

Police Background Checks – Balancing Public Safety, Security and Privacy

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In recent years, it has become increasingly common to request applicants seeking jobs, opportunities to volunteer, educational opportunities, and admission to many trades and professions to provide a "police background check" as part of the process of screening for suitability.

Police background checks, also known as "criminal record checks" or "criminal reference checks", are often required by law or practice where an applicant or incumbent in a position of trust will have regular or unsupervised access to vulnerable individuals such as children, the disabled, and the elderly or where he or she will have access to money, confidential information, or vulnerable property.

In a brochure published in 2000, entitled *Understanding Criminal Records*, the John Howard Society of Alberta listed about thirty volunteer, educational and employment positions for which a police background check is likely to be done, including accounting, banking, payroll positions, cashiers, child care workers and volunteers, correctional centre workers, physiotherapists, police, school staff, criminology students, and veterinarians.

Benefits and problems of police background checks

Protecting vulnerable individuals from harm or employers from theft is an important goal. Indeed, a company, agency or school that fails to protect itself, its clients, and the public by checking an applicant's background runs the risk of being negligent. Failure to collect relevant information may result in physical or psychological harm to coworkers or charges, particularly vulnerable clients such as children and the elderly. It can also result in financial loss to an employer or agency or to its clients through fraud, theft or property damage, and may expose the employer or agency to civil liability for harm that might have been foreseen and prevented had more information been disclosed.

On the other hand, providing too much information – that is, information that is unnecessary for determining suitability or incorrect – may violate the privacy of an applicant and lead to unfair rejection. Significant harm to applicants can arise both when a police report provides irrelevant but inflammatory information and when the information provided is inaccurate or incomplete. The applicant could be denied access to accommodation, employment, and other important benefits and opportunities, based on incorrect or inflammatory information.

Unfortunately, what information may be disclosed in a police background check report and how that information may be used by prospective employers, landlords, and others is largely unregulated in Ontario. In the absence of legislation clearly defining what information may be included in a background check report and how the information may be used by prospective employers, there is a danger of providing either too much or too little information.

The way police background checks are conducted in Ontario, and likely in other parts of Canada, creates a risk of substantial and harmful violation of the privacy and human rights of applicants. Individuals often assume that a police background check will be limited to convictions for criminal offences. They assume that if they have not been convicted of a crime or other serious offences, the report will come back "negative". In fact, police databases may contain information about any contact with the police, whether as a complainant, victim of crime, potential witness, suspect, or "person of interest", or as someone charged with a crime even if charges were subsequently dropped or an acquittal resulted. In many cases, any of this information may be included in a police background check report, regardless of whether it is relevant to a candidate's suitability for a position or eligibility for a benefit.

For example, in 2006, the Information and Privacy Commissioner/Ontario (IPC) received two similar complaints about practices of the Toronto Police Service from individuals who were denied positions interacting with vulnerable individuals. In both cases, the individuals had been detained under the *Mental Health Act*, which permits police to take an individual to be assessed by a physician if he or she

is acting in a manner that gives the police reason to believe that the person may cause harm to herself or others.

When the two organizations received information from police about these individuals who had applied for employment, both organizations denied the applications.

Although both individuals had signed a consent authorizing the police to disclose information in their records to the organizations, the consent form did not make it clear that this included mental health records. As a result, IPC investigator Mark Ratner ruled that the disclosure by the police did not comply with section 32 of the *Municipal Freedom of Information and Protection of Privacy Act*, which permits police to disclose personal information where the individual to whom it relates *has identified that information in particular* and consented to its disclosure.

Similar problems with police checks have arisen in other jurisdictions as well. A San Francisco couple was prevented from adopting a child because a background check report stated that the husband had a criminal record, even though he had "never been in any kind of trouble, ever for anything". Only after the family hired a lawyer and began preparing a lawsuit did the husband receive a letter from the state Justice Department apologizing and acknowledging that he had no criminal record.

Similarly, in 2007, a job applicant in New Zealand won \$12,500 in damages before a human rights tribunal against police who revealed sealed details of a failed court case to a prospective employer.

The limited ability of privacy and human rights laws to prevent problems

While privacy laws place some constraints on what information may be disclosed and how it is used, they are not always well designed to deal with this particular kind of problem. In his June 2006 report *Controlled Disclosure of Criminal Record Data*, the Privacy Commissioner of Victoria, Australia found:

Although privacy laws generally restrict collection, use and disclosure of criminal records and other personal information to what is necessary and relevant (such as to lessen or prevent a serious threat to public safety or public welfare), the legislation is easily trumped by other laws that mandate police checks regardless of necessity or relevance, or expressly dispense with any discretion in how such information might be used.

Human rights laws may also provide protection in some circumstances. For example, as a result of complaints about the London, Ontario police disclosing mental health information, the Ontario Human Rights Commission recently issued a letter to all police forces in Ontario urging them to adopt a "risk-based" approach to disclosure of mental health information.

The Commission states that if a police background check reveals information relating to mental illness, the police should "not 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 position and an evaluation of the actual degree of risk associated with the person's placement in that position".

While human rights laws may protect individuals from discrimination on grounds such as illness, gender, race or religion, they do not assist other individuals such as the San Francisco couple who faced adoption difficulties from disclosure of inaccurate information or from revealing information that may be irrelevant to a risk analysis, such as old convictions for minor offences.

What are the police and government departments that supervise them doing about the problem?

In response to letters from David Simpson, Acting Director of Ontario's Psychiatric Patient Advocate Office, complaining in 2006 about the disclosure of mental health information in police checks to the federal Minister responsible for the RCMP and the Ontario Minister responsible for the OPP and municipal police, both senior levels of government disavowed any responsibility for how police carry

out this function. Monte Kwinter, Ontario's Minister of Community Safety, replied: "This ministry does not set provincewide policies in relation to background checks. These policies are set by individual agencies in conjunction with the policies and procedures of the police service within their jurisdiction".

However, police departments themselves recognize that there is a problem in how they carry out background checks. In 1999, the Ontario Association of Chiefs of Police (OACP) produced guidelines for police departments to use in carrying out background checks, which have never been released to the public. The Durham Police, among others, have acknowledged that these guidelines have not resulted in consistent practices among police forces. As a result, the Durham Police and Toronto Police both wrote to Minister Kwinter asking that the provincial government create standards for police background checks. They received the same response as the Psychiatric Patient Advocate Office – not our responsibility. LEARN (the Law Enforcement and Records Managers Network), a committee of the OACP, began a review of these guidelines in 2006 that may lead to greater consistency.

What have other jurisdictions done?

Other jurisdictions have recognized this concern by introducing specific legislation to regulate what police may disclose in police background checks, how the accuracy and relevance of the information can be verified, and what uses recipient organizations may make of the information.

For example, British Columbia's *Criminal Records Review Act* requires specified employers and the governing bodies of certain professions to ensure that prospective employees or practitioners who will work with children undergo a criminal record check. However, employers are prohibited from requiring such a check until they have made a conditional offer. Although the Act does not explicitly state what information is to be provided by the police, it appears to be limited to convictions and outstanding charges for specified offences.

If a record is found, this does not automatically exclude the applicant from the position. An adjudicator must determine whether the conviction or charge means that the individual represents a risk. If the adjudicator rules that there is no risk, the employer is free to hire the individual despite the record. If the adjudicator finds that the individual does pose a risk, the individual has a right to appeal the ruling.

Britain's *Police Act, 1997* regulates what information may be included in a "criminal record check" report. In most cases, the government will issue a report to the individual to whom it relates, but not to the potential employer. It is up to the individual to decide whether to give it to the employer (although the employer would undoubtedly be entitled to take into account an applicant's failure to provide the report). The report will show only "unspent" convictions. (A spent conviction is similar to a pardoned conviction in Canada). The report will not show "spent" convictions or cautions.

To ask for a more detailed check that provides additional information, an employer must be registered and must have the consent of the prospective employee to receive the record. Only employers who provide services to vulnerable individuals or have substantial security concerns are entitled to be registered.

An applicant who considers information in a report to be inaccurate may apply to the government to correct it.

Illinois' *Health Care Worker Background Check Act* has been in effect since 1995. It prohibits nursing homes, hospitals and other designated "health care employers" from hiring anyone to care for the sick who has been convicted of committing or attempting to commit certain listed offences. Once the health care employer has made a conditional offer of employment, it must apply to the State Police for a "criminal history record check".

The Act provides that the applicant must be informed of the employer's application, has a right to obtain a copy of the report sent to the employer, and has a right to challenge the accuracy and completeness of the report.

If the report shows a conviction, the applicant has the right to apply to a regulatory body for a waiver of the prohibition against employment. In deciding whether to permit the hiring despite the record,

the regulatory body must consider factors such as the age of the applicant when the offence was committed; the circumstances surrounding the offence; the length of time since the conviction; criminal history since the conviction; work history; current employment references; character references; and any other evidence demonstrating the suitability of the applicant or indicating that the applicant does not pose a threat to the health or safety of his or her charges.

Conclusion

The increasing use of police background checks to screen applicants for suitability for many employment and volunteer opportunities and eligibility for other positions and benefits has been raising privacy and human rights concerns that are starting to reach news media, tribunals and courts.

While they constitute an important safeguard for public safety and security, police checks also have the potential to unfairly deprive applicants of important benefits and opportunities, and can interfere with their ability to fulfill their potential as human beings or to earn a living.

It is questionable whether privacy and human rights laws alone as presently constituted are enough to ensure a proper balance between public safety and personal privacy in deciding what is to be disclosed and how it is to be used.

In deciding how to strike a proper balance, it may be worthwhile to consider the approaches taken by other jurisdictions that have passed laws specifically dealing with police background checks. These laws often specify clearly what personal information may be disclosed and mandate a risk-assessment approach to determining what can be disclosed and how that information may be used. In addition, these laws often provide an opportunity to challenge decisions on police background checks on the basis of inaccuracy, irrelevance or unfairness.

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