

What You Need to Know about Police Record Checks

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By Debra McKenna

If you're like me and had all but forgotten about the new *Police Record Checks Reform Act, 2015*,^[1] you are forgiven – you're not the only one. It seems that, until very recently, the government had also forgotten about this *Act*, which has been sitting in legislative limbo, unproclaimed, since it received Royal Assent on December 3, 2015. However, this legislation returned to life on April 25, 2018, with an Order in Council proclaiming that the *Act* would come into force on November 1, 2018.^[2] This was quickly followed by four new regulations on April 27, 2018.^[3] Clearly, someone was getting ready for an election. So let's revisit.

As you may recall, prior to this legislation, concerns were raised that certain information collected by police (so-called non-conviction information, such as mental health matters and/or unproven criminal allegations) was being disclosed to employers, government agencies, and others through police record checks. In addition to human rights issues, such disclosure affected employment and other opportunities. As a result, Bill 113 was introduced on June 3, 2015. The government indicated that the purpose of the legislation was to remove those barriers, while still protecting the public and the rights of individuals.^[4]

To do so, the *Act* provides a comprehensive framework and province-wide standards for how police record checks are requested and conducted, including rules for consent and disclosure.^[5] In particular, while there are various exemptions under the *Act* and prescribed by regulation (O. Reg. 347/18), as to whom the *Act* applies (for example, it will not apply to a search requested by a children's aid society for the purpose of section 35(1) of the *Child, Youth, and Family Services Act, 2017*^[6]), no police record check can be conducted or disclosed without the consent of the individual who is the subject of the request.^[7] Such consent must be in writing,^[8] and the consent must indicate what type of police record check is to be conducted.^[9]

In this regard, the *Act* establishes three types of police record checks (criminal record check, criminal record and judicial matters check, and vulnerable sector check),^[10] which disclose varying degrees of information. Under each category, police are only authorized to disclose the information that is set out in the *Act*^[11] – no other information can be provided and “willful” contravention of the *Act* can give rise to prosecution as a provincial offence.^[12]

As for the nuts and bolts of what information can be disclosed under the various categories, that information is set out in a schedule to the *Act* (see attached). It should be noted that, while the concerns that gave rise to the legislation was the disclosure of non-conviction and/or personal information, the reach of the *Act* is much broader and also restricts the release of other information, including criminal convictions. Specifically, under the various categories, certain information that is authorized to be disclosed by police will time-out after a period of time; that is, police will no longer be authorized to disclose the information. For example, a summary conviction offence^[13] will not be disclosed under any type of search after five years.

Similarly, while police are not permitted to disclose a finding of guilt where an individual was absolutely or conditionally discharged (meaning, probation), such information can be disclosed for a vulnerable sector check or criminal record and judicial matters check for a period of one year only in relation to an absolute discharge. The time-frame increases to three years for a conditional discharge. These time limitations are irrespective of what criminal offence was committed.^[14]

Conversely, section 10 of the *Act* provides a mechanism for the disclosure of “non-conviction” information where there are “exceptional circumstances”^[15] Such information is defined by the *Act* to include criminal charges that were withdrawn, stayed, or dismissed and/or acquittals.^[16] The criteria to establish exceptional circumstances are set out in section 10(2) and include, among other considerations, that the information relates to a prescribed charge (set out in O. Reg. 350/18) and the alleged victim of the offence was a child or a vulnerable person, as defined by the legislation.^[17]

Consequently, where police have reasonable grounds to believe that an individual, “has been engaged in a pattern of predation indicating that the individual presents a risk of harm to a child or a vulnerable person”, police may provide “exceptional disclosure” for a vulnerable sector check only.^[18] In terms of procedural rights, the individual who is the subject of such disclosure may seek reconsideration to exclude the information, under a prescribed process (O. Reg. 348/18). A request for reconsideration must be made in writing no later than 45 days after receiving the record. The police then have 30 days to reconsider the decision to disclose non-conviction information.^[19]

In addition, the *Act* provides an opportunity to individuals to correct inaccurate information in a police record.^[20] Once the results of a police record check are available, the results must be provided to the individual who is the subject of the request. If, after receiving the results, the requester provides written consent, the results may then be provided by the police to another person or organization, as directed by the requester.^[21] However, once disclosed, information from a police records check shall not be used or disclosed except for the purpose for which it was requested, or as authorized by law. Under the *Act*, permitted purposes include, without limitation:

- determining suitability for employment, volunteer work, a licence, an office, membership in any body or to provide or receive goods or services; or
- assessing an application to an educational institution or program.^[22]

It should be noted that subsequent disclosure or misuse of the results of a police record check is an offence under the *Act* where the misuse or disclosure was a “willful” contravention of the *Act*.^[23] On conviction, a party is liable to a fine of not more than \$5,000.

Overall, the important takeaways for the ultimate recipient of a police record check is to recognize the limits of the information that might be provided. First, the information disclosed will vary depending on the category of the search consented to and conducted. Second, some information may not be disclosed from the search if the information is dated. Third, the *Act* prevents disclosure of certain information (for example, convictions for which a pardon was granted or findings of not criminally responsible). Consequently, to the extent that information is self-disclosed (or not) by a member or employee or volunteer, the police record check may or may not confirm the information. The recipient of the check will also need to consider which check is the most appropriate in the circumstances, recognizing that, subject to exemptions^[24], the consent of the requester will be necessary.

But, for now, we wait, again, until November 1, 2018.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

^[1] *Police Record Checks Reform Act, 2015*, S.O. 2015, c. 30 (“*Act*”).

^[2] Order in Council 904/2018.

^[3] O. Reg. 347/18, 348/18, 349/18, and 350/18.

[4] www.ola.org/en/legislative-business/house-documents/parliament-41/session-1/2015-06-03/hansard#para911

[5] *Ibid.*

[6] *Act, supra* note 1, ss. 2(2)8. Also see other exclusions under ss. 2(1) and various time-limited exemptions under O. Reg. 347/18. In particular, O. Reg. 347/18 exempts certain sectors from the entire *Act*, including, among others, police services, correctional institutions, financial institutions, justice sector, and lottery and gaming. Additionally, there is an exemption from section 9 (what information can be disclosed) for schools and child care providers under O. Reg. 347/18, s. 19. Please note that these exemptions all expire one year after section 22(1)(a) of the *Act* comes into force (which permits regulations to be made exempting any person or class of persons from any provision of the *Act* and attaching conditions to the exemption.)

[7] *Ibid.* at ss. 8(3)

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.* at ss. 8(1)

[11] *Ibid.* at ss. 9 and 10.

[12] *Ibid.* at s. 19(1). Note: Consent of the Minister Community Safety and Correctional Services is require to commence prosecution under the *Act*.

[13] A summary conviction offence is a *Criminal Code* offence, but considered to be a “less serious” offence resulting in less serious penalties (generally speaking, no more than six months imprisonment or a fine of \$5,000.00 – *Criminal Code*, ss. 797(1)). A summary conviction can also result from an offence that is a “hybrid offence” under the *Criminal Code* (that is, a more serious offence) where the Crown has elected to proceed by way of summary conviction.

[14] Note that discharges (either absolute or conditional) are not available under the *Criminal Code* or any offence for which there is a minimum punishment prescribed or for an offence punishable by imprisonment for fourteen years or for life – *Criminal Code*, ss. 730(1).

[15] *Act, supra* note 1, ss. 10(1).

[16] *Ibid.* at ss. 1(1).

[17] *Ibid.* at ss. 10(2). Also see: ss. 1(1): “vulnerable person” means a person who, because of his or her age, a disability or other circumstances, whether temporary or permanent, (a) is in a position of dependency on others, or (b) is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them.”

[18] *Ibid.* at ss. 10(1) .

[19] *Ibid.* at ss. 10(4). Note: There is no right to “reconsideration” with respect to other information disclosed in a police record check. The right is only available with respect to “exceptional disclosure”.

[20] *Ibid.* at s. 15.

[21] *Ibid.* at ss. 12(1) and (2).

[22] *Ibid.* at ss. 2(1) and 13.

[23] *Ibid.* at s. 13.

[24] O. Reg. 347/18.

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