participated in consultations that led to the development of the 2011 and 2014 versions of the Ontario Association of Chiefs of Police Law Enforcement and Records (Managers) Network (LEARN) *Guideline for Police Record Checks*. Subsequently, we were consulted by the Ministry of Community Safety and Correctional Services (the Ministry) on the development of a legislative standard to govern how police services conduct police record checks used to screen individuals for a wide range of purposes, including those affecting access to employment, volunteer, educational, and housing opportunities.

I commend the Minister of Community Safety and Correctional Services and the government for bringing forward Bill 113, the *Police Record Checks Reform Act, 2015* (the *Act*). It incorporates the key elements of the privacy protective model we have helped to identify over the last decade. In my view, the *Act* will provide police services and the people of Ontario with much needed clarity as to what information may be disclosed during the course of police record checks, and the manner and scope of the disclosure and subsequent handling of this information.



2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
www.ipc.on.ca

Under the *Act*, non-criminal information will no longer be disclosed and non-conviction information may only be disclosed in exceptional circumstances. The *Act* will assist Ontarians by requiring that correction and reconsideration procedures be put in place to address individuals' concerns about erroneous or excessive police record check disclosures. The *Act* also establishes a stand-alone right to request and receive the results of a police record check on one's own behalf. Properly implemented, the *Act* will help ensure that police record checks are processed in a consistent manner that respects privacy and other human rights.

In an effort to reinforce the privacy protections provided for under the *Act*, enhance public confidence in and transparency with respect to police record checks, and ensure the success of the necessary follow up work required to complete this vital law reform project, I recommend that the following three amendments be made to the *Act*.

1. Ensure transparency with respect to police record check practices

Section 16 of the *Act* provides that "every police record check provider shall prepare and maintain the prescribed statistical information in connection with police record check requests and shall provide that information to the Minister on request." In order to help ensure that the public is well informed about police record checks, we recommend that section 16 be amended to require that police record check providers prepare and submit statistical information to the Minister on an annual basis and that the Minister publish an annual report summarizing those statistics. Such an amendment will also support the effectiveness of the five-year review required under section 21 of the *Act*.

Recommendation 1: Section 16 should be amended as follows:

16. (1) Every police record check provider shall prepare and maintain the prescribed statistical information in connection with police record check requests and shall provide that information to the Minister each year in the prescribed form and within the prescribed timeframe.

(2) The Minister shall, as soon as possible after the end of each year, prepare and publish a report summarizing the statistical information provided to the Minister by police record check providers under subsection (1).

2. Ensure an open and informed review of the *Act*

Section 21 of the *Act* requires the Minister to conduct a review of the *Act* within five years of that section coming into force. This is an important feature of the *Act*. Further legislative changes may well be needed. Five years' time should provide sufficient experience from which to identify the critical adjustments needed to support the privacy, public safety and human rights goals underlying the *Act*. However, in the interests of transparency and accountability, it is recommended that the review include a public consultation component and that, at the end of the review process, the Minister be required to issue a public report setting out his or her conclusions and recommendations with respect to the need for further reforms. We recommend that these

aspects of the review be enshrined in the *Act* to help ensure an informed and transparent review of the *Act*, consistent with the government's commitment to open dialogue.

Recommendation 2: Section 21 should be amended as follows:

21. (1) The Minister shall conduct a review of this Act within five years after the day this section comes into force.

(2) The review conducted under subsection (1) shall include a public consultation process and lead to the issuance of a public report setting out the Minister's conclusions and recommendations with respect to the need for any further regulatory or statutory changes.

3. Ensure public input into the development of Cabinet regulations

Under section 22(1) of the *Act*, Cabinet will have broad powers to enact regulations, including to exempt any person or class of persons from any provision of the *Act* and to define any word or expression used in the *Act* not already expressly defined. Cabinet will also be authorized to enact regulations setting out additional criteria governing the disclosure of non-conviction information, the process governing a police service's reconsideration of its decision to disclose non-conviction information, as well as regulations for carrying out the various purposes and provisions of the *Act*.

The government is to be credited for acting quickly to fulfill its public commitment to introduce the *Act* early in its mandate. I recognize that time constraints made it difficult to define all the essential terms, procedures, and other elements of the new police record check regime. However, the regulation making powers in section 22(1) have the potential to substantially alter critical rights and duties set out in the *Act*. It is therefore recommended that a duty to consult before making regulations be built into the *Act*. A model for such a duty to consult can be found in section 74 of the *Personal Health Information Protection Act, 2004 (PHIPA)*. Section 74 of *PHIPA* sets out the requirements for consulting with the public and allows for necessary exceptions to that duty. It also provides for a limited and carefully tailored right to seek judicial review where the consultation requirements have not been met. Recently the government recognized the importance of public input when creating regulations by incorporating section 74 of *PHIPA* into Bill 119, the *Health Information Protection Act, 2015*. The key elements of section 74 of *PHIPA* should be integrated into the *Act*.

Recommendation 3: The *Act* should be amended by the addition of a new section 22.1 following section 22. Section 22.1 should provide for a duty to consult comparable to that found in section 74 of *PHIPA*. For the text of section 22.1, please see Appendix A.

Additional matters

Completing the task of creating a comprehensive police record check regime will require further work in the coming months and years. As outlined above, some of that work requires changes to the *Act*, while other matters will not.

My office is committed to assisting the government in the development of the necessary forms, directives and regulations under the *Act*, including with respect to the rules needed to: (i) govern the secure retention and timely and secure destruction of personal information (including biometric information) collected by police record check providers for the purpose of administering a police record check; (ii) define words or expressions such as the term “court order” (as used in item six of the schedule to the *Act*); and (iii) establish the reconsideration and error and omission correction procedures needed to address individuals’ concerns about any improper disclosure decisions.

In addition, we anticipate assisting the Ministry in the preparation of interpretive guides and other materials designed to inform police record check providers, the public and other key stakeholders of what is required to comply with the *Act*. For example, following our discussions with the Ministry, we understand that its interpretive guidance will make it clear that, consistent with the requirements in Part VI of the *YCJA*, a police record check provider’s authority to disclose *YCJA* related records will be confined to the disclosure of findings of guilt within the access periods set out in section 119(2) of the *YCJA*.

Finally, I note that as part of our commitment to help ensure that the necessary privacy protections are established, my office will be pleased to participate in future discussions with the Ministry about longer term issues such as those related to service delivery, fees, and a right to an independent and accessible appeal mechanism. Many of these issues may well be best dealt with on the basis of the experience accumulated during the first five years under the *Act*. In any case, my office will remain available to the Legislature, the Ministry, the policing community, the public, and other stakeholders before, during and after the anticipated review process.

Sincerely,

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

Brian Beamish
Commissioner

cc: Tonia Grannum, Clerk, Standing Committee on Justice Policy

Appendix A

Public consultation before making regulations

22.1 (1) Subject to subsection (7), the Lieutenant Governor in Council shall not make any regulation under section 22(1) unless,

- (a) the Minister has published a notice of the proposed regulation in *The Ontario Gazette* and given notice of the proposed regulation by all other means that the Minister considers appropriate for the purpose of providing notice to the persons who may be affected by the proposed regulation;
- (b) the notice complies with the requirements of this section;
- (c) the time periods specified in the notice, during which members of the public may exercise a right described in clause (2) (b) or (c), have expired; and
- (d) the Minister has considered whatever comments and submissions that members of the public have made on the proposed regulation in accordance with clause (2) (b) or (c) and has reported to the Lieutenant Governor in Council on what, if any, changes to the proposed regulation the Minister considers appropriate.

Contents of notice

(2) The notice mentioned in clause (1) (a) shall contain,

- (a) a description of the proposed regulation and the text of it;
- (b) a statement of the time period during which members of the public may submit written comments on the proposed regulation to the Minister and the manner in which and the address to which the comments must be submitted;
- (c) a description of whatever other rights, in addition to the right described in clause (b), that members of the public have to make submissions on the proposed regulation and the manner in which and the time period during which those rights must be exercised;
- (d) a statement of where and when members of the public may review written information about the proposed regulation;
- (e) all prescribed information; and
- (f) all other information that the Minister considers appropriate.

Time period for comments

(3) The time period mentioned in clauses (2) (b) and (c) shall be at least 60 days after the Minister gives the notice mentioned in clause (1) (a) unless the Minister shortens the time period in accordance with subsection (4).

Shorter time period for comments

(4) The Minister may shorten the time period if, in the Minister's opinion,

- (a) the urgency of the situation requires it; or
- (b) the proposed regulation is of a minor or technical nature.

Discretion to make regulations

(5) Upon receiving the Minister's report mentioned in clause (1) (d), the Lieutenant Governor in Council, without further notice under subsection (1), may make the proposed regulation with the changes that the Lieutenant Governor in Council considers appropriate, whether or not those changes are mentioned in the Minister's report.

No public consultation

(6) The Minister may decide that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under section 22(1) if, in the Minister's opinion,

- (a) the urgency of the situation requires it; or
- (b) the proposed regulation is of a minor or technical nature.

Same

(7) If the Minister decides that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under section 22(1),

- (a) those subsections do not apply to the power of the Lieutenant Governor in Council to make the regulation; and
- (b) the Minister shall give notice of the decision to the public as soon as is reasonably possible after making the decision.

Contents of notice

(8) The notice mentioned in clause (7) (b) shall include a statement of the Minister's reasons for making the decision and all other information that the Minister considers appropriate.

Publication of notice

(9) The Minister shall publish the notice mentioned in clause (7) (b) in *The Ontario Gazette* and give the notice by all other means that the Minister considers appropriate.

Temporary regulation

(10) If the Minister decides that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under section 22(1) because the Minister is of the opinion that the urgency of the situation requires it, the regulation shall,

- (a) be identified as a temporary regulation in the text of the regulation; and
- (b) unless it is revoked before its expiry, expire at a time specified in the regulation, which shall not be after the first anniversary of the day on which the regulation comes into force.

No review

(11) Subject to subsection (12), a court shall not review any action, decision, failure to take action or failure to make a decision by the Lieutenant Governor in Council or the Minister under this section.

Exception

(12) Any person resident in Ontario may make an application for judicial review under the *Judicial Review Procedure Act* on the grounds that the Minister has not taken a step required by this section.

Time for application

(13) No person shall make an application under subsection (12) with respect to a regulation later than 21 days after the day on which,

- (a) the Minister publishes a notice with respect to the regulation under clause (1) (a) or subsection (9), where applicable; or
- (b) the regulation is filed, if it is a regulation described in subsection (10).