



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

VIA ELECTRONIC MAIL & ONLINE SUBMISSION

July 20, 2021

Ms. Michelina Longo
Director, External Relations Branch, Public Safety Division
Ministry of the Solicitor General
George Drew Bldg 12th Flr, 25 Grosvenor St
Toronto, ON M7A 1Y6

Dear Ms. Longo:

RE: Regulation Registry Proposals 21-SOLGEN004, 21-SOLGEN005, 21-SOLGEN011, 21-SOLGEN012, and 21-SOLGEN013

Thank you for the opportunity to participate in the Ministry of the Solicitor General (the Ministry) consultation on regulations under the *Community Safety and Policing Act, 2019 (CSPA)*. The *CSPA* will repeal and replace the *Police Services Act*, the legislation governing the standards and framework of policing in Ontario. The Ministry consulted with our office on privacy and access matters relating to the *CSPA*, and we have been very pleased to continue this productive engagement over the last several weeks. Our thanks to you and your team for taking time to meet with my team on June 30 and July 8 about the seven proposed *CSPA* regulations that were posted to the Regulation Registry on June 11, 2021 for public consultation.

We are writing with respect to the following five of those seven proposed regulations:

- [21-SOLGEN004](#) – Code of Conduct for Police Officers
- [21-SOLGEN005](#) – Code of Conduct for Police Service Board members
- [21-SOLGEN011](#) – Code of Conduct for Advisory Council
- [21-SOLGEN012](#) – Standard – Investigations
- [21-SOLGEN013](#) – Responses to Active Attacker Incidents

As the office with the mandate to protect the privacy and access to information rights of Ontarians within the public sector, the purpose of our recommendations is to help ensure that these regulations include measures to support good governance of personal information, and promote transparency, while protecting the need for the confidentiality of sensitive policing information. In addition, these recommendations will support consistent, effective, and accountable policing across Ontario.

In the discussion that follows, we will address our recommendations with respect to code of conduct related regulatory proposals first, before turning to the regulatory proposals related to investigations and responses to active attacker incidents.



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1. Code of Conduct Regulations (Proposals 21-SOLGEN004, 21-SOLGEN005, and 21-SOLGEN011)

The *CSPA* requires police officers, police service board members, and Ontario Provincial Police Governance Advisory Council members to adhere to Codes of Conduct that are prescribed by regulation. Each Code of Conduct establishes duties and expectations for the members to whom they apply. Three of the proposed regulations under the *CSPA* are these Codes of Conduct:

- [21-SOLGEN004](#) – Code of Conduct for Police Officers
- [21-SOLGEN005](#) – Code of Conduct for Police Service Board Members
- [21-SOLGEN011](#) – Code of Conduct for Advisory Council

A) Prohibition on Disclosures to the Public

Each Code of Conduct regulation contains a provision that sets limits on the information that an officer, board member, or Advisory Council member can disclose to the public.

Unfortunately, section 16(1) of the Code of Conduct for Police Officers regulation appears to prohibit officers from disclosing information to the public that would otherwise be permitted under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* or the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

In particular, section 16(1) provides that:

A police officer shall not disclose to the public information obtained or made available in the course of their duties as a police officer except as authorized in accordance with the procedures established by their chief of police or as required by law.

As drafted, this provision may effectively prevent officers from disclosing information to the public when an officer needs to, for example:

- communicate personal information about a named suspect, victim, or other person of interest to members of the public who are or may be a witness to an incident under investigation;
- disclose personal information about a specific but yet to be identified individual for whom they are searching to help develop investigative leads; or
- update family members about an injured or deceased family member.

In addition, this provision may become a basis for an officer refusing to disclose information that the public requires for legitimate purposes including those related to transparency and accountability. Leaving it to individual Chiefs' procedures to address these concerns is likely to lead to inconsistent approaches to privacy, transparency, and police discipline across the province. In our view, the quality of the instructions provided to police officers on these critical matters should not depend on the priorities of, or resources available to, any one particular chief of police. The baseline standard can and should be provided for in provincial regulations.

Accordingly, we recommend that in addition to any guidance the Ministry may provide to chiefs about the preparation of necessary procedures (and boards about the related policies), section 16(1) of the Code of Conduct for Police Officers regulation be amended to read as follows:

16. (1) A police officer shall not disclose to the public information obtained or made available in the course of their duties as a police officer except where the disclosure is
- (a) required by law or
 - (b) permitted by law and consistent with the policies of their police service board and the procedures established by their chief of police.

This amendment would ensure that by default, officers are permitted the latitude provided by *MFIPPA* and *FIPPA*, but would also enable the board and chief to set parameters around the discretion granted to officers under these statutes.

We recommend that comparable amendments be made to section 15(1) of the Code of Conduct for Police Service Board Members regulation and section 15(1) of the Code of Conduct for Advisory Council regulation.

B) Contraventions of Other Legislation

The draft Code of Conduct regulations for police officers (sections 4 and 5), board members (sections 8 and 9), and Advisory Council members (sections 8 and 9) define misconduct to include contraventions of legislation such as the *Criminal Code*, the *Controlled Drugs and Substances Act*, and the *Ontario Human Rights Code*. No similar provisions exist in the Code of Conduct regulations in relation to contraventions of *MFIPPA* or *FIPPA*.

We recommend that a new code of conduct matter be established with respect to a contravention of the specific sections of *MFIPPA* and *FIPPA* that define access and privacy-related offences. In particular, we recommend that the Code of Conduct for Police Officers regulation include the following new provision:

- 4.1. A police officer contravenes this code of conduct if they are found guilty of an offence under section 48 of the *Municipal Freedom of Information and Protection of Privacy Act* or section 61 of the *Freedom of Information and Protection of Privacy Act*.

We recommend that a comparable section be added as section 8.1 to both the Conduct for Police Service Board Members regulation and the Code of Conduct for Advisory Council regulation.

2. Standard – Investigations Regulation (Proposal 21-SOLGEN012)

The Standard – Investigations regulation establishes the standards and duties that apply during investigations by members of police services. Section 1 of the regulation defines an “investigation” as:

- ...a systematic inquiry to
- (a) locate a missing person, or
 - (b) determine whether an offence under the *Criminal Code* (Canada), the *Controlled Drugs and Substances Act* (Canada) or the *Cannabis Act* (Canada) has been or will

be committed when there is a reasonable suspicion that such an offence has been or will be committed;

Section 7(1) of the regulation requires a supervisor to determine whether a missing persons matter or a suspected offence will be investigated. While the regulation sets out a number of duties the supervisor must perform once they have determined that a matter will be investigated, the regulation does not require the supervisor to document their decision not to investigate, or record the reasons for their decision.

It is our view that the documentation of every decision not to investigate is critical. The need for documentation is particularly vital, given human rights concerns about underserved communities, including concerns related to the under-policing of crimes against Indigenous peoples, members of racialized communities, and those who work in the sex trade.¹ In addition, there is significant public interest in investigations into missing individuals, including as demonstrated by Justice Epstein's Independent Civilian Review into Missing Person Investigations² and the National Inquiry into Missing and Murdered Indigenous Women and Girls.³

Accordingly, we recommend that section 7 of the regulation be amended to require that supervisors document their decision not to investigate a matter under section 5 and provide written reasons. To assist the Ministry in developing such an amendment, we suggest the following as a starting point:

7. (1.1) If the supervisor determines the matter will not be investigated, the supervisor shall document that decision, the reasons for that decision, and the steps taken to inform that decision.

3. Responses to Active Attacker Incidents Regulation (Proposal 21-SOLGEN013)

The Responses to Active Attacker Incidents Regulation sets out the standards and duties of police services in responding to and reporting on active attacker incidents. Section 1 of the regulation defines an “active attacker” as:

...an individual who appears to be engaged in, attempting to engage in, or about to engage in an attack where there is reason to suspect that,

- (a) the attack will be sustained,
- (b) the attacker will cause serious bodily harm or death to other individuals, and
- (c) the attacker will continue to attack more individuals if the attacker is not stopped.

¹ Canadian HIV/AIDS Legal Network, “[The Perils of “Protection”: Sex Workers’ experiences of law enforcement in Ontario](#)” (March 27, 2019), retrieved July 14, 2021; Ontario Human Rights Commission, “[Policy on Eliminating Racial Profiling in Law Enforcement](#)” (September 20, 2019), retrieved July 14, 2021.

² The Honourable Gloria J. Epstein, “[Missing and Missed: Report of the Independent Civilian Review into Missing Person Investigations](#)” (April 9, 2021), retrieved July 14, 2021.

³ National Inquiry into Missing and Murdered Indigenous Women and Girls, “[Reclaiming Power and Place](#)” (June 3, 2019), retrieved July 14, 2021.

A) Chief's Report

Section 9 of the proposed regulation requires the chief of police to prepare a report reviewing and evaluating the police service's response to an active attacker incident. This section sets out the required content of the report, but does not specify to whom – if anyone – this report is delivered, or whether the report will be made public.

Police response to active attacker incidents may be of significant public interest in terms of service delivery and public safety, as well as with regard to issues such as the use of force. We understand that under the *CSPA*, the Inspector General, police services boards, and the Minister in the case of the Ontario Provincial Police (OPP), have the power to compel information from the chief, including these reports. However, it is our view that leaving it to boards and the Inspector General to ask for reports reduces the likelihood of consistent and transparent oversight of what are often very significant policing actions.

Given the public interest in these reports and effective oversight and accountability of policing, we recommend that the chief be required to submit the report to the police service board, or the Minister in the case of the OPP. In addition, we recommend that in a reasonable period thereafter, such as 90 days after submitting the report to the board or Minister, the report or, in defined circumstances, a redacted copy of the report, be made available to the public. Note that our reference to a redacted report is designed to allow for the withholding of, for example, any sensitive operational information the disclosure of which would jeopardize safe and effective policing.

Accordingly, we recommend that section 9 of the regulation be amended by adding the following new subsections:

9. (3) The chief of police shall provide their police service board or, in the case of the Commissioner of the Ontario Provincial Police, the Minister with the report prepared under subsection (1).

(4) Within 90 days of providing their board or, in the case of the Commissioner of the Ontario Provincial Police, the Minister with the report prepared under subsection (1), the chief of police shall, subject to subsection (5), make a copy of the report available to members of the public by publishing it on the service's website.

(5) The chief of police shall ensure that the copy of the report provided to the public is redacted, but only to the extent necessary to protect a privacy right or interest provided for under the *Municipal Freedom of Information and Protection of Privacy Act* or the *Freedom of Information and Protection of Privacy Act*.

(6) In providing the public with a redacted report under subsection (5), the chief of police shall attach a summary of the report that includes an explanation of the reasons for the redactions.

B) Public Alerts

Section 7 of the proposed regulation requires the chief of police to ensure that the police service has the ability to issue public alerts using an emergency alert system that delivers alerts through television,

radio, and wireless devices and using social media notifications. However, the regulation does not address privacy considerations with regard to issuing these public alerts.

While we recognize the importance of ensuring that emergency alerts allow for the disclosure of sufficient information to ensure public safety, we recommend that the regulation include data minimization requirements with respect to what personal information can be disclosed as part of an emergency alert or a related social media notification. In particular, we recommend the following provisions be added to the regulation:

Other information serves purpose

7.1 In issuing a public alert under section 7, every chief of police shall ensure that the alert does not disclose personal information if other information will serve the purpose of the disclosure.

Personal information limited to what is reasonably necessary

7.2 In issuing a public alert under section 7, every chief of police shall ensure that the alert does not disclose more personal information than is reasonably necessary to meet the purpose of the disclosure.

In conclusion, we appreciate the time the Ministry has devoted to discussions with our office about the proposed regulations. We look forward to continuing to engage with the Ministry on other privacy and access related matters associated with bringing the *CSPA* into force.

In the interest of transparency, we will be making this submission available on our website.

Sincerely,

A handwritten signature in blue ink, appearing to read "R Barrette".

Renee Barrette
Director of Policy