



Information and Privacy
Commissioner of Ontario

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

March 15, 2021

Director Melissa Kittmer
Ministry of the Solicitor General
Community Safety Policy
Strategic Policy, Research and Innovation Division
25 Grosvenor Street, Floor 9
Toronto, ON M7A 1Y6

Dear Ms. Kittmer:

Re: Proposal Number: 21-SOLGEN001 - PRCs Reform Act, 2015, O. Reg. 347/18 Exemptions, Exemptions Proposal (Instrument Type: Regulation – LGIC)

For over a decade, the Information and Privacy Commissioner of Ontario (the IPC) has worked closely with the Ministry of the Solicitor General (the Ministry), along with police leaders, the Ontario Human Rights Commission and others to help ensure that police record check (PRC) practices both enhance public safety and respect privacy and other fundamental human rights. The culmination of this broad-based, province-wide effort was the enactment of the *Police Record Checks Reform Act, 2015* (the *Act*). It follows that the work of establishing permanent exemptions from the *Act* is equally of vital public importance.

In this context, I want to thank you and your team for meeting with my staff on February 26, 2021 to discuss the Ministry's proposed approach to enacting permanent exemptions to address the concerns of various justice and education-related public sector organizations. In providing this public submission, my goal is to further the Ministry's efforts to "determine whether any of [the temporary exemptions in O. Reg. 347/18] are required ... on an on-going basis and if so, whether the exemption could be narrowed..." Before turning to my recommendations, I believe it is important to provide additional context relevant to the path forward.

THE CONTEXT

As indicated in the Ministry's [regulatory proposal](#), a PRC involves police searching their record systems for information associated with a specific individual for the purpose of deciding whether to disclose some of that information:

... as part of a screening process for employment or volunteering; entering education or a profession; accessing programs or services; etc. PRCs are typically used in addition to other screening tools (e.g., interviews, reference checks, certifications) to help safeguard public safety by ensuring a person's suitability for certain opportunities. Police databases contain a



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wide range of information, including non-conviction and non-criminal information. The *Act* set Ontario's first-ever clear, consistent and comprehensive standards to govern PRCs.

The pre-*Act* era demonstrated that the absence of clear and comprehensive PRC rules is likely to result in:

- Inconsistent disclosure practices, with attendant risks to the protection of privacy and public safety,
- The disclosure of sensitive personal information without adequate justification, and
- Associated human rights injuries, including those tied to police reliance on record systems that may reflect discriminatory policing practices (e.g., disproportionate rates of police documenting members of Indigenous and racialized communities in the context of carding, street checks, mental health and addictions response, search, seizure, arrest and charging, etc.).

In bringing the *Act* into force, the government secured three critical advancements for Ontarians that stand well above other PRC-related laws, including the federal *Criminal Records Act, 1985*.

First, the *Act* established binding *rules* that set clear boundaries and processes within which police and other authorized PRC providers must operate (see sections 5-12 and 14). These rules and boundaries include prohibitions against disclosing information in response to a request for a PRC unless the individual provides written consent to the particular type of PRC and the disclosure is in accordance with the *Act's* Authorized Disclosure Table (the Table). Together with sections 8, 9, and 10 of the *Act*, the Table prescribes the three permissible checks and the types of information that may be disclosed in each case:

- A criminal record check, which is confined to convictions and findings of guilt,
- A criminal record and judicial matters check, which adds absolute and conditional discharges, outstanding charges or arrest warrants, and certain court orders, and
- A vulnerable sector check, which adds “not criminally responsible” findings, certain pardons, and, in exceptional circumstances, non-conviction disposition information.

In this context, it is worth highlighting that the only information that is permitted to be disclosed under the *Act* is criminal information, i.e., information that, at its foundations, directly relates to the fact that the person being subjected to a PRC has been charged with a criminal offence. The *Act* prohibits the disclosure of non-criminal information. Moreover, the *Act* restricts the disclosure of criminal information after the underlying charges are disposed of in a manner other than by way of a conviction or a guilty finding. Such “non-conviction information” may only be disclosed if police are satisfied that the “exceptional circumstances”, vulnerable sector screening criteria in section 10 of the *Act* have been satisfied. A key component of those criteria is that police must be satisfied that the individual's entries provide reasonable grounds to believe that the individual has

“engaged in a pattern of predation indicating that the individual presents a risk of harm to a child or a vulnerable person.”

Secondly, the *Act* established that individuals have *rights* to see the results of their PRC (sections 7 and 12), to seek correction of errors or omissions in the associated information (section 15), and to seek reconsideration of any decision to disclose non-conviction information (section 10).

Thirdly, the *Act* established critical transparency and accountability *requirements* designed to help to ensure that:

- The Solicitor General is informed about PRC practices (see section 16 and the police duty to provide the Minister with statistics) and is in a position to issue directives to PRC providers (see section 20) and conduct a thorough review of the *Act* (see section 21),
- Police service boards are able to ensure third party PRC service providers comply with the *Act* (see sections 17 and 18 and duties associated with third parties and related agreements), and
- Organizations and persons who receive the results of a PRC do not use or disclose the information for an unauthorized purpose (see section 13 and the related offence in section 19).

In addition to securing these three advancements, the *Act* gave government the power to adjust the critical rules, rights and requirements where necessary. It did so by enacting section 22(1)(a) of the *Act*, which provides that “the Lieutenant Governor in Council may make regulations exempting any person or class of persons from any provision of this *Act* and attaching conditions to the exemption.” It follows that when it comes to enacting permanent exemptions, the Government of Ontario has both the responsibility and the opportunity to do so in a manner that addresses objective public safety concerns and protects privacy and other fundamental rights.

THE MINISTRY’S PROPOSED APPROACH TO PERMANENT EXEMPTIONS

When the *Act* was brought into force on November 1, 2018, temporary exemptions were enacted to provide the government with the time necessary to determine the character and scope of any exemptions that might be required on an on-going basis. The temporary exemptions are scheduled to expire on July 1, 2021.

Put simply, those temporary exemptions have allowed police to continue to disclose a wider array of non-criminal and non-conviction information to various organizations. As indicated in its exemptions proposal documents, the Ministry has no plan to provide an exemption for any new sectors, bodies, or employers. It is my understanding that the Ministry’s plans with respect to sectors, bodies and employers that currently enjoy a temporary exemption have yet to crystallize. At present, the Ministry is considering the following approach:

- Allow some temporary exemptions from the entire *Act* to simply lapse (e.g., the Office of the Public Guardian and Trustee and the Office for Victims of Crime).
- Turn some temporary exemptions from the entire *Act* into permanent exemptions from the entire *Act*. Exemptions from the entire *Act* will continue indefinitely with respect to PRCs for:
 - Employees, volunteers and contractors of police services
 - Individuals with access to the Major Case Management System
 - Staff of Criminal Intelligence Service Ontario
 - Employees of the Office of the Provincial Security Advisor
 - Employees and contracted services of the Office of the Children's Lawyer
- Narrow some temporary exemptions from the entire *Act*, by restricting the application of a permanent exemption from the entire *Act* to a narrower range of employees or positions within the relevant organization. For example, a permanent exemption from the entire *Act* would apply to PRCs for employees who provide youth, but not adult probation and parole services, and to PRCs for some but not all Ontario Public Sector inspectors or investigators.
- Narrow some temporary exemptions from the entire *Act*, by restricting the scope of these permanent exemptions to a yet-to-be determined list of sections of the *Act*. Irrespective of the scope of these permanent exemptions, they would allow police to disclose a wider range of information in PRCs for the purpose of screening:
 - Staff employed in key roles in some, but not all adjudicative tribunals (e.g., the Criminal Injuries Compensation Board)
 - Staff employed in certain roles in the administration of justice (e.g., Crown Attorneys, administrative staff, information technology staff)
 - Staff, investigators, and volunteers with the Special Investigations Unit
 - The Independent Police Review Director and his or her staff and investigators
 - Licensees, registrants and appointees associated with the alcohol, gaming, horseracing and cannabis industries and their regulators
 - Employees, volunteers and student placements at the Child and Parent Resource Institute
 - License applicants of the Financial Services Regulatory Authority and its investigators
 - A wide array of positions within publicly funded school boards, provincial and demonstration schools, school authorities, and licensed childcare settings

As part of the exemptions framework, the Ministry is also considering including conditions that would require:

- Transparency around how an exempted PRC is conducted, including how information is disclosed,

- A process to respond to a request from an individual to review and potentially correct inaccurate information, and
- Protections to ensure, for example, that, in “most cases”:
 - Street check/carding information would not be included in an exempted PRC, and
 - Mental health contact information would not be included in an exempted PRC and no such information would be disclosed unless it related to an event that occurred within the last five years.

THE IPC’S RECOMMENDATIONS

As indicated at the outset, the work of designing permanent exemptions is of vital public importance. The Ministry’s task is to establish an exemptions framework that supports other employment-type screening tools, addresses objective public safety concerns, and effectively protects fundamental rights, including the right to privacy. To assist the Ministry in fulfilling its responsibilities, I recommend the following.

A. The Ministry should adopt the following three-part approach to designing permanent exemptions from the Act.

1. Limit the number of permanent exemptions and the scope of their application

In order to ensure that only necessary exemptions are granted, the Ministry should only grant an exemption on the basis of objective and demonstrable evidence that the PRCs authorized under the *Act* are insufficient to address a specific, significant and objective public safety concern, along with clear and compelling reasoning as to why. This requires that each sector, body, or employer provide the Ministry with sufficient information about the specific positions it believes require enhanced screening, including:

- A detailed description of the key functions of the positions, the specific safety concerns associated with those functions, and the classes of additional police-held information required to address the identified safety concerns,
- A detailed explanation as to why that information is required and how it will be used to address the specific safety concerns, and
- A detailed description of what, if any, process-related changes are required in terms of how an enhanced PRC is conducted and why those changes are necessary.

In my view, this approach should apply with respect to any proposed permanent exemption, including those related to the education and childcare sector that would permit the disclosure of information associated with charges, convictions, or outstanding orders under a provincial statute such as the *Child Youth and Family Services Act*, the *Child Care and Early Years Act*, or the *Highway Traffic Act*.

2. Narrow the scope of each exemption in terms of which provisions of the *Act* will not apply

To ensure that the scope of a permanent exemption is no wider than is necessary, each exemption must be carefully tailored such that it only restricts the application of those sections of the *Act* that can be shown to interfere with a valid public safety concern. In other words, permanent exemptions should only be granted on the basis of objective and demonstrable evidence, and clear and compelling reasoning why specific sections of the *Act* will interfere with a valid public safety concern. It follows that an exemption from the *Act* as a whole should be very hard to justify.

To begin with, it is difficult to imagine any justification for relaxing, let alone dispensing with, any of the *Act's* transparency and accountability requirements. A sector or organization *may* be able to satisfy the Ministry that it should amend the rules and restrictions related to the types of information that can be included in a PRC or relax the requirement to provide the PRC results to the individual who is the subject of the check before it is seen by the organization making the screening decision. However, it does not necessarily follow that there is any justification for denying individuals the right under the *Act* to see the results of their PRC, to seek correction of associated errors or omissions or to seek reconsideration with respect to the disclosure of non-conviction, let alone non-criminal information.

3. Where an exemption is justified, attach the necessary conditions to provide for protections comparable to those found within the *Act*

As indicated above, permanent exemptions should be limited in terms of which sections of the *Act* will not apply. Further, it is critical that any permanent exemption be accompanied by specific conditions that provide the police with clear and binding instructions, including those that govern the disclosure of non-conviction and non-criminal information.

Fortunately, the Ministry need look no further than to the *Act* itself as the source of model language upon which to draw in drafting the necessary rules, rights, and requirements. If, for example, a permanent exemption is to be enacted that permits some form of enhanced screening, it should, nonetheless come with conditions that establish:

- Rules setting out precisely what kinds of non-conviction or non-criminal records may be considered for disclosure by police,
- The thresholds and criteria governing any such police disclosure decisions, tailored to provide an effective and rational set of controls proportionate to the objective risks associated with the applicable positions to be screened, and
- Rules restricting the purpose for which recipient organizations may use PRC information.

B. The Ministry should ensure that any enhanced screening for the purpose of addressing demonstrable concerns related to organized crime and terrorism is accompanied by strong controls and protections

The Ministry is considering enacting permanent exemptions related to concerns about organized crime and terrorism. It seems reasonable to conclude that section 10 of the *Act* – the vulnerable sector screening provision – is not appropriate for the purposes of records check required to help a justice sector organization identify and screen out applicants who present a significant risk associated with organized crime or terrorism. Section 10 is aimed solely at preventing risks of harm to children and other vulnerable people. A different set of rules is clearly called for in relation to significant and demonstrable concerns about organized crime and terrorism.

Appropriately targeted and tailored, such rules should only permit the disclosure of specific classes of relevant non-conviction information where that information provides police with reasonable grounds to believe that the individual has consequential ties to organized crime or terrorism that would present an objectively significant risk to public safety or the proper administration of justice. It bears emphasizing that here too any such rules should only be contemplated and enacted once the three-part approach above has helped define a proportionate exemption with both an appropriately narrow scope and a sufficiently robust set of rights, rules and requirements.

C. The Ministry should refrain from permitting the disclosure of non-criminal information until longstanding concerns about police record holdings have been adequately addressed

The possibility of permitting the disclosure of non-criminal information raises additional concerns. Even if a sufficiently clear and compelling case were made justifying the disclosure of any such information along with the kinds of conditions discussed above, the Ministry should first take steps to ensure that police record holdings are properly vetted and appropriately purged, subject to the right of access or other applicable legal requirements. In my view, these steps are required to address longstanding and widespread concerns raised by the Ontario Human Rights Commission, among others, about the disproportionate rates of police documenting members of Indigenous and racialized communities and those suffering from mental illness. This is particularly the case in the context of police practices related to, for example, carding, street checks, traffic stops, mental health and addictions response, and search and seizure. Only by regularly purging information that is inaccurate, inappropriate, or no longer relevant or required, would it make sense to consider authorizing any such disclosures.

CONCLUSION

I believe that an appropriate framework for developing permanent exemptions should start from the premise that exemptions should be justified on clear and demonstrable evidence and that even justifiable exemptions should include conditions that provide for rules, rights, and requirements comparable to those found under the *Act*. In my view, the

three-part approach described above allows the Ministry to enhance public safety while protecting privacy and other fundamental human rights.

The IPC stands ready to meet with the Ministry in the coming weeks, including for the purpose of discussing the necessary rules and conditions required to control the police disclosure of non-conviction information. I look forward to further discussions with the Ministry regarding these vital issues.

In the interest of transparency, I intend to post this submission on our website.

Sincerely,

A handwritten signature in black ink, appearing to read "Kosseim", with a horizontal line underneath the name.

Patricia Kosseim
Commissioner