

Ontario Passes Police Record Checks Legislation

Tuesday, December 1, 2015

On December 1, 2015, the Ontario government unanimously enacted the *Police Record Checks Reform Act, 2015* (the "Act"). The Act limits the types of information that can be released in each of three different types of police record checks. Notably, it prohibits disclosure of mental health records and records from police "carding" checks and other non-conviction records, except in limited circumstances. It also standardizes the disclosure procedure.

The Act is not yet in force, but will come into force on a date to be named by proclamation of the Lieutenant Governor.

Background

The Act was introduced after lobbying efforts from various civil liberties advocacy groups, who protested the broad scope and inconsistent practices of police record check disclosure. These checks had included more than convictions: they disclosed records of suicide attempts, mental health detentions, complaints where charges were never laid, withdrawn charges, and acquittals. This information became available when individuals attempted to cross the US border or when checks were conducted for volunteer, employment, educational, or licensing applications. The release of these non-conviction records was viewed as creating barriers to education, employment, volunteering, and other opportunities.

Application

The Act generally applies to checks conducted as part of applications for employment, volunteering, licensing, office, group membership, and education. It does not affect searches conducted for child custody, youth criminal justice, change of name, juries, firearms, or Crown prosecution purposes.

The Act authorizes police forces to conduct three defined types of police record checks: criminal record checks, criminal record and judicial matters checks, and vulnerable sector checks (performed when an individual is in a position of trust or authority over vulnerable persons like children or the elderly). Each category has specific disclosure permitted and standardized, as discussed below.

Certain other parties are also authorized to conduct those types of police record checks if they are permitted to do so under an agreement with a police force or under Canadian law.

Limited disclosure permitted

The Act sets out a schedule that outlines when disclosure is permitted. The schedule addresses information relating to mental health orders, convictions, absolute and conditional discharges, outstanding charges or arrest warrants, pardoned convictions, and other non-conviction information. Generally, more disclosure is permitted for vulnerable sector checks than for criminal record and judicial matters check, and more disclosure is permitted for criminal record and judicial matters check than for a standard criminal record check.

The Act's most significant limitation on disclosure is in the areas of mental health and non-conviction information. Non-conviction information (such as complaints where no charges

were laid, acquittals, etc.) can only be disclosed in a vulnerable sector check and only if it meets the test for exceptional disclosure, discussed below.

Court orders made under the *Mental Health Act* or Part XX.1 of the *Criminal Code* generally may not be disclosed under any of the three types of records check. Criminal offences for which the individual has been found not criminally responsible on account of mental disorder generally may only be disclosed under a vulnerable sector check that is made within five years of the finding. Restraining orders made under the *Family Law Act*, *Children's Law Reform Act*, or *Child and Family Services Act*, and court orders relating to charges that have been withdrawn, generally may not be disclosed under any type of check.

However, there are provisions in the Act for exceptions to these disclosure rules for vulnerable sector checks. Police must consider factors such as how long ago an incident took place, if the record relates to predatory behaviour around a vulnerable person, and whether the records show a pattern of such behaviour before deciding whether to release those records in a vulnerable sector check.

Standardized disclosure practices

In addition to limiting disclosure, the Act also prescribes a system for how to disclose information in record checks. It lays out requirements for how to request a record check, how to respond, selecting which type of check is to be performed, obtaining consent, proper scope and manner of disclosure, implementing a process for correcting errors, tracking statistics, and holding third parties accountable.

Enforcement

A person or organization that willfully contravenes certain provisions of the Act is guilty of an offence, and is liable to a fine of not more than \$5,000. A prosecution cannot be commenced unless the Minister of Community Safety and Correctional Services consents.

Looking Ahead

While the Act is not yet in force, it will likely be proclaimed in the near future. Given the implementation of different types of checks that carry different disclosure permissions, there may need to be changes to the system for requesting background checks. This means that employers should be prepared for new logistical and organizational steps in order to adapt.

Employers requesting record checks will no longer be provided with information about mental health orders or non-conviction records, except in limited circumstances.

For more details regarding the full set of changes brought in by the Act, please contact any member of the [Labour and Employment Group](#) at Borden Ladner Gervais LLP, who would be pleased to assist you with any questions.

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