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Ontario Human Rights Commission

Commission ontarienne des droits de la personne

Office of the Chief Commissioner

Cabinet du commissaire en chef

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COPY

January 22, 2007

Chief Terry McLaren
Peterborough - Lakefield Community Police Service
P.O. Box 2050
500 Water Street
Peterborough, ON
K9J 7Y4

Dear Chief McLaren,

Re: The Impact of Police Records Searches on Persons with Mental Illness

I am writing to inform you about the potentially discriminatory impact of police records search processes on persons who have had non-criminal contact with police because of mental illness, to offer suggestions for addressing the problem, and to provide an example of steps taken by one Ontario police service in order to comply with Ontario's *Human Rights Code* (the "Code"). Because of ongoing concerns, the Commission has decided to contact the Ontario Provincial Police and municipal police services province-wide about the matter.

The *Code* requires that service providers, including policing organizations, provide services in a manner that does not discriminate against persons with disabilities, whether mental or physical. Approximately 20% of Canadians will experience mental illness at some point in their lives,¹⁵³ and they often face significant stigmatization and barriers in areas such as employment.

The Commission has received a number of inquiries and complaints about the impact of employment and volunteer-related police records searches on Ontarians who have had non-criminal contact with police because of ongoing or past mental illness. The Psychiatric Patient Advocate Office has indicated that police practices in assessing and disclosing this information have the effect of "criminalizing" persons with current or past mental illness, impeding their successful reintegration into the community and their pursuit of life and career aspirations.

¹⁵³ Health Canada. *A Report on Mental Illnesses in Canada*, Ottawa, Canada 2002. Accessed through the Canadian Mental Health Association website, at <http://www.cmha.ca>. Last accessed October 24 2006.

Although it is permissible under the *Code* to inquire about a record of offence for which a pardon has not been granted, the disclosure of information by police forces may constitute a violation of the *Code* if it goes beyond the *bona fide* criminal record of an individual. This includes information relating directly or indirectly to mental illness, another disability, or other prohibited grounds of discrimination. I understand that police records checks are frequently performed to assist employers and other organizations in protecting vulnerable clients, and are in some cases required.¹⁵⁴ However, consideration of a person's suitability for a position should not be based on stereotypical assumptions relating to *Code* grounds, such as mental illness or other disability.

The Supreme Court of Canada has set out a test for assessing whether a discriminatory requirement, policy, practice, or rule may be justified as *bona fide*. This test considers whether there is a link between the requirement and the function being performed, whether it was established in the belief that it is necessary, and whether the requirement is reasonably necessary to accomplish its purpose.¹⁵⁵ Further, as indicated in the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* (the "*Policy*") states that (s. 4.3.3(b)), the "...fact that a person has a disability, in and of itself, is not sufficient to establish that there is a risk."

Therefore, where a police service has records about contact with a person relating to mental illness, the person should not be automatically assumed to be unfit for the position or to pose a risk, nor be identified as such in any information disclosed to outside organizations. For example, without further assessment, police services should not automatically indicate that the person has or had mental illness, that there is reason for "caution" or "concern", or that there was other, unspecified contact, leading an employer or other organization to assume that the person presents a risk.

Instead, police services should undertake an individualized assessment, taking into account the nature of the police contact, the essential duties of the specific position¹⁵⁶ and an evaluation of the actual degree of risk associated with the person's placement in that position. The *Policy* describes (s. 4.3.3 (b)) factors that should be considered in assessing risk, including:

- the nature of the risk
 - what could happen that would be harmful?
- the severity of the risk
 - how serious would the harm be if it occurred?
- the probability of the risk:

¹⁵⁴ For certain positions involving work with vulnerable persons, organizations are required to ask for a full criminal and police records check (*Education Act*, O. Reg. 521/01 at ss. 2-3, *Developmental Services Act*, R.R.O. 1990, Reg. 272 at s. 13.1(k))

¹⁵⁵ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 68 ["Meiorin"].

¹⁵⁶ The Commission document, *Human Rights at Work* (IV.1), provides more information on *bona fide* requirements and essential duties.

- how likely is it that the potential harm will actually occur?
- is it a real risk, or merely hypothetical or speculative?
- could it occur frequently?
- the scope of the risk:
 - who will be affected by the event if it occurs?

This assessment decreases the discriminatory impact on persons with mental illness, ensuring that decisions are made based on a detailed evaluation of risk, rather than on stereotypes or assumptions about mental illness. In the rare case that the police service decides that it is necessary to convey concern, it will be better prepared to respond should a complaint be filed. Any information disclosed should maintain confidentiality regarding the disability, rather than, for example, indicating that there was contact relating to the *Mental Health Act*.

The Commission recently resolved a complaint on this matter, through a positive settlement between the complainant and the London Police Service (LPS). As you will see in the enclosed details of settlement, the LPS took a number of significant steps to address the concerns raised in the complaint. The Ontario Human Rights Commission commends the London Police Service for their positive approach in addressing the community's concerns and ensuring that they comply with the *Code* in providing background check and screening services.

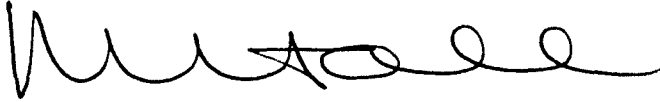
I would like to draw particular attention to the work the LPS did in developing and implementing an individualized risk assessment process. The new screening process is based on the details about the applicant's contact with police, and the nature and degree of contact with vulnerable persons that the applicant would have in the position. Accordingly, the LPS amended their forms to gather more specific details about the position in question, and developed training for staff on the new assessment process. They also implemented an appeals mechanism and conducted informational seminars with stakeholder groups in the volunteer and mental health sectors.

It is the Commission's hope and intention that these matters can be resolved province-wide through cooperative efforts and systemic change, rather than the human rights complaints process. I have provided information about this settlement as an example both of how an individual police service has acted to comply with the *Code*, and of how the Commission may proceed with similar cases in the future.

For more information on assessment of risk, please see the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*. All of the Commission's publications can be found on our website, at www.ohrc.on.ca. If you would like information from the London Police Service about their forms, procedures, or assessment tools, please contact Eldon Amoroso, Senior Director, Support Services Division, at (519) 661-5670. If you require further information, please contact Jacquelin Pegg, Policy Analyst with the Commission's Policy and Education Branch, at (416) 212-6565.

I hope that this information is helpful to you in ensuring that your organization is not acting in a discriminatory manner in performing and disclosing the results of these searches.

Yours truly,



Barbara Hall, B.A, LL.B, Ph.D (hon.)
Chief Commissioner

c.c. Honourable Monte Kwinter
Ministry of Community Safety and Correctional Services

Chief Terry McLaren, President
Ontario Association of Chiefs of Police

Bernie Morelli, President
Ontario Association of Police Services Boards

Julian Fantino, Commissioner
Ontario Provincial Police

✓ David Simpson, Director (Acting)
Psychiatric Patient Advocate Office

Ann Cavoukian
Information and Privacy Commissioner

Encl.

Ontario Human Rights Commission settlement: disclosure of personal information relating to mental illness through police records searches

In May 2006, the Commission approved a settlement of a complaint between an individual and the London Police Service (LPS) regarding disclosure through police records searches of information relating to mental illness. The following are the issues of public interest based on which the parties agreed to settle the matter:

1. The LPS acknowledged that it has a responsibility to protect the safety of vulnerable members of society, those who cannot be expected to protect themselves, such as children, the elderly and persons with mental disabilities, in accordance with the *Police Services Act*, R.S.O. 1990, c. P. 15 as amended.
2. The LPS acknowledged that it provides a service whereby an employer or agency can submit a Police Records Check and Vulnerable Position Screening form on an applicant, who is interested in employment or volunteering with the employer or agency, and a Records Screening Operator employed by the LPS will carry out the Police Records Check and Vulnerable Position Screening process.
3. The LPS acknowledged that it indicates to the employer or agency whether the applicant: does or does not have Information of Concern on file, does or does not have a criminal record with the London Police Service, and does or does not have a criminal record in the RCMP National Repository for Criminal Records in Canada.
4. The LPS acknowledged that, in the fall of 2004, it started overhauling its Vulnerable Position Screening process. It acknowledged that the first change made to its process was to put in place a more comprehensive review of vulnerable position screening for persons with potential Information of Concern related to suicide, whereby the LPS would attempt to determine whether there was a risk to others.
5. The LPS acknowledged that the second change to its process was to develop a system that looks at potential Information of Concern more objectively, with written guidelines, and attempts to analyze the level of risk associated with the person's occupation of the particular position in question. It also acknowledged that it developed a list of questions that attempts to objectively quantify the risk level associated with particular position being filled by a particular person. It acknowledged that, if it is unsure of what position the person will be doing, it will rate the person at the highest risk level.
6. The LPS implemented this amended process for Police Records Check and Vulnerable Position Screening.
7. The LPS made a presentation about the amended process for Police Records Check and Vulnerable Position Screening at a meeting of London and Area Volunteer Administrators (LAVA) on May 17, 2005

8. The LPS also implemented a process whereby the recipients of the Police Records Check and Vulnerable Position Screening form can appeal the decisions made by the Records Screening Operator.
9. The LPS had prepared an amended Police Records Check and Vulnerable Position Screening form, which included the new risk assessment questions in regard to the particular job being applied for
10. The LPS was working with various organizations to co-ordinate educational seminars to allow the amended Police Records Check and Vulnerable Position Screening form to be implemented. It committed to complete the seminars by April 21, 2006.
11. The LPS agreed to complete the implementation of the amended Police Records Check and Vulnerable Position Screening form by July 31, 2006. The LPS agreed to provide to the Commission a letter confirming the date of implementation of the amended Police Records Check and Vulnerable Position Screening form by August 15, 2006.
12. The LPS provided training to its current Record Screening Operators on the amended Police Records Check and Vulnerable Position Screening process and form. They agreed to continue to provide such training to Record Screening Operators who they hire in the future.
13. The parties agreed that these Minutes of Settlement and Release are confidential as between them and will not be disclosed to any third party, including the media, save as may be required by law or in order to implement the terms of settlement contained herein. It is understood by the parties that the Commission is not so bound. It is understood that the complainant may disclose the terms herein to his immediate family members and legal advisors. The parties agreed to not disclose the circumstances of the matters giving rise to the instant complaint to any third party, including the media.
14. The complainant agreed that the settlement is in full, final and complete settlement of all claims existing up to the date hereof, arising out of or in any way relating to the matters giving rise to the complaint referred to above against the corporate respondent.
15. It is understood and agreed that the corporate respondent by entering into this agreement does not admit any violations of any provisions of the **Code**. It is further understood and agreed that the complainant does not retract any allegation.