

Collection, Storage, and Disclosure of Personal Information by the Police: Recommendations for National Standards

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Myrna El Fakhry Tuttle, J.D., M.A., LL.M., Research Associate.

Editor

Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director.

Project Management

Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director.
Sharnjeet Kaur, B.Ed., Administrator.

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Executive Summary

The purpose of this report is to provide information about police record checks, particularly for non-conviction records. Many employers, educational institutions and organizations – among others—ask individuals for a police record check before they are hired or before they are accepted as students or volunteers. Therefore, it is essential for people to understand the implications of collecting, retaining and disclosing personal information by police.

Many people are unaware that they have a police record because they were a witness to a crime or because they called 911. Police records contain private and personal information that when disclosed, release information about mental health problems, withdrawn charges and acquittals, incidents where no charges were laid and suicide attempts. When information like this is released, it can impact the lives of those individuals to a great extent.

Part One of this report introduces the problem of collecting, retaining and disclosing personal information by police, particularly when individuals are not part of an investigation of a specific crime or have not been charged of an offence or found guilty.

Part Two talks about the legislation that covers the collection, retention and disclosure of personal information by police. Most people do not know that police have a record about them because of a non-conviction disposition. Also, most people are unaware of the kinds of information contained in police databases that can be disclosed. According to Canadian law, personal information held by government agencies or private companies must be protected and cannot be disclosed to third parties without the person's permission. This Part shows that many laws restrict the release of personal information on various levels of checks. It also outlines the authority of police officers, who are government agents, and who can act only to the degree to which the law allows them.

Part Three discusses the ways and issues of collecting personal information by police. It describes how police collect personal information and examines some of the problems facing

these practices. A lot of people do not know that they have the right to refuse to provide information when they are randomly stopped by the police. This Part shows that carding reduces the trust between police and the public, and damages the relationship between the two. Carding can be considered constitutional if the police inform individuals—who are stopped—of their rights. Those individuals should be informed that they may leave if they wish, that they are not obliged to answer any of the officer’s questions and have no legal obligation to share, or be carrying, identification. Unfortunately, people feel obligated to answer questions posed by police, which results in people releasing information that gets recorded and stored. Moreover, this Part discusses the impact of carding on civil liberties and human rights where there is no law allowing or justifying this practice, nor there is such a positive duty or right of the police. This Part examines several cases in which courts discuss the effect of arbitrarily police stop/arrest/detention on individual liberties, and the impact on individuals being forced to provide personal information where police had no reasonable grounds to do so.

Part Four looks into the disclosure of criminal convictions and non-conviction records. It starts by defining a police record which is information gathered by police. This may include criminal information, such as charges and convictions, as well as non-criminal contact with police. This Part talks also about the storage of information collected by police and the databases where police records are stored. Police records are maintained and stored in different databases, and they do not all necessarily contain the same information. National databases, local police databases and border agencies may all have access to different amounts of information. There are different types of police record checks where individuals may be required to obtain a police record check for employment, volunteering, education or other civil screening processes. In order to get these checks, a search may take place against different police databases. There is no specific statutory provisions that show police when they can or cannot release non-conviction dispositions. Thus, many non-conviction records, including withdrawn charges, acquittals, mental health apprehensions and suspect information, can be included in different levels of record checks. This Part also outlines the special provisions that apply to youth records where The *Youth Criminal Justice Act (YCJA)* applies. The *YCJA* protects the privacy of young persons who are accused or found guilty of a crime by keeping their

identity and other personal information confidential. The *YCJA* forbids the disclosure of information that would recognize a young person's involvement in the criminal justice system and restricts access to their youth records.

Part Five examines the impact of disclosure of non-conviction records on people's lives. Disclosing non-conviction records can have more serious implications than disclosing conviction records. Convictions can usually be pardoned, while the destruction of non-conviction charges is left to police discretion. Therefore, an individual can have a police record for life. Local police record checks may disclose information about situations where the individual was not even charged—in cases where the person was the one making the complaint, was the victim or a witness. This situation may impact people's lives; for example, an employer may not know the difference between the meaning of a conviction and a non-conviction record. Therefore, this employer might decide not to hire anyone who has been involved with the police. Furthermore, non-conviction police records are not removed from police databases automatically. These records may be disclosed on a police record check or made available to United States border officials; for example, an individual who is affected by the disclosure may be banned from entering the United States.

Part Six covers the issue of retaining and purging the information of convictions and non-convictions. Non-conviction and conviction information is stored in the National Repository of Criminal Records. Storage and retention of the information is governed by the *Identification of Criminals Act*, the *Youth Criminal Justice Act* and the *Criminal Records Act* and other relevant laws. The fact that someone was stopped by the police does not mean that they are guilty. According to section 11(d) of the Canadian *Charter of Rights and freedoms*, everyone is presumed to be innocent until proven guilty beyond a reasonable doubt. Revealing this type of personal information may threaten the presumption of innocence. This Part also shows how people can ask to remove or destroy non conviction records and how to remove a record for those who were found not guilty.

Part Seven talks about law reform initiatives on carding and police record checks. In Ontario in 2017, *Regulation 58/16 under the Police Services Act* was enacted. This regulation bans police from collecting information in certain specific situations. Also in 2017, Alberta

Justice launched province-wide consultations on police street checks to create rules around carding. In the same year, the Edmonton police commission started reviewing the practice of street checks, or carding, by city police. In 2018, street checks by Edmonton police dropped 30 per cent in one year. Initiatives by different cities in Alberta also took place. This Part also talks about the 2015 *Police Record Checks Reform Act in Ontario*. The Act limits the types of information that police may release in police record checks. Also, there was a Proposed Reform to the *Ontario Human Rights Code* in 2017. Finally, in 2018, there was an initiative taken by the *Uniform Law Conference of Canada*, which regulates the types of criminal record checks that may be provided and restricts the disclosure of non-conviction information.

Part Eight sets some recommendations to the Alberta government, police, employers and different organizations. These address how to deal with carding or street checks and police record checks.

I. Introduction

Local and federal police databases store not only a history of criminal convictions but also details about mental health apprehensions, 911 calls, casual police contact, unproven allegations, withdrawn charges and acquittals (non-conviction records). In many jurisdictions, these non-conviction records are usually disclosed when someone applies for a police record check. Human rights statutes provide varied levels of protection, at times prohibiting discrimination against those with pardoned convictions (or record suspensions), while leaving those with non-conviction records open to unfair treatment. The Canadian Civil Liberties Association (CCLA) notes that:

Because of these and other gaps in Canadian law, depending on where a person lives, receiving an acquittal or having a withdrawn charge can be more personally and professionally damaging than a formal finding of guilt.¹

Also, according to the Canadian Bar Association:

A wide range of pre-charge or non-criminal contact with authorities can result in non-conviction records that may prejudice a person in many ways. These can include being questioned as a person of interest or a suspect of a crime (but not charged), police apprehensions and transport under provincial or territorial mental health statutes, and other observed behaviours that can result in [placing] flags [on personal information] in police databases, such as suspicions of gang affiliation or perceived suicide attempts.²

The nature of non-conviction records creates challenges for people applying for jobs, wanting to volunteer, seeking higher education or looking for a place to rent. These records can be stored for years and employers are frequently unaware of the difference between

¹ *False Promises, Hidden Costs: The Case for Reframing Employment and Volunteer Police Record Check Practices in Canada* (May 2014), online: Canadian Civil Liberties Association <<https://www.ccla.org/recordchecks/falsepromises>> at 5 [False Promises].

² *Collateral Consequences of Criminal Convictions: Considerations for Lawyers* (February 2017), online: The Canadian Bar Association <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/CollateralConsequencesWebAccessible.pdf> at 37 [The Canadian Bar Association 2017].

conviction and non-conviction records and do not know how to relate them to a specific situation.³

The John Howard Society of Ontario (JHSO) adds that: “The results of record checks can have a powerful effect on hiring practices and outcomes, even when the criminal record is unrelated to the job being sought.”⁴

Carding or street checks (also known by other names) is one main way for the police to collect personal information from the public. Once this information is collected, it is stored in the police databases, then released when a police background (non-criminal record) is requested.

In his report entitled *Report of the Independent Street Checks Review*, Justice Michael Tulloch (the *Tulloch Report*) notes that:

Street checks were originally intended as an investigative tool to capture information of people who police had reason to suspect of being involved in criminal activity. Over time, however, it grew into a much less focused practice. Some police services began collecting and storing personal identifying information of many citizens without any belief that they were involved in criminal activity, and without much evidence that such databases were particularly useful in solving crime.⁵

The *Tulloch Report* adds that: “[C]arding is a small subset of street checks in which a police officer randomly asks an individual to provide identifying information when the individual is not suspected of any crime, nor is there any reason to believe that the individual has information about any crime. This information is then entered into a police database”.⁶

Nikita Gush of the CCLA provides that in Alberta, police are usually allowed to request that an individual provides them with their personal information without cause during their foot patrols. This practice of carding raises serious concerns about profiling, because most of

³ *The Invisible Burden: Police Records and the Barriers to Employment in Ontario*, online: John Howard Society of Ontario <<https://policerecordhub.ca/wp-content/uploads/2018/02/The-Invisible-Burden-Report-FINAL.pdf>> at 10 [*Invisible Burden*].

⁴ *Invisible Burden* at 12.

⁵ The Honourable Michael H. Tulloch, *Report of the Independent Street Checks Review* (2018), online: <<http://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/StreetChecks.pdf>> at 3 [*Tulloch Report* 2018].

⁶ *Tulloch Report* 2018 at 4.

the people being arbitrarily stopped fall into specific minority groups based on race and socioeconomic class.

The reality is that most people are unaware that they do not have to provide information to police when being randomly stopped. Unfortunately, this arbitrary stop damages the relationship between the police and the public.⁷

According to Noa Mendleson Aviv of the CCLA:

An arbitrary police stop will often constitute an unjustified interference with one's fundamental rights and freedoms, including the right to be free from arbitrary detention, and the right to liberty, privacy, dignity, and equality. When a person is constrained, physically or psychologically, this impacts their ability to go about their business. Even a brief stop may cause an individual to lose valuable time in getting to work on time, catching their bus, or meeting a curfew. The eliciting and recording of personal information interfere with an individual's right to privacy. Any person stopped and questioned by police for no reason will likely experience the sting of indignity and humiliation, in particular if the stop takes place in the presence of neighbours or other acquaintances.⁸

The release of non-conviction records contradicts the principle of the presumption of innocence. By disclosing these records, people's privacy can be violated. They also can be discriminated against by not being hired or being unable to pursue an education or being unable to volunteer.⁹

In addition, treating those who have criminal conviction records (for being charged or suspected) differently from those who have non-criminal conviction records (for not being charged) just because that they have had contacts with the police, violates the principle of the presumption of innocence.

⁷ Nikita Gush, "Arbitrary Police Carding in Alberta Raises Profiling Concerns" (16 November 2016), online: Canadian Civil Liberties Association <http://rightswatch.ca/2016/11/26/arbitrary-police-carding-in-alberta-raises-profiling-concerns/>.

⁸ Noa Mendelsohn Aviv, "Canadian Civil Liberties Association Submission to Ministry of Community Safety and Correctional Service Re: "Ontario Proposed Regulation for Street Checks Consultation Discussion Document"(31 August 2015), online: Canadian Civil Liberties Association <<https://ccla.org/cclanewsites/wp-content/uploads/2015/09/2015-08-17-Racial-profiling-MCSCS-Consultation-Written-Submission-FINAL.pdf>> at 2 [Aviv 2015].

⁹ False Promises at 68-69.

Having had interactions with the police does not mean that the person is guilty. Assuming the person is guilty actually violates article 11(d) of the *Canadian Charter of Rights and Freedoms* which states that everyone is presumed to be innocent until proven guilty.¹⁰

II. Legislation Pertaining to Collection and Disclosure of Personal Information by Police

The Ontario Police Records Check Coalition notes that most people are unaware that the police have a record about them because of a non-conviction disposition and/or are unaware of the other kinds of information contained in police databases that can be disclosed. People are often unaware of what type of police check they agree to, and are unaware of what is being disclosed on these respective checks. Thus, there are questions about whether consent for backgrounds checks is truly voluntary.¹¹

In general, Canadian law provides that personal information held by governments, related agencies or even private companies is to be protected by not being disclosed to third parties without the individual's consent. Many statutes limit the information that can be released on various levels of checks. Those limitations are mentioned in the *Criminal Records Act*, the *Criminal Code*, the *Youth Criminal Justice Act*, federal and provincial privacy laws and human rights legislation. In addition, this legislation also provides exceptions which allow governments to share personal information in some circumstances.

A. What is Personal Information?

Personal information is data about an “identifiable individual”. It is information that on its own or combined with other pieces of data, can identify *you* as an individual.

Personal information generally means information about your:

- race, national or ethnic origin,

¹⁰ James Mencil, “Not Guilty But Not Really: Will Withdrawn or Acquitted Charges Appear on a Criminal Record Check?”, online: Edward H. Royle & Partners LLP <<https://roylelaw.ca/not-guilty-but-not-really-will-withdrawn-or-acquitted-charges-appear-on-a-criminal-record-check/>> [Mencil].

¹¹ Jacqueline Tasca, Abby Deshman, Theresa Claxton & Irina Sytcheva, “Addictions, Mental Health and Police Records: An Examination of the Impact of Non-Conviction Records, Issues and Solutions”, online: <http://www.prcontario.ca/wordpress/wp-content/uploads/2015/04/PRCCPresentationToProvincialHSJCC_20131125.pdf> at 17.

- religion,
- age, marital status,
- medical, education or employment history,
- financial information,
- DNA,
- identifying numbers such as your social insurance number, or driver's licence, and
- views or opinions about you as an employee.

What is generally *not* considered personal information can include:

- i. Information that is not about an individual, because the connection with a person is too weak or far-removed (for example, a postal code on its own which covers a wide area with many homes);
- ii. Information about an organization such as a business;
- iii. Information that has been rendered anonymous, as long as it is not possible to link that data back to an identifiable person;
- iv. Certain information about public servants such as their name, position and title;
- v. A person's business contact information that an organization collects, uses or discloses for the sole purpose of communicating with that person in relation to their employment, business or profession; and
- vi. Government information. Occasionally people contact [the government] for access to government information. This is different from personal information.¹²

B. Privacy Legislation

i. Federal *Privacy Act*

The *Privacy Act*¹³ is the law that governs the personal information handling practices of federal government institutions. This Act applies to all of the personal information the federal government collects, uses and discloses—be it about individuals or federal employees.¹⁴

Section 6(1) of this Act requires that personal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may be prescribed by regulation, in order to ensure

¹² Summary of Privacy Laws in Canada, online: Office of The Privacy Commissioner of Canada <https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/#heading-0-0-1>.

¹³ *Privacy Act*, RSC 1985, c. P-21.

¹⁴ *The Privacy Act*, online: Office of the Privacy Commissioner of Canada <<https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-privacy-act/>>.

that the individual to whom it relates has a reasonable opportunity to obtain access to the information.

Section 7 states:

Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except:

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

Section 8(1) states: "Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section."

Section 4(1) of the *Privacy Regulations* (SOR/83-508) states:

Personal information concerning an individual that has been used by a government institution for an administrative purpose shall be retained by the institution:

(a) for at least two years following the last time the personal information was used for an administrative purpose unless the individual consents to its disposal; and

(b) where a request for access to the information has been received, until such time as the individual has had the opportunity to exercise all his rights under the Act.

The *Privacy Act* does not have a statutory period limiting how long personal information must be retained. Therefore, the RCMP can retain the information for an unlimited time, except when there is a law that states otherwise.

ii. *Personal Information Protection Act*

The *Personal Information Protection Act* (PIPA)¹⁵ is an Alberta law that applies to non-government (private) organizations. Section 5(1) states that an organization is responsible for personal information that is in its custody or under its control.

Section 7 states:

- (1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,
 - (a) collect that information unless the individual consents to the collection of that information,
 - (b) collect that information from a source other than the individual unless the individual consents to the collection of that information from the other source,
 - (c) use that information unless the individual consents to the use of that information, or
 - (d) disclose that information unless the individual consents to the disclosure of that information.

- (2) An organization shall not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information about an individual beyond what is necessary to provide the product or service.

- (3) An individual may give a consent subject to any reasonable terms, conditions or qualifications established, set, approved by or otherwise acceptable to the individual.

Under section 7, organizations need an individual's consent to collect, use, and disclose their personal information. However, there are exceptions to this general principle that include:

- If the disclosure of the information is authorized or required by a statute of Alberta or Canada (20(b)(i));
- If the disclosure of the information is to a public body and that public body is authorized or required by an enactment of Alberta or Canada to collect the information from the organization (20(c));

¹⁵ *Personal Information Protection Act*, SA 2003, c P-6.5.

- If the disclosure of the information is to a public body or a law enforcement agency in Canada to assist in an investigation (i) undertaken with a view to a law enforcement proceeding, or (ii) from which a law enforcement proceeding is likely to result (20(f)); or
- If the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding (20(m)).

iii. *Freedom of Information and Protection of Privacy Act*

The *Freedom of Information and Protection of Privacy Act* (FOIP Act)¹⁶ is also a provincial law. It has five purposes:

1. A right of access to records held by a public body,¹⁷ subject to limited and specific exceptions.
2. A right of access to one's own personal information held by a public body.
3. A right to request the correction of one's personal information held by a public body.
4. The protection of personal information held by a public body.
5. Independent review of a public body's decisions by the Office of the Information and Privacy Commissioner.

This means anyone has a right to ask for any information held, for example, by the Calgary Police Service (CPS), who must then collect responsive records and determine if an individual is entitled to receive them.¹⁸

Section 33 of the FOIP Act states:

- No personal information may be collected by or for a public body unless:
- (a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,
 - (b) that information is collected for the **purposes of law enforcement**, or

¹⁶ *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 [FOIP Act].

¹⁷ Section 1(p) of the FOIP Act defines public body as: "public body" means (i) a department, branch or office of the Government of Alberta, (ii) an agency, board, commission, corporation, office or other body designated as a public body in the regulations, (iii) the Executive Council Office, (iv) the office of a member of the Executive Council, (v) the Legislative Assembly Office, (vi) the office of the Auditor General, the Ombudsman, the Chief Electoral Officer, the Election Commissioner, the Ethics Commissioner, the Information and Privacy Commissioner, the Child and Youth Advocate or the Public Interest Commissioner, or (vii) a local public body, but does not include (viii) the office of the Speaker of the Legislative Assembly and the office of a Member of the Legislative Assembly, or (ix) the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta.

¹⁸ *Freedom of Information and Protection of Privacy Act request*, online: Calgary Police Service <<http://www.calgary.ca/cps/Pages/Public-services/Freedom-of-Information-and-Protection-of-Privacy-Act-request.aspx>>.

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

Section 1(h)(i) of the FOIP Act states that law enforcement means policing, including criminal intelligence operations.

The Office of the Information and Privacy Commissioner of Alberta held that In order to show that it properly collected the Complainant's personal information, a Public Body must prove that section 33(c) of the Act applies.¹⁹

iv. *Health Information Act*

The *Health Information Act (HIA)*²⁰ is an Alberta provincial law that protects the privacy of individuals' health information. It also regulates how health information can be collected, used and disclosed.

The *HIA* requires custodians (either named health care organizations or named professions in the Health Information Regulation) and affiliates (employees, volunteers, contractors and other authorized people who work for a custodian) to only collect, use and disclose health information in the most limited manner, with the highest degree of anonymity possible and on a need-to-know basis.

The Office of the Information and Privacy Commissioner (OIPC) oversees the *HIA* and monitors how it is administered in the health system.²¹

The *HIA* enables the release of individually identifiable health information with or without the consent of an individual.

Section 35(1)(m) of the *HIA* allows a custodian to disclose individually identifying diagnostic, treatment and care information without the consent of the individual who is the subject of the information to any person including a police service if a staff member believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health and safety of any person. Disclosure can be to any person so this can include joint police and mental

¹⁹ Calgary Police Service (18 December 2015), ORDER F2015-41, online: Office of the Information and Privacy Commissioner of Alberta <<https://www.oipc.ab.ca/media/649692/F2015-41Order.pdf>>.

²⁰ *Health Information Act*, RSA 2000, c H-5.

²¹ Alberta Netcare HER, online: Alberta <<http://www.albertanetcare.ca/patientprivacy.htm>>.

health teams or other individuals considered to be in a position to assist in to avert or minimize imminent danger.

Section 37.3 of the *HIA* grants custodians the discretionary authority to disclose individually identifying health information, without the individual's consent, to the police or Minister of Justice and Attorney General where the custodian reasonably believes:

- the information relates to a possible commission of an offence under a statute of Alberta or Canada and
- disclosure will protect the health and safety of Albertans.

Under this provision, the health information that a custodian may disclose is:

- an individual's name;
- an individual's date of birth;
- the nature of any injury or illness of an individual;
- the date on which a health service was sought or received a health service; and
- whether any samples of bodily substance were taken from the individual (not the sample itself or the results).

The purpose of the provision is to give a police service sufficient information so that it may apply to a court for a search warrant or a production order.²²

C. Legislation Dealing with the Authority of Police Officers

Police officers are agents of the state and may act only to the extent to which the law empowers them. The powers granted to officers are designed to enable them to discharge their duties. It is therefore important to understand the parameters of those duties and their impact on police officers' ability to perform their duties and to do their jobs – a large part of which is to respond to the safety and security needs of the community, as well as to engage and interact with individuals and the public.²³

Section 38(1) of the *Police Act*²⁴ states:

Every police officer is a peace officer and has the authority, responsibility and duty

²² Disclosure of Health Information under the Health Information Act, online: Alberta Health Services <https://www.albertahealthservices.ca/info/Page3937.aspx>.

²³ *Tulloch Report* 2018, at 66.

²⁴ *Police Act*, RSA 2000, c P-17, s 38(1).

- (a) to perform all duties that are necessary
 - i. to carry out the police officer's functions as a peace officer;
 - ii. to encourage and assist the community in preventing crime;
 - iii. to encourage and foster a co-operative relationship between the police service and the members of the community; and
 - iv. to apprehend persons who may lawfully be taken into custody; and
- (b) to execute all warrants and perform all related duties and services.

Section 25(2) of the *Interpretation Act*²⁵ states that:

if in an enactment power is given to a person to do or enforce the doing of any act or thing, all other powers that are necessary to enable the person to do or enforce the doing of the act or thing are deemed to be given also.

John Sewell states:

Officers have considerable flexibility in how they will act, and a variety of actions can be taken in any situation. When an officer stops someone on the street, the officer can ask questions, frisk the person, tell the person to leave the area, arrest the person, threaten to use force, put handcuffs on the person, call more officers, and so forth. One set of actions may follow from the officer's decision that his or her key role in this instance is to keep the peace; another set arises if he or she thinks the emphasis should be upon enforcing the law. And what the officer actually does is often a result of the actions of the person stopped. Most often, the officer will ask for the consent of a person to do something for which the officer has no legal authority—such as searching a bag without a warrant—but the person believes that objecting to that search will lead to further trouble, and so consents. The powers of an officer expand enormously because of consent given under duress.²⁶

The existing legislation dealing with collection of information addresses the collection, storage and disclosure of personal information held by the police.

Section 33 of the *Freedom of Information and Protection of Privacy Act* (FOIP Act) states that:

- [n]o personal information may be collected by or for a public body unless . . .
- (b) that information is collected for the purposes of law enforcement.

It is apparent that the rules for collection and disclosure of personal information by governments, public bodies and non-government (private) organizations generally require

²⁵ *Interpretation Act*, RSA 2000, c I-8, s 25(2).

²⁶ John Sewell, *Police in Canada: The Real Story*, (Toronto: James Lorimer & Company Ltd., Publishers 2010) at 25.

consent of the individual, but federal, provincial and municipal policing agencies enjoy exceptions in both collection and disclosure of personal information in some circumstances. This legislation must be kept in mind when reading the next two sections of this report.

III. Police Collection of Personal Information

Carding usually involves arbitrary detention by police where unnecessary personal information gets collected with no lawful purpose. It also gets retained indefinitely. This practice usually discriminates against racialized and marginalized individuals, and violates individual rights to liberty, privacy and equality.

A. Privacy Principles and Police Records

According to the Canadian Civil Liberties Association:

Any data recorded in police records should comply with fundamental privacy principles including those relating to necessity, use (and secondary uses), storage and retention, dissemination, access, and destruction.

Recorded data that complies with the principle of necessity and is stored, must include the specific purpose of the police stop, and how this purpose is applicable on the facts of that stop. Police officers should not collect or retain information in their memo books, in police databases or otherwise unless such collection or retention is legitimate, necessary and proportional, in relation to the specific purpose for which it was collected. A supervisor should review any materials in police records before it is uploaded to a police database, in light of the above criteria. Once reviewed and stored, information in the database should be subject to strict protocols that place firm and appropriate limits on access and dissemination or sharing; prevent secondary uses unrelated to the specific purpose for which information was collected; and specify clear limits on retention.²⁷

Personal information collected during police stops should not be retained for an unspecified period of time. People assume that the information is stored for a limited time only, unless there is a specific reason to keep storing it. Therefore, individuals should be given enough information at the time of the police stop, in order for them to request a copy of the

²⁷ Aviv 2015, at 7.

information held about them. Personal information should not be retained unless it is used for a specific investigation.²⁸

The material following describes some of the ways that police agencies collect personal information and also discusses some of the concerns with these practices.

B. Police Carding

The police practice of documenting the personal details of encounters with citizens—usually with no charges laid—has had many names since the '50s. Back in 1957, Toronto police were given actual cards, called "suspect cards," to document and forward information about persons of interest to detectives.²⁹ Over the years, the card became a "form" and later a "report." By 2015, the practice was called "community engagements," but the term "carding" stuck, and still involved random stops of citizens and collection of personal data—including details of physical appearance, address and contact information.³⁰

As police across North America began to integrate new technology into their investigations, information collected through carding was then put directly into computer databases.³¹

These police interactions can also be called "street checks" and can have a significant impact on public confidence in, and the legitimacy of the police.³²

Why do the police employ carding? The *Tulloch Report* notes:

Certain powers are granted to police officers in order to enable them to discharge their duties. These powers come from both statutes; for example, the *Criminal Code*, and from common law. Police duties include the preservation of peace, the prevention of crime and the protection of life and property. To discharge these duties, police officers may need to engage with members of the public, including stopping and questioning them. But their ability to do so is not unlimited: a balance must be struck between protecting individual liberties and properly recognizing certain police functions.³³

²⁸ Aviv 2015, at 7.

²⁹ Here's What You Need to Know About Carding (30 September 2017), online; CBC News <<https://www.cbc.ca/firsthand/m-features/heres-what-you-need-to-know-about-carding>> [CBC Carding].

³⁰ CBC Carding.

³¹ CBC Carding.

³² Curt T. Griffiths, Ruth Montgomery & Joshua J. Murphy, "CITY OF EDMONTON STREET CHECKS POLICY AND PRACTICE REVIEW" (June 2018), online: <<https://edmontonpolicecommission.com/wp-content/uploads/2019/02/EPS-Street-Check-Study-Final-REDACTED.pdf>> at 16 [Griffiths Report 2018].

³³ *Tulloch Report* 2018 at 7-8.

When carding takes place, people reveal personal information that they are not required to provide. Most people do not know that they are not obliged to volunteer any information. But even if they do know, they usually get intimidated by police officers and decide to provide information.³⁴

Police say they need to be able to card people to help them fight crime and locate suspects, and Marni Soupcoff says: “one can see how having information on file about hundreds of thousands of people who wouldn’t normally show up in a criminal database—people with no arrest records—would be a boon to an officer conducting any sort of investigation.”³⁵

As discussed below, carding may be considered constitutional if there is a regular practice of informing a person who is stopped that he or she may leave at any time, may choose not to answer any or all of the officer’s questions and has no legal obligation to share, or be carrying, identification; or a regular practice of only retaining personal information if it can be linked to an investigation of a specific crime.

C. Informing Individuals of their Rights During Street Checks

The *Tulloch Report* summarizes:

People enjoy many individual rights, one of which is the right to walk about freely without state interference. Faced with police questioning on the street, a person is generally free to decline to answer and walk away. This, of course, does not prevent a police officer from being able to speak to people, but, unless a police officer has grounds to arrest or detain a person, they cannot prevent someone from leaving an interaction.³⁶

i. In Alberta

Section 7 of the *Canadian Charter of Rights and Freedoms*³⁷ (*the Charter*) provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In conducting their duties, the police must ensure that their actions are consistent with:

³⁴ Marni Soupcoff, “The Definitive Guide to the Controversial Police Practice of Carding” (1 October 2015), online: Canadian Constitution Foundation <<http://theccf.ca/the-definitive-guide-to-the-controversial-police-practice-of-carding/>> [Soupcoff].

³⁵ Soupcoff.

³⁶ *Tulloch Report* 2018, at 7.

³⁷ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. [Charter].

- The provisions of the *Charter of Rights and Freedoms*;
- Any agreements governing the police service; and
- The provisions of an array of federal and provincial statutes including, for example, those governing freedom of information, protection of privacy and human rights.³⁸

The Alberta *Police Act* mandates the government of Alberta to ensure that adequate and effective policing is maintained throughout the province.³⁹ Police services in Alberta, as part of the criminal justice system, and in accordance with the *Charter*, are responsible for maintaining peace and order, protecting lives and property, preventing and investigating crime, and providing policing services that are responsive to community needs.⁴⁰

According to Rocky Mountain Civil Liberties Association (RMCLA), the Edmonton Police Service has acknowledged that police do not inform people that they have the right to walk away, and takes the position that some of the responsibility should be on individuals to know their rights. Figures provided by Edmonton police show that, between 2011 and 2014, officers carded an average 26,000-plus people per year, and a total of 105,306 over four years. When RMCLA asked the Calgary Police Service (CPS) about carding, CPS claimed that although there is a practice of police checkups (similar to carding), it does not target minorities and/or low income people.⁴¹

Many people feel obligated to answer a request by police, and that results in people divulging a wealth of information that is dutifully recorded and retained. For most people, being questioned by a police officer is a kind of psychological detention, with the person believing that they have no choice but to provide the information.

The RMCLA indicates that people are not certain whether:

- It is mandatory or voluntary in nature—whether they have to talk to the police or have the right to walk away;
- It is “detention” *per se* (detention may require that some information be provided);

³⁸ *Roles and Responsibilities*, 2018, online: <https://open.alberta.ca/dataset/65be10e5-1d1a-4fa8-a807-d68af51965a3/resource/872e08e4-e6d0-4d43-ad4b-db8fb689e338/download/policing-standards-2.1-april-30-2018.pdf> at 8 [Roles and Responsibilities].

³⁹ *Roles and Responsibilities* at 3.

⁴⁰ *Police Carding in Calgary: The Police Response to RMCLA’s Request*, online: Rocky Mountain Civil Liberties Association <http://rmcla.ca/ESW/Files/Police_Carding_in_Calgary_Backgrounder.pdf> at 2.

⁴¹ RMCLA *Police Carding*.

- The police will do something with their personal information and, if so, what;
- They have rights over personal information provided to the police;
- There is anything they can do if there is an error in the information recorded or how it is recorded;
- One gets a written record of any interactions with the peace officer;
- The police will keep that information for a long time, or forever; and/or
- The information provided to police gets reviewed at any point, among other issues.⁴²

According to the Calgary Police Service, when questioning a citizen, officers must consider the law of detention, including when an interaction may become a detention, and the legal limits, powers, duties and obligations that apply. Whenever a citizen is not under arrest or detention, officers may advise them that their responses are voluntary and that they are free to leave should they choose to do so.⁴³

ii. In Ontario

In 2016, the province of Ontario enacted Regulation 58/16, which sets out guidelines for police officers with respect to stopping persons and attempting “to collect identifying information by asking the individual, in a face-to-face encounter, to identify himself or herself or to provide information for the purpose of identifying the individual and includes such an attempt to do so, whether or not identifying information is collected.”⁴⁴

According to the Regulation (ss 7 to 9), officers conducting street checks in Ontario must inform the person who is stopped why they were stopped, that they have the right to walk away from the encounter, that the person’s participation in the encounter is voluntary, and, that they are not required to provide any information to the officer. The officer must provide a written record of the stop and of the encounter with the citizen, provide the person who is stopped with their own information, including their badge number, and inform the person about how to contact the provincial office of the Independent Police Review Director should they have any concerns about the encounter with the officer. The legislation does appear to

⁴² RMCLA Police Carding.

⁴³ Calgary Information Forms (New), online: Calgary Police Service <http://www.rmcla.ca/CPS_Check-up%20Slips_Forms_Policy_2016Jan22.pdf> at 4.

⁴⁴ O. Reg. 58/16: Collection of Identifying Information in Certain Circumstances – Prohibition and Duties under *Police Services Act*, RSO 1990, c P15 [O. Reg. 58/16].

have contributed to a significant reduction in the number of street checks conducted by some police services in the province.⁴⁵

An Australian study found that being treated in a courteous, friendly way and being given an explanation for a stop by the police was:

consistently important for influencing both emotional reactions and compliance with the law and the police. By engaging with the public in a polite, respectful, and empathetic manner, police officers will be able to reduce negative sentiments and emotion directed at them, thereby increasing people's willingness to comply with them both immediately and in the future....If the police wish to be able to effectively manage citizen behaviour and promote compliance with the law, the findings suggest that they ought to treat people with procedural justice.⁴⁶

This is not to say that the police should not be encouraged to continue to talk to people on the street. However, Doob and Gartner note that the evidence that it is useful to stop, question, identify, and/or search people and to record and store this information simply because the police and citizens "are there" appears to be substantially outweighed by convincing evidence of the harm of such practices both to the person subject to them and to the long term and overall relationship of the police to the community.⁴⁷

D. Violations of Civil Liberties and Human Rights

Carding has been practised across Canada. There is no law that defines, prescribes or justifies this practice. Stopping individuals and retaining information from them could violate their rights under the constitution and under provincial human rights laws.

When individuals provide information, they do not get informed by the police that they are not required to do so. But even if the police do inform them, there is no proof that those individuals provide their information voluntarily.⁴⁸

Aviv of the Canadian Civil Liberties Association (CCLA) notes that the power imbalance between police and individuals may result in individuals being reluctant to assert their rights:

⁴⁵ Griffiths Report 2018 at 20-21.

⁴⁶ Anthony N. Doob & Rosemary Gartner, "Understanding the Impact of Police Stops" (17 January 2017), online: University of Toronto <<http://criminology.utoronto.ca/wp-content/uploads/2017/03/DoobGartnerPoliceStopsReport-17Jan2017r.pdf>> at p A14 [Doob 2017].

⁴⁷ Doob 2017 at A22.

⁴⁸ Aviv 2015 at 3.

There is an inherent power imbalance that arises when police interrogate individuals — that is, law enforcement powers including carrying weapons and powers of arrest and detention which can and do intimidate individuals stopped and questioned by police. Individuals may not know their rights or may be understandably reluctant to assert their rights. It is fair to opine that not many people would choose to be interrogated and documented in police databases in the absence of a valid policing purpose. Youth can be rendered particularly vulnerable, and more so in racialized communities where, as a result of the long history of racial profiling, there is arguably a ‘crisis of distrust’ with police.⁴⁹

Aviv also notes that there are certain legal obligations on the police when a stop does not amount to investigative detention or arrest:

In the event that a police stop does not amount to investigative detention, detention or arrest, the interaction should not and cannot take place if it is not voluntary. If it is determined that such a stop is permitted, the onus is on police officers to communicate to the individual that they are not required to participate in the encounter, to answer any questions or provide any personal information, and that they are free to go. This should take place at the beginning of the interaction. At the conclusion of the interaction, police should issue to individuals a carbon copy or printout of any information that is recorded about them in the police database and in the database monitoring racial profiling, subject to public safety purposes.⁵⁰

Aviv also states that: “courts have recognized that police stops may not be voluntary, but rather the result of psychological constraint, for example out of fear of the exercise of physical force or prosecution.”⁵¹

The *Tulloch Report* notes: “Not everyone who is stopped (and not formally detained) by the police will understand that they have the right to proceed on their way without answering questions.”⁵²

The *Tulloch Report* also notes that: “If a person reasonably believes, even if that belief is erroneous, that they have no choice but to cooperate with police, a psychological detention

⁴⁹ Aviv 2015 at 3.

⁵⁰ Aviv 2015 at 8.

⁵¹ Aviv 2015 at 3.

⁵² *Tulloch Report* 2018 at 76.

may occur. These concerns, if objectively reasonable, would trigger police obligations to advise the person of their right to counsel and of the reason for the detention.”⁵³

The *Tulloch Report* further states: “Given the inherent power imbalance in a police interaction with an individual, particularly when the person is young, suffers from mental health issues or is a member of a racialized group, it is especially important for police to ensure that the person is genuinely cooperating voluntarily.”⁵⁴

E. Case Law

i. *R v Ferdinand*

Mr. Ferdinand was stopped and carded by the police. He claimed that the criminal charges against him were the result of the unlawful conduct of the police. He alleged that the police breached ss 7, 8, 9 and 10 of the *Charter* asking that the evidence be excluded from his trial according to s 24(2) of the *Charter*.

In this case, Justice Harry LaForme stated the following with respect to carding:

While I am not at all deciding that this is the case—and it is not necessary for me to do so—I make my observations only to express a profound note of caution. If the manner in which these 208 cards are currently being used continues; there will be serious consequences ahead. They are but another means whereby subjective assessments based upon race—or some other irrelevant factor—can be used to mask discriminatory conduct. If this is someday made out—this court for one will not tolerate it. This kind of daily tracking of the whereabouts of persons—including many innocent law-abiding persons—has an aspect to it that reminds me of former government regimes that I am certain all of us would prefer not to replicate.⁵⁵

....

Although I do not dispute that 208 cards might well be a useful and proper investigative tool for the police; in my view the manner in which the police currently use them makes them somewhat menacing. These cards are currently being used by the police to track the movements—in some cases on a daily basis—of persons who must include innocent law-abiding residents.⁵⁶

⁵³ *Tulloch Report* 2018 at 76.

⁵⁴ *Tulloch Report* 2018 at 76.

⁵⁵ *R v Ferdinand*, 2004 CanLII 5854 (ON SC) at paras 20-21. A 208 card is approximately 3" by 5" and is printed on both sides, commencing with the words, "Person Investigated". It records information obtained from a person who is stopped by the police that includes information such as, "name, aliases, date of birth, colour, address, and contact location including the time". On the back it has entries for things such as: "associates" and "associated with: gang, motorcycle club, Drug Treatment Court". The police then input the information from the completed 208 cards into a police computer database for their future reference (at para 10) [*Ferdinand*].

⁵⁶ *Ferdinand* at paras 18-19.

Justice Laforme added that “there is no evidence that any police officer advises, or has ever advised, any person stopped that they have a right not to answer any questions from this card and that they are free to leave if they wish. One reasonable—although very unfortunate—impression that one could draw from the information sought on these 208 cards—along with the current manner in which they are being used—is that they could be a tool utilized for racial profiling”.⁵⁷

ii. *R v Mann*

Mr. Mann, who matched the description of the suspect, was stopped by two police officers after being informed about a break and enter. He was patted down for weapons when an officer found marijuana in his pockets. He was arrested and charged with possession of marijuana for the purpose of trafficking. It turned out that Mr. Mann had no connection to the break and enter.

The Supreme Court of Canada (SCC) stated that the court is required to:

[B]alance individual liberty rights and privacy interests with a societal interest in effective policing. Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law. The vibrancy of a democracy is apparent by how wisely it navigates through those critical junctures where state action intersects with, and threatens to impinge upon, individual liberties.⁵⁸

The SCC applied the *Waterfield*⁵⁹ test, wherein:

[P]olice powers are recognized as deriving from the nature and scope of police duties, including, at common law, ‘the preservation of the peace, the prevention of crime, and the protection of life and property’ (*Dedman, supra*, at p. 32). The second stage of the test requires a balance between the competing interests of the police duty and of the liberty interests at stake. This aspect of the test requires a consideration of:

whether an invasion of individual rights is necessary in order for the peace officers to perform their duty, and whether such invasion is reasonable in light of the public purposes served by effective control of criminal acts on

⁵⁷ *Ferdinand* at para 14.

⁵⁸ *R v Mann*, [2004] 3 SCR 59, 2004 SCC 52 (CanLII) at para 15 [*Mann* 2004].

⁵⁹ *R v Waterfield and Lynn* (1963), 3 All ER 659, [1964] LR 1 KB 164.

the one hand and on the other respect for the liberty and fundamental dignity of individuals.⁶⁰

iii. *R v Grant*

Mr. Grant was stopped by one of the three police officers who were patrolling a school in a high crime neighbourhood. Mr. Grant provided his identification to the officer. But before being able to leave, the other two officers showed up and started talking to Mr. Grant who admitted that he had marijuana and a firearm on him. Subsequently, Mr. Grant was arrested, without being informed of his right to speak to a lawyer. The marijuana and weapon were seized.

In this case, the SCC stated that:⁶¹

psychological constraint amounting to detention has been recognized in two situations. The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject's position would feel so obligated. The court added that the rationale for this second form of psychological detention was explained by Le Dain J. in *Therens* as follows:

In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary.⁶²

The SCC added:

⁶⁰ *Mann* 2004 at para 26 (citing *Cloutier v Langlois*, 1990 CanLII 122 (SCC), at pp 181-182).

⁶¹ *R v Grant*, [2009] 2 SCR 353, 2009 SCC 32 (CanLII) at para 30.

⁶² *R v Therens*, [1985] 1 SCR 613, 1985 CanLII 29 (SCC).

While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.⁶³

...

Another often-discussed situation is when police officers approach bystanders in the wake of an accident or crime, to determine if they witnessed the event and obtain information that may assist in their investigation. While many people may be happy to assist the police, the law is clear that, subject to specific provisions that may exceptionally govern, the citizen is free to walk away.⁶⁴

iv. *R v Suberu*

Mr. Suberu and his friend possessed a stolen credit card with which they purchased different items including six \$100 gift certificates. When his friend tried to make a purchase with one of the gift certificates, the store employee called the police. A police officer arrived and started questioning his friend. Mr. Suberu decided to leave the store and said: "he did this, not me, so I guess I can go". At the same time, a second officer entered the store and said to Mr. Suberu: "Wait a minute. I need to talk to you before you go anywhere." He did not advise Mr. Suberu of his right to counsel. After admitting that the purchases of the gift cards were made with a stolen credit card, the officer told Mr. Suberu that he was under arrest for fraud. Then Mr. Suberu confessed, after being asked by the police officer about the bags in the car,

⁶³ *Grant* at para 32.

⁶⁴ *Grant* at para 37.

that some of them belonged to him. The police officer repeated that Mr. Suberu was under arrest for fraud, and only then informed him of his right to counsel.

In this case, the SCC confirmed what was mentioned in *Grant* by stating that:

Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.⁶⁵

People who are not under investigation should be protected by a respectful relationship with the police. Police will be able to do a better job if this person-police relationship improves. Police should inform people that providing information is voluntary and should tell them how that information will be used. But, as noted earlier, the reality is that people who are randomly stopped and questioned by the police are usually not aware of their rights. They are rarely advised as to how any information they provide might be used.

IV. Police Disclosure of Criminal Convictions and Non-Conviction Records

A. What is a Police Record?

The Ontario Government (Psychiatric Patient Advocate Office) defines a “police record” as follows:

A police record is information created or gathered by police. It may include criminal information, such as charges and convictions, as well as non-criminal contact with police. For example, a police record is created any time you are actively involved with the police. Even if you have never been charged or convicted of an offense, but interacted with police in some way, a police record may be created.

A police record may include information related to a person's mental health. This is because police often play a role in the provision of mental health care, such as

⁶⁵ *R v Suberu*, [2009] 2 SCR 460, 2009 SCC 33 (CanLII) at para 25.

transferring persons to hospital for assessment or responding to persons who are in crisis.⁶⁶

Contrary to what people think, the information that is revealed in a check of police records is not limited to criminal convictions. Canadian laws and police policies do not define “criminal record”. Many types of information can be disclosed on a police record check.

Different information can be disclosed on a police record check depending on the services provided by the police and the type of the requested record check. People who have not been charged or found guilty, may still have some information revealed on a police record check.⁶⁷

i. Criminal convictions

As explained by the CCLA:

A person who is found guilty of a criminal offence can receive either a criminal conviction or a discharge. A person will have a criminal conviction if they are sentenced to:

- a term of imprisonment (continuous or intermittent),
 - a fine or forfeiture,
 - a conditional sentence (where the sentence is to be served in the community),
- or
- a suspended sentence with probation (rehabilitative supervision in the community through probation).

A criminal conviction will remain on an individual’s record until the person applies for and receives a record suspension (formerly called a pardon)⁶⁸ under the *Criminal Records Act*.⁶⁹

ii. Absolute and conditional discharges

The CCLA also explains:

A person who pleads or is found guilty of a criminal offence may also receive an absolute or conditional discharge. These are findings of guilt, but they are explicitly *not* criminal convictions.

...

⁶⁶ “Police Information Checks and Vulnerable Sector Checks” (July 2011), online: <<https://www.sse.gov.on.ca/mohltc/ppao/en/Documents/11.07.25%20-%20PPAO%20InfoGuide%20Police%20Records.pdf>> [Police Information Checks 2011].

⁶⁷ Police Information Checks 2011.

⁶⁸ What is a Criminal Record? at 1.

⁶⁹ *Criminal Records Act*, RSC 1985, c. C-47, s 6(1).1.

[Section 6(1).1 of] the *Criminal Records Act* requires that these records be automatically sealed and removed from RCMP databases after one year for an absolute discharge and three years after a conditional discharge.

Individuals who are discharged are frequently told that they will not have a criminal record of conviction(s). While this is technically correct, it is misleading: the fact that a person received a discharge is widely disclosed on a basic criminal record check, at least within the one- and three-year retention time frames.⁷⁰

iii. Other non-conviction records

Police record checks can reveal mental health apprehensions, withdrawn charges, stays of proceedings and acquittals. Despite the fact that those individuals were never found guilty, their information is going to be revealed on a police record check.⁷¹

B. Storage of Police Collected Information

The RCMP's Canadian Criminal Real Time Identification Services (CCRTIS) maintains the National Repository of Criminal Records. Based on fingerprint records, it contains information about a person's criminal history, including charges and the court's final ruling.

CCRTIS must ensure that personal and fingerprint information is kept and disclosed in accordance with legislation, including the *Identification of Criminals Act*, the *Criminal Records Act*, the *Privacy Act* and the *Youth Criminal Justice Act*.

CCRTIS seals records under certain provisions. When a record is sealed:

This means that while the general public may go online to check for a criminal record and find nothing, the record of that conviction does still exist, but it's only accessible under very specific circumstances by legal agencies. It's also important to note that while even a sexual offense conviction can technically be suspended in Canada, a person's name may still be present and come up as flagged under certain searches.⁷²

⁷⁰ What is a Criminal Record? at 2.

⁷¹ What is a Criminal Record? at 2.

⁷² Pardons Canada, *How Long Will My Criminal Record Last?* Online: <https://www.pardons.org/long-criminal-record-last/>.

The CCRTS also retains both conviction and non-conviction record information in the National Repository of Criminal Records in accordance with legislation. This includes charges that are withdrawn or dismissed.⁷³

C. Databases that Store Police Records

According to the Canadian Civil Liberties Association (CCLA) and the Ontario John Howard Society (OJHS), police records are maintained and stored in a variety of databases – and they do not all necessarily contain the same information. For example, national databases, local police databases and border agencies may all have access to different amounts of information.

The CCLA and the OJHS go on to state:

Local police databases generally contain the majority of information and detail about specific incidents or police interactions. If a criminal charge is laid against someone, the local police service creates a file in their database and they may send a copy of this information to the Canadian Police Information Centre (CPIC), managed by the RCMP. CPIC then creates a temporary file until further action is taken by the courts. If the charge results in a conviction, staff at CPIC enters the information into its computerized database that is accessible by police officers across Canada. Once a conviction has been entered in the CPIC system, police across Canada will have access to the same information that was contained in the temporary file, as well as the record of conviction and sentencing.⁷⁴

Information is uploaded at the discretion of the local police department. The time frame of when information is uploaded, or whether it is uploaded in an ongoing fashion, is decided by each service and can vary across police departments and provinces. If charges are dropped, stayed, changed or in any way modified, it is the responsibility of the local police agency to adjust the information in their database and ensure that one of the major RCMP databases does not contain inaccurate information.

There are instances where non-criminal contacts with local police can be shared with CPIC. If individuals have had interactions with the police relating to threat

⁷³ Managing Criminal Records, Commitment to Privacy, online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/en/managing-criminal-records>> [Managing Criminal Records].

⁷⁴ Canadian Civil Liberties Association & John Howard Society of Ontario (October 2014), “On The Record An Information Guide For People Impacted By Non-Conviction Police Records In Ontario”, online: <<http://www.johnhoward.on.ca/wp-content/uploads/2014/11/On-the-Record-1-FINAL.pdf>> at 14 [“On The Record 2014”].

of suicide or attempted suicide, this information may be ‘flagged’ in CPIC, and therefore accessible to all police services and agencies with access to CPIC.⁷⁵

Non-conviction records, pending charges, absolute and conditional discharges can be included in national databases. According to the limits set in the CPIC manual, local police services determine what to upload to the national databases. Once uploaded, it will be accessible to police across Canada.⁷⁶

Thus, it can be seen that the variety of available personal information records and the variety of locations where these are stored can be challenging for a person who seeks to have a non-conviction record expunged or otherwise sealed.

D. Types of Police Record Checks

Individuals may be required to obtain a police record check or background check for employment, volunteer work or other civil screening processes. In order to complete these checks, a search may be conducted against various police databases, including the RCMP National Repository of Criminal Records. Searches of the National Repository of Criminal Records may be done either by name and date of birth, or fingerprints.⁷⁷

A police record check or police background check refers to one of three different levels of background checks:

i. Criminal Record Check

A criminal record check shows any criminal convictions a person has received. This is the most common type of background check.

According to Pardons Applications of Canada:

A person who is found guilty of a criminal offence will receive a conviction, which will be stated on their criminal record.

The following penalties may appear on a criminal record:

- A term of imprisonment;
- A fine;
- A conditional sentence, which is to be served within the community;
- A suspended sentence with probation[.]

⁷⁵ On the Record 2014 at 14-15.

⁷⁶ The Canadian Bar Association 2017 at 40.

⁷⁷ Canadian Criminal Real Time Identification Services, online: RCMP <<https://referencesandmoreservices.com/wp-content/uploads/Criminal-Record-Checks-Fact-Sheet-EN.pdf>> at p 1 [RCMP].

A criminal conviction will remain on a person's criminal record until they apply for and receive a Pardon, also known as a record suspension. There is no period of time in which convictions are removed or erased automatically. For example, an individual with a criminal conviction from 40 years ago will still have a visible criminal record until they have been pardoned.⁷⁸

ii. Police Information Check (Non-Conviction Records)

The Ontario Government (Psychiatric Patient Advocate Office) describes a police information check as follows:

A police information check shows the same information as a criminal record check, and additionally includes non-conviction criminal information such as charges, warrants, probation orders, peace bonds, and dispositions of Not Criminally Responsible on account of Mental Disorder (NCR). It may also show other police contact, including contact that involved the use of weapon or behaviour which was violent, threatening or harmful.⁷⁹

According to the CCLA:

Non-conviction information refers to information on an individual who has been charged with a crime but not found guilty or convicted. This includes charges that were withdrawn or dismissed.

When people have interactions with the police, their personal information such as being a witness or a victim, withdrawn charges, acquittals, allegations and mental health apprehensions can be collected and stored by the police. This information may appear on police record checks despite the fact that these records are not criminal convictions.⁸⁰

The CCLA also discusses how the police end up obtaining non-conviction records:

Non-conviction records can result from a wide range of interactions with the police, mainly police carding or police street checks, that can include:

- having informal interactions with the police where individuals give an officer their name;
- having mental health-related interactions with the police;
- calling 911 or being present when the police responded to a 911 call;

⁷⁸ The Difference Between Criminal Convictions & Non-Convictions (28 February 2017), online: Pardon Applications of Canada <<https://www.pardonapplications.ca/articles/difference-criminal-convictions-non-convictions/>>.

⁷⁹ Police Information Checks 2011.

⁸⁰ Non-Conviction Records, online: Canadian Civil Liberties Association <<https://ccla.org/recordchecks/doc/Non-Conviction%20Records.pdf>> [CCLA Non-Convictions Records].

- being involved in a police investigation as a witness, victim or suspect;
- being charged with an offence but never convicted of the crime (for example, the charge was withdrawn, and the person was found not guilty, the charge was stayed, an individual received a conditional or absolute discharge, etc...).⁸¹

According to the police, any contact with them and any non-conviction record should be revealed on police record checks. Police forces disclose different kinds of information which makes it really difficult for individuals to know what is going to be included in their record check. Non-conviction records can be disclosed even if there was no charge or no findings of guilt since no law covers what can be revealed on a police record check. In Alberta, no law forbids employers from discriminating on the basis of conviction or non-conviction record, however, in other jurisdictions (e.g., federal, Ontario), employers cannot discriminate on the basis of a pardoned conviction.⁸²

Employers should not be informed frequently about mental health issues that are not related to any criminal investigation, unless there is a possibility that vulnerable people including children and elderly people can be at risk. When police think that mental health information should be revealed, they should explain the reason and should give the applicant a chance to explain the situation before making a final decision.⁸³

iii. Vulnerable Sector Check

Section 6.3(1) of the *Criminal Records Act* defines “vulnerable person” as 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.

Section 6.3(3) reads:

⁸¹ CCLA Non-Convictions Records.

⁸² False Promises at 10.

⁸³ Daniel Marshall & Terry Thomas, The Disclosure of Police-Held ‘Non-Conviction Information’ to Employers, *International Journal of Political Science & Management* 2015, Vol. 17(4) 237-245, online: <<https://journals.sagepub.com/doi/pdf/10.1177/1461355715616989>> at 242-243.

At the request of any person or organization responsible for the well-being of a child or vulnerable person and to whom or to which an application is made for a paid or volunteer position, a member of a police force or other authorized body shall verify whether the applicant is the subject of a notation made in accordance with subsection (2) if

(a) the position is one of trust or authority towards that child or vulnerable person; and

(b) the applicant has consented in writing to the verification.

Section 6.3(7) provides that:

a police force or other authorized body shall disclose the information referred to in subsection (6) to the person or organization that requested a verification if the applicant for a position has consented in writing to the disclosure.

Police vulnerable sector checks are required for those who are seeking to work with vulnerable groups, such as children, disabled persons and elderly people. They provide employers and organizations with information needed to decide on whether an individual is suitable to work with vulnerable people. This will require a search of police databases and local police records, in addition to the National Repository of Criminal Records.⁸⁴

According to the Calgary Police Service:

Some organizations may require a vulnerable sector verification by their own choice. Potential employees or volunteers are therefore required to attend their local police agency for verifications. Some examples of individuals who are required to undergo this process may include teachers, social workers, daycare providers, coaches, care providers, counselors, camp providers, bus drivers and students preparing for work terms with the vulnerable sector. Some licensing requirements also require a Vulnerable Sector Verification record search for security guards and locksmiths.⁸⁵

⁸⁴ RCMP at 3.

⁸⁵ Vulnerable Sector Verification FAQs, online: Calgary Police Service <<http://www.calgary.ca/cps/Pages/Public-services/Vulnerable-sector-verification-FAQs.aspx>>.

Some employers and organizations may require prospective employees and volunteers to get certain kinds of background check. They do that in order to determine their suitability for the position and if there was any risk in hiring them.⁸⁶

The British Columbia Department of Justice explains:

But prior to having an applicant apply for a police check, an organization/employer should determine if it is a *bona fide* requirement for the job in question. The Supreme Court of Canada has set out a three step test, referred to as the *Meiorin*⁸⁷ test, which states such a requirement must be:

1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.⁸⁸

In *Ireland v Translink*, the Human Rights Tribunal stated that a review of the RCMP's Consent for Disclosure of Criminal Record Information indicates that there are four categories of information that may be disclosed in response to a request for a criminal record check. It appears that Category 4 information is what is at issue in the complaint:

Police information located on computer systems and information located through local police indices checks. This will include all information related to non-convictions and all charges regardless of disposition.

In short, Category 4 includes information about a police interaction for which there has been no conviction or even charges. It further appears that Category 4

⁸⁶ British Columbia Guideline For Police Information Checks; Police Information Check, Police information Check With Vulnerable Sector (June 2015), online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/standards/police_infochecks_guideline_3.pdf> at 36-37.

⁸⁷ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC) at para 54 [*Meiorin*].

⁸⁸ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC) at para 54.

information is only accessible where the person is applying for a job working or volunteering with Vulnerable Persons.⁸⁹

E. Limits on Police Collection and Disclosure of Personal Information

As mentioned earlier, those who have not been charged or found guilty will have their information disclosed on a police record check. However, those who have received a pardon, will get a police report declaring that they have no criminal record.

According to Legalline:

Where charges result in not guilty dispositions, it is unclear whether police services have the legal right to:

- keep the information (including fingerprints and photographs of the accused),
- use this information for investigation purposes, and
- disclose this information to third parties.

There is a strong *Charter* argument against the maintenance and use of information derived from such charges.⁹⁰

Non-conviction records can be contained in different levels of record checks. There is no law that governs the way police release information on non-conviction dispositions and records of police contact. An applicant's consent plays a factor in releasing a police record check despite the fact that federal, provincial and territorial privacy laws put a limit on the information that can be released.

If privacy laws do not apply, police will have the discretion to release any information on any types of record checks particularly vulnerable sector check. Police can have different policies on what to disclose on a police record check since there no definition of a criminal record check or police record check. Only a few jurisdictions have some guidelines on what to release on a police record check.⁹¹

⁸⁹ *Ireland v Translink and another*, 2016 BCHRT 19 (CanLII) at paras 32-33.

⁹⁰ Legal Line.

⁹¹ The Canadian Bar Association 2017 at 40.

F. Principles on Disclosure of Personal Information that Apply to Law Enforcement

Police can reveal personal information to different agencies including agencies in foreign countries if there is an agreement or if it is authorized by law. Also, personal information may be released to the public when it is reasonable to breach a person's privacy. For example, inform a register for child-care workers about people with history of child molestation or inform a community about the release of dangerous criminals.⁹²

Kathryn Schellenberg states: "Whether data can serve legitimate police needs and protect civil liberties depends in part on how it is used."⁹³ She continues:

[T]he government should act as a 'trustee' as opposed to mere 'custodian' of personal information. The notion of trusteeship implies the discretion to withhold as well as disclose - and a duty to balance the public's interest in guarding against those who pose a clear and present danger to public safety against its interest in safeguarding the privacy of those who have run afoul of the law but deserve: 'a second chance, an opportunity to start life anew, regardless of past sins or crimes, to rehabilitate themselves through work and reintegration into the community' [citing Laudon 1986, p 114].⁹⁴

These principles are generally reflected in our freedom of information legislation.

According to the Alberta Government, one of the fundamental purposes of the *FOIP Act* is to:

[c]ontrol the manner in which a public body may collect personal information from individuals; to control the use that a public body may make of that information; and to control the disclosure by a public body of that information.⁹⁵

The *FOIP Act* "applies to government departments, as well as agencies, boards, commissions, corporations, offices and other bodies designated in the *FOIP Regulation*."⁹⁶

Municipal and provincial police forces are considered "bodies" and therefore are subject to the *FOIP Act*. The legislation also provides:

⁹² Kathryn Schellenberg "Police Information Systems, Information Practices and Individual Privacy (1997) 23(1) Canadian Public Policy 23 at 25 [Schellenberg].

⁹³ Schellenberg at 32.

⁹⁴ Schellenberg at 37.

⁹⁵ Government of Alberta *Freedom of Information and Protection of Privacy: A Guide*, 2006 online: <<https://www.servicealberta.ca/foip/documents/FOIPGuide.pdf>> at 1 [FOIP Guide].

⁹⁶ FOIP Guide at 4.

A record is in the custody of a public body if the public body has physical possession of the record. A record is under the control of a public body when the public body has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition.⁹⁷

G. Special Provisions Applying to Youth Records

The *Youth Criminal Justice Act (YCJA)*⁹⁸ applies to young people from the ages of 12 to 17 who are charged with a criminal offence.

Criminal record checks contain youth records and adult police records. The disclosure of youth records is regulated by the YCJA, while adult police record disclosure is managed by the *Criminal Records Act* and the *Privacy Act*. The YCJA prohibits the disclosure of youth records in the same way adult police records are disclosed. The disclosure must protect the privacy of youth records in accordance with the provisions of the YCJA.⁹⁹

Justice Binnie, speaking for the SCC, noted that:

[T]he importance of confidentiality in dealing with youthful offenders is recognized internationally, as set out in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules') adopted by General Assembly Resolution A/RES/40/33 of November 29, 1985, supported by Canada, which includes the following provisions in Rule 8:

- 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
- 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.¹⁰⁰

The privacy of young persons who are accused or found guilty of a crime is protected by the YCJA. It forbids the release of their personal information if they were involved in a crime or

⁹⁷ FOIP Guide at 2.

⁹⁸ *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA].

⁹⁹ Chantelle Van Wiltenburg, "Off the Record: A Critical Analysis of Youth Record Disclosure Practices" (2018) 76 U.T. Fac. L. Rev. 29 at 34 [Van Wiltenburg].

¹⁰⁰ *F.N. (Re)*, [2000] 1 SCR 880, 2000 SCC 35 (CanLII) at para 16.

an offence. The *YCJA* also requires that the information stays confidential and restricts the access to their records.¹⁰¹

The Department of Justice goes on to define “record” as:

A record is anything that contains information created or kept for the purposes of the *YCJA* or for investigating an offence that could be prosecuted under the *YCJA*. For example, the following information may be part of a youth record: name or birth date; details about arrest, charge or sentence; and information provided by family members, neighbours, school authorities and victims.¹⁰²

According to the Department of Justice, a youth record stays open depending on the offence committed, the sentence imposed and if the young person carries out another offence while the record is still open. The period during which the record is open is called access period. Once this period ends, youth records are sealed and destroyed. If someone over the age of 18 with an open youth record commits another crime, the youth record will become part of that person’s adult record.¹⁰³

Section 115(1) of the *YCJA* authorizes police services to keep records of youth offences. It states:

[a] record relating to any offence alleged to have been committed by a young person, including the original or a copy of any fingerprints or photographs of the young person, may be kept by any police force responsible for or participating in the investigation of the offence.

The Canadian Department of Justice lists those who may be allowed to see a youth record:

- A young person who is accused or found guilty of a crime, along with the young person’s lawyers, parents or guardians, and anyone else authorized by the court;
- Crown prosecutors;
- Judges, courts and review boards;
- Police officers involved in the case;
- Directors of correctional facilities where the youth serves a sentence;

¹⁰¹ *Youth Records*, online: Department of Justice <<https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/recor-dossi.html>> [Youth Records].

¹⁰² *Youth Records*.

¹⁰³ *Youth Records*.

- People involved in a youth justice conference;
- The victim; and
- Someone carrying out a criminal record check for a government job (municipal, provincial or federal).¹⁰⁴

According to subsections 82(1) & (4), after the termination of a youth sentence, a young person is deemed not to have been found guilty or convicted of the offence with certain exceptions. Also, a finding of guilt under the *YCJA* is not a previous conviction for the purposes of any offence with certain exceptions.

Chantelle Van Wiltenburg also sets out other restrictions on access to youth records:

[A]ccess to most youth records is further limited by section 119(2). This provision stipulates specific periods of time for which the aforementioned persons can access particular youth records. Access periods vary depending on the type of record in question; they can range from 2 months to 5 years, and are subject to further extensions in certain circumstances. If a youth record falls outside of its access period, it is generally inaccessible unless a person brings a successful application for access under a stringent test set out in section 123 of the *YCJA*. Notwithstanding these access periods a young person and his or her counsel may continue to access the young person's record at any time.¹⁰⁵

Youth have access to their own records, but according to section 129 of the *YCJA*: “no person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any other person unless the disclosure is authorized under this Act.”

However, the *YCJA* does not necessarily protect all youth records from disclosure.

Chantelle Van Wiltenburg discusses some of the interpretations of the *YCJA* that are troubling:

Numerous police services take the position that including youth record information in a criminal record check requested on consent is justified because it does not, strictly speaking, contravene the *YCJA*.

...

According to police services, when an individual consents to a criminal record check, police forces are therefore authorized to disclose pertinent youth record information on that criminal record check. Police services are of the opinion that

¹⁰⁴ Youth Records.

¹⁰⁵ Van Wiltenburg at 38.

they are not responsible if the individual then passes that information on to a third party.¹⁰⁶

It is illegal for an employer to ask about an individual's youth record. However, the police can disclose information to the requestor if the person with the youth record consented to such disclosure. The individual will then decide if they want to provide it to a potential employer. The decision the individual makes may be risky and may affect their chances of getting the job. There might be an assumption that that individual voluntarily gave consent to access and disclosure of their record, when in fact, in order to be hired, they did not have a choice but to consent.

V. Impact of Disclosure of Non-Convictions Records

A. How do Non-Conviction Records Impact People's Lives?

Non-conviction records can have a significant impact on people's life. Unlike non-convictions, convictions can be pardoned and subsequently stop affecting people's police records. Non-convictions, such as stayed charges, acquittals, dismissed or withdrawn charges, absolute and conditional charges, can show up on police records for life. Their destruction is left up to the police.

Police record checks might reveal information about incidents where the individual was not charged, for example if that individual was a complainant or a witness. If that individual had applied for a job or volunteer position, then the prospective employer might not know the difference between a conviction and a non-conviction. The prospective employer might think that the applicant was involved in a criminal incident, then decide not to hire them. It is important that the applicant explains the situation if the disclosure of a non-conviction on a police record prevent them from getting the job.¹⁰⁷

According to the CCLA and the OJHS:

Non-conviction police records are not removed from police databases automatically. And, depending on the policies of the local police service, these

¹⁰⁶ Van Wiltenburg at 39-40.

¹⁰⁷ Legal Line.

records may be disclosed on a police record check or made available to United States border officials. Individuals who have been charged with a criminal offence, but who are acquitted of the charges or have their charges withdrawn or discharged, are often told by court personnel that they 'do not have a criminal record'. Although this is partially true – they do not have a criminal record of conviction – the information can nonetheless be disclosed on a record check. These same individuals are understandably distressed when they later find out that this is the case. Most people are entirely unaware that they have a non-conviction police record until it is too late - when they are rejected for an employment opportunity or turned away at the U.S. Border.¹⁰⁸

...

The disclosure of these records results in unwarranted stigma, discrimination and a loss of trust or respect. It places an unfair burden on the individual to explain the incident and risk being denied for employment or other opportunities, such as housing insurance, citizenship, volunteer work, travel, adoption/fostering, travel and so forth. Consequently, non-conviction records can have the same impact as a record of conviction. On an individual level, having a police record check disclose non-conviction information can negatively impact individuals' self-esteem and their self-perception. For individuals who have mental health issues, the disclosure of police contacts can severely undermine their recovery process.¹⁰⁹

Police record checks, particularly non-conviction records, impact the life of many individuals in different ways. What is not logical is that individuals with convictions have been provided protection but those who are innocent with non-conviction records have been discriminated against.

B. Stories of People Affected by Disclosure of Non-Convictions Records

There are many examples of situations where the disclosure of non-convictions records has had a negative impact. These may be divided into the following categories.

i. US Border Crossings

Unfortunately, many individuals with non-conviction records have been denied entry to the United States. The reason is that the United States Department of Homeland security and the

¹⁰⁸ On the Record 2014 at 6.

¹⁰⁹ On the Record 2014 at 6-7.

U.S. Customs and Border Protection have access to the CPIC databases. That gives them access to criminal records and non-conviction records cases under investigation.¹¹⁰

The CCLA provides the following example:

- Lois was trying to board a flight to Los Angeles to spend thanksgiving with family when she was pulled over by American border officials for secondary screening. She was told she was not able to cross over to the United States because Toronto police had attended her home in 2006 after a 911 call for medical assistance.¹¹¹

ii. Studies and Employment

The CCLA lists the following examples of circumstances where people were adversely affected in their employment or professional studies by the release of non-conviction records:¹¹²

- Lana's abusive ex-partner phoned the police and accused her of assault, twice. After leaving her partner she was unemployed and needed financial assistance to try to pay school application fees. When she first went to Ontario Works, they initially told her they wouldn't even pay for the application for nursing school because there was a chance she wouldn't get a nursing placement while in school.
- Gord was a nursing student when he was asked to get a vulnerable sector check in order to complete college placements. His non-conviction record, which was nearly two decades old when it was disclosed on his police check, completely altered the course of his life.
- Jane and John's daughter was a straight-A student nearing the end of a nursing program. She had passed multiple background checks while at school. But suddenly one of these checks brought up two incidents from years earlier, where the police had taken her to hospital under the *Mental Health Act* but had labelled her as being 'violent and aggressive'. After the first incident, the examining psychiatrist had sent her home. After the second

¹¹⁰ CCLA and OJHS at 29.

¹¹¹ Canadian Civil Liberties Association, "Presumption of Guilt: The Human Story", online: <<https://ccla.org/recordchecks/humancost/>> [Presumption of Guilt]. ACLRC and RMCLA report other instances where individuals have reported difficulties crossing the US border.

¹¹² Presumption of Guilt. Likewise, ACLRC has been contacted by individuals experiencing similar difficulties in Alberta.

incident, where again, it was determined that she was intoxicated but not suffering from a mental disorder, she was sent home. Police initially refused to remove the record. After an extensive legal action, the police stated that they would remove the records for now but that they could replace the record at any time.

Other examples provided by Robert Cribb:

- A Toronto man studying to be a nurse was forced to quit because unproven charges from 20 years earlier appeared on a police background check. The reason? He had worked as a clerk at a comic book store on a day when it was raided by police on allegations of selling obscene material. The charges were quickly thrown out by a judge, but a record of them remained and forced his exit from a career that he dreamed of in health care.
- A Caledon man's dream of being a firefighter ended because a police check detailed a childhood friendship with a suspected drug dealer — even though he himself had no contact with police.
- Teresa Sanderson, a woman who was training to be an RCMP officer when a background check turned up 'occurrences' in Toronto police computers dating back to 1999. She said she had no idea what the records referred to or how they got there. None of the allegations led to convictions. Still, her prospective career in the RCMP was over.¹¹³

iii. Volunteer Opportunities

CBC's Maureen Brosnahan reported:

Cassandra House wanted to volunteer for a local chapter of Big Sisters, but she was turned away because her job once required her to appear in court. Cassandra was working as an EMR in Lac La Biche when, in 2006, she was called to testify in the suspicious death of a child. According to Cassandra the record states that she was involved in an active investigation.¹¹⁴

¹¹³ Robert Cribb, "Law protecting Ontarians from disclosure of police records finally gets green light" (7 May 2018), online: The STAR <<https://www.thestar.com/news/investigations/2018/05/07/law-protecting-ontarians-from-disclosure-of-police-records-finally-gets-green-light.html>> [Cribb 2018].

¹¹⁴ Maureen Brosnahan, "Police Check Routinely Violate Privacy, Report Says" (17 September 2012), online: CBC <<https://www.cbc.ca/news/canada/police-checks-routinely-violate-privacy-report-says-1.1129717>>.

iv. Police Investigations not Resulting in Criminal Charges

As noted, non-conviction records can impact people's lives long after a police investigation does not result in criminal charges.

- Gabriel went to the police for advice after he got a text message threatening his life. The police arrested the woman who sent the text message – and the day after she was released on bail, she went to the police and made a series of serious allegations against him. Two days later Gabriel was arrested and charged. Months afterwards all the charges against him were withdrawn – but the police refused to destroy the records.¹¹⁵
- An Ottawa man lost a promising career with Air Canada despite never being charged with or convicted of any crime. But his record check showed police noted that he was seen with a suspected drug dealer in the low-income neighbourhood where he grew up.¹¹⁶
- A Toronto woman trained as a social worker had her career and personal life 'ruined' by 16-year-old assault allegations from her then teenage daughter following a heated dispute — allegations that never led to a conviction.¹¹⁷

These are but a few of many examples of the serious consequences of disclosure of non-convictions records by the police. The next section discusses the challenges with getting these records expunged.

VI. Retention and Destruction of Conviction and Non-Conviction Information

Non-conviction and conviction information is stored in the National Repository of Criminal Records. Storage and retention of the information is governed by the *Identification of Criminals Act*, the *Youth Criminal Justice Act* and the *Criminal Records Act* and other applicable laws.¹¹⁸

¹¹⁵ Presumption of Guilt.

¹¹⁶ Cribb 2018.

¹¹⁷ Cribb 2018.

¹¹⁸ Managing Criminal Records, online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/en/managing-criminal-records>> [RCMP, Managing Criminal Records].

A. Presumption of Innocence

The Presumption of Innocence is impacted by the police's record retention policies which usually fail to respect this principle. If an individual is simply charged or accused, that does not mean that he or she is guilty.¹¹⁹

Section 11(d) of the *Charter* states that any person charged with an offence has the right to be presumed innocent until proven guilty. According to this section, those who are guilty are sentenced according to the criminal justice system. It guarantees the right of any person charged with an offence to be presumed innocent until proven guilty beyond a reasonable doubt. It also ensures that a fair process will take place in order to prove the guilt of an accused.¹²⁰

The CCLA stated that:

Disclosing this type of sensitive information may undermine the presumption of innocence. For example, employers who receive negative police record checks may not fully understand the distinctions between the different types of police information in the police report, creating a significant risk that non-conviction records will be misconstrued as a clear indication of criminal conduct. In the case of mental health records, this information may lead to illegal discrimination against those with mental disabilities.¹²¹

David Schell agreed:

Disclosing police records of those who have not been charged or who have had their charges withdrawn or dismissed runs against the presumption of innocence. Despite no finding of guilt against them, these individuals can end up losing out on employment opportunities or can otherwise have their freedom restricted (for example crossing borders). It also appears they are afforded little opportunity to clear their name, as there is no proceeding within which they can defend themselves.¹²²

¹¹⁹ James Mencil.

¹²⁰ Paragraph 11(d) – Presumption of Innocence, online: Government of Canada, Department of Justice <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art11d.html>>.

¹²¹ Presumption of Guilt at 2.

¹²² David Schell, "Criminal Record vs Police Records" (19 March 2018), online: Mondaq <<http://www.mondaq.com/canada/x/684220/Crime/Criminal+Record+vs+Police+Records>>.

In a recent decision, *Kalo v Winnipeg*,¹²³ the Manitoba Court of Queen's Bench stated: "Although not a violation of his section 11(d) *Charter* rights as to the presumption of innocence prior to a finding of guilt or innocence, this disclosure without [the complainant's] input is eerily similar."¹²⁴ The court added that the: "mere presence of stayed or withdrawn charges, or protection orders, may cause an applicant to be rejected out of hand. The applicant may never get an interview to set forth his explanation. This must also be weighed against the disclosure without his input."¹²⁵

As a result, the Court suggested the police thoroughly review the process of including non-convictions in criminal record checks.¹²⁶

B. Making a Request for Removal/ Destruction of Non-Conviction Records

According to the RCMP, non-conviction information is kept in the National Repository of Criminal Records until the individual formally requests its destruction, receives a record suspension [pardon] or until the individual reaches the age of 125.¹²⁷

Many individuals are quite surprised that they must take steps to secure the removal of these records.

The CCLA provides the requirements for those who plead guilty or are found guilty but they receive an absolute or conditional discharge:

These are findings of guilt, but they are not criminal convictions. A person cannot receive a record suspension for a discharge. The *Criminal Records Act* states that these records should be automatically sealed and removed from the Royal Canadian Mounted Police's (RCMP) databases after one year for an absolute discharge, and three years for a conditional discharge.¹²⁸

Obtaining a Record Suspension (formerly Pardon) is not necessary for an individual who has *only* non-conviction records, but there is still a request that can be made to remove police

¹²³ *Kalo v Winnipeg (City of) on behalf of Winnipeg Police Service*, 2018 MBQB 68 (CanLII) [Kalo, MBQB]; matter referred back to MBQB to be considered on a proper record 2019 MBCA 46.

¹²⁴ Kalo, MBQB at para 26.

¹²⁵ Kalo, MBQB at para 39.

¹²⁶ Kalo, MBQB at para 53.

¹²⁷ RCMP, Managing Criminal Records.

¹²⁸ On the Record 2014 at 10.

records, fingerprints and photographs. Usually, the police service that created the non-conviction record can decide whether or not to purge the information from the local and national databases.

The RCMP sets out the following steps:

To make a request for the destruction of non-conviction information, individuals must apply to the police service that laid the original charge. If the police approve the request, it will then contact the RCMP's Canadian Criminal Real Time Identification Services (CCRTIS) to request the destruction of the non-conviction information from the National Repository of Criminal Records.

CCRTIS may refuse to destroy the non-conviction information if there are compelling reasons to deny the request. Individuals can appeal this decision by CCRTIS by sending a letter to:

Director General
Canadian Real Time Identification Services
RCMP, NPS Bldg.
1200 Vanier Parkway
Ottawa, Ontario K1A 0R2

...

The RCMP's Records Suspension & Purge Services may deny an application to destroy a non-conviction record if one or more of the following conditions apply:

- You were charged as a young person under the *Youth Criminal Justice Act*
- You have a criminal conviction on file within the National Repository
- You have an outstanding criminal charge before the courts
- The appeal period has not expired for the charge
- Less than one year has passed since you were given a Peace Bond
- Less than one year has passed since you were given a Stay of Proceedings. A non-conviction record will be retained for a minimum of five years from the date of the court decision if the charge is related to:
 - High treason or treason
 - Potential terrorist activity
 - First and second degree murder
 - Manslaughter
 - Aggravated assault
 - Sexually-based offences

The non-conviction record will also be retained for a minimum of five years in cases where individuals have been found not criminally responsible due to a mental disorder.

- Requests to have the above records destroyed within the five-year period should be supported by additional information, such as Crown proceedings, police services records, and/or court documents.¹²⁹

C. Record Removal for those Found “Not Guilty”

If an individual in Canada has been accused and charged of a crime and fingerprinted or was required to go to court, he or she will have a criminal record, even if found not guilty.

Legalline sets out how these non-conviction records can be removed:

The criminal record file of a not-guilty outcome is under the legal jurisdiction of the police that laid the charges. If that police service agrees, it will usually destroy the person’s fingerprints and photographs and destroy or seal the charge outcome records. Most times, the police will also request that the RCMP return its copy of the criminal record file for destruction. In the case where photographs, fingerprints, and other records held by police are permanently destroyed, they can never resurface or be accessed again. On average, a complete file destruction can take anywhere from three to eighteen months.

Whether [an individual’s] file will be destroyed depends on the policies of the local police service that laid the charges. The criteria used by police services for making their decision can include such things as the nature of the offence and whether there are any other charges on the individual’s record. Since local police policies across the country are constantly changing, it is difficult for the average person to know what to do. In some cases, having charges at more than one police service can further complicate the destruction or sealing of records, and if done incorrectly, can result in revealing the information to other police services instead of having it destroyed. Although the destruction of files relating to not-guilty outcomes should be the least complicated and most successful of applications, it is not.¹³⁰

In *R v Dore*,¹³¹ an individual was convicted of a number of serious offences. He was identified because the police had fingerprints on file from a previous encounter on an unrelated matter wherein he was charged with an indictable offence but pled guilty to misdemeanour

¹²⁹ Legal Line.

¹³⁰ Legal Line.

¹³¹ *R v Dore*, 2002 CanLII 45006 (ON CA) [Dore ONCA].

offences. Dore argued that his right to be free from unreasonable search and seizure under *Charter* s 8 had been violated by the unconstitutional retention and use of his fingerprints.¹³²

The Ontario Court of Appeal discussed police retention of fingerprints where there was no conviction and stated that: “there is no reason to differentiate the expectation of privacy that an acquitted person has in such information from the expectation that a person who has never been charged with an indictable offence would have, because it is information about and from one’s body not normally available without one’s consent.”¹³³

The Court cited with agreement Dore’s *factum*, which stated that:

Fingerprint destruction is a matter of police discretion. Almost without exception, the police exercise their discretion in favour of destroying fingerprints upon receipt of a simple request from an individual. This enhances the reasonableness of the retention scheme. It allows those individuals who are troubled by the fact of their fingerprints are being retained, to request their destruction. Except in highly exceptional circumstances, this request is acceded to. It is submitted that this approach strikes a reasonable balance between the privacy interests of the individual and the societal interest in the fair, effective, timely and accurate investigation of crime and administration of justice.¹³⁴

Because Dore had not requested that his records be destroyed, the ONCA held that *Charter* s 8 had not been violated by the police.¹³⁵

D. Effectiveness of Police Record Checks

As has been seen, police records checks have implications for citizens’ civil liberties and human rights.

Police record checks impact the lives of many individuals because it affects their ability to be employed, to volunteer, to get an education, and to travel, etc..., even when the released information is not related to the situation. Non-conviction records disclose information that breaches individuals’ privacy and can lead to discriminatory outcomes against them.

¹³² Dore ONCA at paras 1-3.

¹³³ Dore ONCA at para 64.

¹³⁴ Dore ONCA at para 83.

¹³⁵ Dore ONCA at paras 87-8.

At the same time, despite these significant impacts on civil liberties and human rights, record checks are not effective risk management tools. The Ontario John Howard Society (OJHS) indicates that:

[T]here is no research demonstrating that police record checks are effective as risk management tools. This is important to emphasize given that the type of information that can be disclosed on police record checks is highly sensitive and personal, often resulting in the prejudicial and stigmatizing treatment of those with police records.¹³⁶

The OJHS also indicates:

There is also no compelling evidence to suggest that workplace violence is perpetrated more by persons with criminal records than those without one; indeed, 'considering the problem of workplace crime in the aggregate, an assumption that much employee perpetrated illegal activity may be due to employees with no prior criminal justice involvement is probably not unreasonable' (Harris and Keller 2005).

Research suggests that after certain time frames, there are no differences in the risk of offending between those with a prior conviction and those without. There is a period of time for which the risk of offending is the same for those with a prior conviction and those who have never been convicted.

Since there is no compelling evidence suggesting that past police records of conviction are useful predictors of risk, it would be reasonable to suggest that non-conviction police records are even less useful in predicting future behaviour.¹³⁷

However, for individuals who want to work with vulnerable people, it is totally acceptable for employers to request police records from them. These records are required in order to protect the vulnerable population, but that does not mean that those who have a clear police record have not committed an offence in the past or will not commit an offence in the future.¹³⁸

¹³⁶ Help Wanted: Reducing Barriers for Ontario's Youth With Police Records, online: John Howard Society of Ontario < <http://johnhoward.on.ca/wp-content/uploads/2014/07/johnhoward-ontario-help-wanted.pdf> > at 16 [OJHS 2014].

¹³⁷ OJHS 2014 at 17.

¹³⁸ OJHS 2014 at 18.

The OJHS recommends that organizations develop a company policy regarding police record checks before requesting them. Also, organizations should look into each case alone to determine whether a record check is necessary or not.¹³⁹

In a submission to the *Police Records Reform Act* Consultation, the OJHS stated:

Vulnerable Sector Checks should only be conducted by an individual with experience in these types of checks, or in a supervisory/managerial position. It should not be performed by the person conducting the police records check.

...

This will help to ensure some measure of transparency in disclosure, as well as efficiency.¹⁴⁰

This report has shown the different ways people get affected by the disclosure of non-conviction records. The report has also shown that police carding or street checks that take place arbitrarily are the main reasons for having police records. What does not make sense, is that we provide protection for individuals with criminal convictions, but potentially discriminate against those who are innocent by collecting and disclosing non-conviction records.

Following are law reform initiatives made or suggested to address the civil liberties and human rights concerns about these practices. Finally, we provide some suggested law reforms.

VII. Law Reform Initiatives

- A. Carding/ Collection of Personal Information by Police
 - i. Ontario Regulation Changes

As mentioned earlier, in January 2017, Ontario enacted Regulation 58/16 under the Police Services Act, preventing carding by police in specific situations. The regulation bans police from collecting identifying information arbitrarily or based on a person's race or presence in a high crime neighbourhood in certain instances.

¹³⁹ OJHS at 32-3.

¹⁴⁰ Submission: *MCSCS Police Record Checks Reform Act Regulations Consultation*, online: John Howard Society of Ontario <<http://johnhoward.on.ca/wp-content/uploads/2016/04/Police-Records-Check-Regulations-MCSCS-Submission-2016.pdf>> at 8.

Ontario is the first province in Canada to create such a regulation, while other provinces are still struggling with this issue. As reported by Muriel Draaisma, according to the Ontario government, “it is the first jurisdiction in Canada to set out what it calls ‘clear and consistent’ rules for ‘voluntary’ interactions between the police and public when police are seeking identifying information.”¹⁴¹

Muriel Draaisma describes the new regulation as follows:

The rule applies if an officer asks the person for identifying information or to see an identifying document while:

- Looking into suspicious activities;
- Gathering intelligence;
- Investigating possible criminal activity.

The rule does not apply if police ask for identifying information or to see an identifying document while:

- Doing a traffic stop;
- Arresting or detaining someone;
- Executing a warrant;
- Investigating a specific crime.

The regulation also establishes training, data management and reporting requirements about the collection of identifying information. The ban on carding is mandatory for all Ontario police services.¹⁴²

The Canadian Press summarizes the new provisions:

[Since January 1, 2017 when the Regulation got enacted], police in Ontario must tell people that they have a right not to talk to them, and refusing to co-operate or walking away cannot then be used as reasons to compel information.

However, police can gather personal information during routine traffic stops, when someone is being arrested or detained, or when a search warrant is executed. The new rules will also not apply to police undercover operations.

...

¹⁴¹ Muriel Draaisma, “New Ontario Rule Banning Carding By Police Takes Effect (2 January 2017), online: CBC <<https://www.cbc.ca/news/canada/toronto/carding-ontario-police-government-ban-1.3918134>> [Muriel Draaisma].

¹⁴² Muriel Draaisma.

Under the new regulations, police must offer a written record of any interactions with the public, including their name and badge number, along with information on how to contact the Independent Police Review Director.

All identifying information that is collected by officers will have to be submitted within 30 days for review by the local chief of police. At least once a year, the chiefs will have to conduct a detailed review of a random sample of entries in their database to verify it was collected in compliance with the regulation.

Chiefs must also issue an annual public report on the number of attempted collections of personal information, the sex, age and race of the individuals stopped, and the neighbourhoods where the information was collected.¹⁴³

Marc-Andre Cosette noted: “After spending more than \$500,000 to implement new provincial rules governing street checks, Ottawa police stopped only seven people between March and December 2017.”¹⁴⁴

In June 2017, Justice Michael Tulloch was appointed by the Ontario Government to review the Regulation and its implementation. His report came out in December, 2018 where he called for a full ban of police carding. He recommended that the Regulation expressly state that no police officer should arbitrarily or randomly stop individuals to request their identifying information.¹⁴⁵

Justice Tulloch also recommended:

Recommendation 7.2

Before identifying information is requested, individuals should be informed of the following:

- (a) the reason for the request to provide identifying information;
- (b) that, if the individual provides identifying information, the information may be recorded and stored in the police records management system as a record of this interaction;
- (c) that participation is voluntary; and

¹⁴³ “Ontario regulation bans carding by police” (22 March 2016) Online: <https://www.cbc.ca/news/canada/toronto/yasir-naqvi-carding-1.3501913> [Ontario Regulation].

¹⁴⁴ Marc-Andre Cosette, “Critics Doubt New Police Stats On Street Checks” (29 January 2018), online: <https://www.cbc.ca/news/canada/ottawa/street-check-2017-report-1.4506005>.

¹⁴⁵ *Tulloch Report* 2018 at 223.

(d) that, if they chose to provide information, some of the identifying information that may be requested, such as the person's religion, is being requested by law to help eliminate systemic racism.¹⁴⁶

Justice Tulloch acknowledged that there are some situations where street checks are legitimate and appropriate, but he argued that there is no place in policing for carding – which he defined as “randomly stopping individuals to gather their identifying information for the creation of a database for intelligence purposes.”¹⁴⁷

ii. Alberta Initiatives on Carding

a. *The Alberta Government*

In 2017, Alberta Justice launched province-wide consultations on police street checks to create rules around carding. Just under 100 organizations were asked to share their views on street checks as the province considered regulating the police practice of “randomly stopping and documenting people in Alberta.”¹⁴⁸

Then Justice Minister Kathleen Ganley was quoted by the CBC as stating: “We are looking to work towards a guideline that would ensure that the rights of the public are protected but still allow community policing and engagement between communities and the police.”¹⁴⁹

Minister Ganley added: “We don't want to limit police to only talking to folks who are arrested or detained because we think there is an expectation to have those more positive interactions as well. At the end of the day a provincial guideline will hopefully provide clear and consistent rules that everyone can follow and that everyone can be aligned with.”¹⁵⁰

According to Yolande Cole, Ganley called “concerning” the data that revealed in Edmonton that black and indigenous people were both stopped a higher rate than their share of the population, and said she had heard from a number of community groups about the

¹⁴⁶ *Tulloch Report 2018* at 226.

¹⁴⁷ Molly Hayes, “Judge’s call to ban carding now rests with Ontario government (4 January 2019), online: The Globe And Mail <<https://www.theglobeandmail.com/canada/article-judges-call-to-ban-carding-now-rests-with-ontario-government/>>.

¹⁴⁸ Andrea Huncar, “Alberta government launches provincewide consultation on police street checks” (24 August 2017), online: CBC News <<https://www.cbc.ca/news/canada/edmonton/alberta-street-check-consultations-1.4260272>> [Andrea Huncar].

¹⁴⁹ Andrea Huncar.

¹⁵⁰ Andrea Huncar.

unequal distribution of street checks. She said the next step for the provincial working group that is reviewing the practice was reaching out to community groups. “It’s important to get it right, because there are both liberties and safety at stake at the same time,” Ganley said.¹⁵¹

Alberta’s Government changed in April, 2019. As of January 2019, the then Government had not announced any new guidelines or changes in policy.¹⁵²

b. Edmonton’s “Street Checks”

According to the CBC: In 2017, the Edmonton police commission started reviewing the practice of street checks, or carding, by city police, saying it wants to determine if it is “respectful of all the people served by the Edmonton Police Service (EPS).”¹⁵³

In 2018, an independent report¹⁵⁴ released by the Edmonton Police Commission called for changes to Edmonton police’s use of street checks. The report recommended the police increase its diversity, monitor for inappropriate stops and initiate a public dialogue around the practice sometimes referred to as carding. However, it did not recommend the banning of the practice. After the release of the report, Edmonton Police decided to distribute multi-language pamphlets explaining street checks.¹⁵⁵

In June 2018, Jonny Wakefield of the Edmonton Journal reported that carding stops by Edmonton police dropped 30 per cent in one year. He noted:

Edmonton police officers are carrying out fewer ‘carding’ stops, a trend Police Chief Rod Knecht attributes in part to ongoing controversy around the practice. Officers filed 15,909 street check reports in 2017, documenting cases where they stop and request information from someone who is not suspected of a crime.

Last year’s total was down 30 per cent since 2016 and nearly 40 per cent from a high of 27,322 street check reports in 2012.

¹⁵¹ Yolande Cole, “Calgary police chief welcomes provincial review of street checks” (28 June 2017), online: <<https://calgaryherald.com/news/local-news/calgary-police-chief-welcomes-provincial-review-of-street-checks>> [Yolande Cole].

¹⁵² Keegan Wynchuk, “Alberta Liberals demand action on carding before next election” (9 January 2019) online: <<https://www.albertaliberal.com/alberta-liberals-demand-action-on-police-carding-before-next-election>>

¹⁵³ Edmonton police commission to review police practice of street checks” (12 July 2017), online: <<https://www.cbc.ca/news/canada/edmonton/edmonton-police-commission-review-street-checks-1.4201919>>

¹⁵⁴ Griffiths Report 2018.

¹⁵⁵ Jonny Wakefield, “Police will distribute multi-language pamphlets explaining street checks in wake of carding report (22 November 2018), online: <<https://edmontonjournal.com/news/local-news/police-will-distribute-multi-language-pamphlets-explaining-street-checks-in-wake-of-carding-report>>.

'I think we're doing it better as a consequence of the feedback we got from the community,' Knecht said. 'I think we're changing the way we street check a little bit.'

'The other thing is we have some officers who just aren't doing street checks any more,' he added. 'They've sort of stepped back and said, 'I don't want to be investigated, I don't want to be hassled, I'm going to get in trouble, so I'm just not going to do these street checks anymore' ... we don't want that.'¹⁵⁶

c. *Calgary's "Street Checks"*

In Calgary, there is what is called a "Contact Information Form." It is a Calgary Police Service (CPS) intelligence gathering form which may be used following interactions between police officers and the public to record a person's information and/or the person's circumstances at a particular time and place.

According to Calgary Police Service, the form works as follows:

- 1.1. Collecting relevant and reliable information is necessary to achieve the statutory and common law duties of policing.
- 1.2. When collecting information, police officers must respect their statutory and common law powers and limits, in full compliance with:
 - a. the *Canadian Charter of Rights and Freedoms*;
 - b. the *Alberta Bill of Rights*;
 - c. the *Freedom of Information and Protection of Privacy Act*; and
 - d. the Calgary Police Service Bias-Free Policing policy....

...

6.2 Officers will not collect personal information using a Contact Information Form:

- a. about the political, religious or social views, associations or activities of any individual or any group, association, corporation, business, partnership or other organization unless:
 - i) the information relates to criminal conduct or activity; or
 - ii) there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity.

¹⁵⁶ Jonny Wakefield, "'Carding' stops by Edmonton police drop 30 per cent in one year" (24 June 2018), online: Edmonton Journal <<https://edmontonjournal.com/news/crime/carding-stops-by-edmonton-police-drop-30-per-cent-in-one-year>>.

- b. in order to satisfy a performance measure;
- c. to raise awareness of police presence in the community;
- d. to randomly document routine interactions with members of the public;
- e. to record information received from a confidential informant;
- f. to collect information in violation of the guarantees as outlined in s. 1(2) above; or
- g. when it would be more appropriate to submit an Occurrence Report.

...

8.2 The retention period for a Contact Information Form is currently under review.¹⁵⁷

In 2016, the Rocky Mountain Civil Liberties Association was raising questions about Calgary police stopping people in public places and asking them for identification. The CBC reported:

Through a freedom of information (FOIP) request, the Association received data dating back to 2010 and, while the numbers show a decline in how frequently Calgary police use the tactic, the group says many questions remain.

The police carded people 27,735 times in 2015, a decline of 40 per cent from 46,081 such incidents in 2010.

[The Association's] president Kelly Ernst noted there are still tens of thousands of such incidents in the city every year and it's not clear exactly what happens to the information police collect.

'All of that information is kept somewhere in some database and being shared with other police forces,' Ernst said.

'So we need to know a little bit more information about the carding — or 'police checkups' as they're called in Calgary — than what is readily available.'¹⁵⁸

¹⁵⁷ Contact Information Forms (New), online: <http://www.rmcla.ca/CPS_Check-up%20Slips_Forms_Policy_2016Jan22.pdf>.

¹⁵⁸ "Calgary police 'carding' raises concerns, says civil liberties group that filed FOIP request" (10 May 2016), online: <<https://www.cbc.ca/news/canada/calgary/calgary-carding-rocky-mountain-civil-liberties-1.3575539>>.

The Alberta Civil Liberties Research Centre held a forum on October 4, 2016, which included the then Calgary Police Chief Roger Chaffin and Kelly Ernst as speakers. The CBC provided the following report:

Personal information recorded by officers in non-arrest encounters will have to be justified.

Calgary's police chief Roger Chaffin said the force's procedures for 'carding' will be modernized and made more accountable.

...

'If someone collects data on someone that's non-criminal, but merely based on suspicion, there's going to be a strong element, that our intelligence group has to go through that data and score it and understand it — is it relevant, real data or is it not. And if it's not, if it simply was not relevant or necessary, it can be released,' he said.

'Why that person, why that place, what were you attempting to garner by gathering that information.'

Under the new system, information that is determined that cannot be justifiably kept on file will be deleted within a year, Chaffin said.¹⁵⁹

(Then) Calgary Police Chief Roger Chaffin's response to the results of other Alberta studies was summarized by David Bell:

Calgary's top cop says "random" police checks are not happening in the city, after accusations of racial profiling hit other Alberta cities. However, terminology may be important as the chief committed to improving the practice of 'carding' or 'check-up slips' just last year [2016].

...

The Calgary police chief, however, says this practice [racial profiling] is not happening in his city, at least not in a random manner.

'We have no word like 'random' in our lexicon,' Chief Roger Chaffin told CBC News.

¹⁵⁹ "Calgary police 'carding' practice to be modernized, made more accountable" (5 October 2016), online: <<https://www.cbc.ca/news/canada/calgary/calgary-police-carding-1.3791827>>.

'The idea where we could stop and talk to people who are suspicious, and who are linked to some articulable reason to want to stop someone and collect some information [from] so we can use that later on for investigations or to solve crimes that may have occurred in the area, is important.' Chaffin admitted that carding is a valuable tool but it's not arbitrary.¹⁶⁰

Chaffin also said in another report by Yolande Cole that the Calgary Police Service had been looking at how it collects its data and has implemented oversight of how that information ends up in the service's system. She noted:

Chaffin said Calgary police have been talking to community groups and advancing their own program called Info Post...while also participating in the discussion about provincial standards.¹⁶¹

d. *Lethbridge's "Street Checks"*

The CBC reported:

The Lethbridge Police Service is making changes following complaints about its practice of performing 'street checks.'

...

...Lethbridge police Chief Robert Davis said the review of practice that followed a complaint uncovered some problems that are being addressed.

Davis said the service will produce an annual report on the practice and beef up training around street checks and ensure the quality of the data that's collected.

'We already provide an annual report on say, use of force and on pursuits, so it only makes sense to provide these statistics as well, in an annual report that we'll submit to the commission,' he said.¹⁶²

As can be seen, various jurisdictions in Alberta are examining their practices, but it does not appear that street checks are being halted.

¹⁶⁰ David Bell, "Top cop says 'random' police checks not happening in Calgary, after accusations pile up elsewhere" (30 June 2017), online: CBC <<https://www.cbc.ca/news/canada/calgary/no-random-carding-says-calgary-police-1.4185777>>.

¹⁶¹ Yolande Cole.

¹⁶² "Lethbridge police review of 'street checks' leads to more training, annual reports on practice" (6 March 2018), online: <<https://www.cbc.ca/news/canada/calgary/lethbridge-police-checks-review-annual-report-1.4561435>>.

- B. Disclosure of Personal Information by Police
 - i. Ontario Law Reform Initiatives Related to Record Checks
 - a. *Police Record Checks Reform Act*

On December 1, 2015, the Ontario government unanimously enacted the *Police Record Checks Reform Act, 2015*.¹⁶³ It came into force on November 1, 2018.

Maddie Axelrod of Borden Ladner Gervais summarized the main provisions:

The Act limits the types of information that police may release in each of three different types of police record checks: (1) criminal record checks, (2) criminal record and judicial matters checks, and (3) vulnerable sector checks...

This Act requires that individuals provide their written consent to conduct any particular check and to disclose the results of the check to the organization or person requesting the check.

Vulnerable sector checks contain more information than any other police record check. Therefore, non-conviction information would be revealed in a vulnerable sector check not a standard criminal record check.¹⁶⁴

Jordan Kirkness and Susan MacMillan note:

A criminal record check would not contain information about a criminal offence for which the individual received an absolute discharge. Additionally, non-conviction information in response to a request for a vulnerable sector check cannot be disclosed unless it satisfies certain criteria for 'exceptional disclosure.' The criteria are: (1) the offence is one of the offences enumerated in the Regulations (2) the alleged victim was a child or a vulnerable person and (3) the police record check provider has reasonable grounds to believe the individual presents a risk of harm to a child or a vulnerable person, having regard to certain factors.

...

An organization or person may not disclose information provided in the check except for the purpose for which it was requested or as authorized by law.

...

¹⁶³ *Police Record Checks Reform Act*, SO 2015, c. 30.

¹⁶⁴ Maddie Axelrod, "Police Record Checks Legislation Comes Into Force" (01 November 2018), online: Mondaq <<http://www.mondaq.com/canada/x/739248/Crime/Police+Record+Checks+Legislation+Comes+Into+Force+November+1+2018>>.

Generally, a request for reconsideration must be made in writing, not later than 45 days after receiving the record and the request can be accompanied by written submissions to be taken into account by the police record check provider. The provider has 30 days from the day after it receives a request for reconsideration to reconsider its determination and notify the individual of its decision in writing. Non-conviction information will not be disclosed if after a reconsideration, the provider concludes that the information does not meet the criteria for 'exceptional disclosure'.¹⁶⁵

Brian Weingarten summarizes this new law as requiring police to:

- 1) tell you that you have the right to walk away from the interaction;
- 2) inform you that the interaction is voluntary and that you do not have to provide any information;
- 3) provide a reason for the stop;
- 4) provide a written record of the stop/interaction;
- 5) provide the individual with information about the particular officer, such as a badge number;
- 6) inform the individual about the process to make a complaint.¹⁶⁶

What is significant about this Act is that individuals will receive the information revealed on the police record, then will review it and consent to its disclosure. Only then, the police record check provider may provide a copy of the information to the person or organization who requested the check (s 12). The Act also gives the individual the right to request a reconsideration of the disclosure if inappropriate non-conviction information was disclosed (s 10(4)).

b. Proposed Reform to the Ontario Human Rights Code

A revision was proposed to the *Human Rights Code: Bill 164 The Human Rights Code Amendment Act*.¹⁶⁷ This *Bill* passed second reading in October 2017. Unfortunately, the Bill died on the Order Paper on May 8, 2018.¹⁶⁸

¹⁶⁵ Jordan Kirkness & Susan MacMillan, "Conducting a Police Record Check? What You Need to Know for November 1 (22 October 2018), online: Canadian Labour and Employment Law <<https://www.labourandemploymentlaw.com/2018/10/conducting-a-police-record-check-what-you-need-to-know-for-november-1/>>.

¹⁶⁶ Brian Weingarten, Police Carding, "Investigative Detention," and Section 9 of the Charter (16 November 2015), online: Brian Weingarten Defence Law <<https://www.bwdefencelaw.com/section-9-of-the-charter/police-carding-investigative-detention-and-section-9-of-the-charter/>>.

¹⁶⁷ Bill 164, Human Rights Code Amendment Act, 2017, online: Legislative Assembly of Ontario <<https://www.ola.org/en/legislative-business/bills/parliament-41/session-2/bill-164>>.

According to Grossman Gale Fletcher Hopkins:

The *Bill* [sought] to create a new protected right of ‘police records’ which includes any pending charge, any conviction (even where there has been no pardon) and any details of police involvement, including any “non-criminal contact” with police. This would thus prevent an employer from using in its decision-making process any prior criminal convictions an employee may have. It [was] expected that there will be further amendments to the proposed law, at the very least for situations involving the employment of people in trusted and sensitive positions such as teachers, coaches, or the care of the elderly.¹⁶⁹

The current *Code* prohibits discrimination against those who have been convicted and received a pardon. Discrimination is permitted, however, against those who have been charged for an offence, been acquitted of an offence, or just had contact with police. The proposed amendment aimed to extend this protection to these people.¹⁷⁰

ii. Uniform Law Conference of Canada

The Uniform Law Conference of Canada (ULCC), founded in 1918, is a government supported organization. It works to modernize and harmonize federal, provincial and territorial laws. It also looks into proposals to reform criminal laws.¹⁷¹

In August 2018, a new *Uniform Police Record Checks Act* was adopted by the ULCC (see link below):

The new Act standardizes the types of criminal record checks that may be provided, places limits on the disclosure of non-conviction information and creates procedural protections including appeal and reconsideration processes to correct inaccurate information and challenge irrelevant information disclosed in criminal record checks.¹⁷²

¹⁶⁸ Alexander Dezan, “Ontario election expected to determine survival of Human Rights Code amendments” (22 May 2018) online: <<https://nelliganlaw.ca/blog/employment-law/ontario-election-expected-to-determine-survival-of-human-rights-code-amendments/>>.

¹⁶⁹ “New Law On Police Records Effective November 1, 2018” (27 September 2018), online: Grosman Gale Fletcher Hopkins <<https://www.grosman.com/blog/police-records-check/new-law-on-police-records-effective-november-1-2018/>>.

¹⁷⁰ Lisa Stam, “Bill 164: Amendments to the Ontario Human Rights Code” (19 September 2018), online: Employment & Human Rights Law in Canada <<https://www.canadaemploymenthumanrightslaw.com/2018/09/bill-164-amendments-ontario-human-rights-code/>>.

¹⁷¹ Uniform Law Conference of Canada online: <<https://www.ulcc.ca/en/>>.

¹⁷² “ULCC Concludes its 100th Annual Meeting” (16 August 2018), online: CISION <<https://www.newswire.ca/news-releases/ulcc-concludes-its-100th-annual-meeting-691044891.html>>.

The purpose of the *Act* is to make a balance between the protection of personal privacy and the protection of the public interest. Non-disclosure of non-conviction information protects individual privacy, with the exception of those who will be working with vulnerable persons. Disclosure of such information protects the public.¹⁷³

The *Uniform Act* was drafted “using the same expressions related to police forces as Ontario’s *Police Record Checks Reform Act, 2015*.”¹⁷⁴

Section 9 of the *Uniform Act* states:

A police record check provider shall not disclose information in response to a request for a police record check unless the information is authorized to be disclosed in connection with the particular type of police record check in accordance with the Schedule.

The Comments to s 10 state:

Subsections 10(1) & (2) govern the circumstances under which ‘non-conviction information’ may be disclosed. Non-conviction information may only be disclosed in response to a ‘vulnerable sector check’ and only where the three criteria for disclosure in subsection (2) are met. The criteria are designed to limit the disclosure of non-conviction information to situations where the information may be considered truly relevant, such that it outweighs society’s interest in protecting privacy and the presumption of innocence.

The criteria achieve this balance by limiting disclosure to circumstances where the non-conviction information relates to a relevant charge, and where the alleged offence involves a child / vulnerable victim, and where there are reasonable grounds to believe that the person in question has been engaged in behaviour indicating a risk of harm to a child or vulnerable person. To ensure consistency in the application of this final criterion, six factors are set out to help define what may constitute a behaviour that indicates a ‘risk of harm’.

These subsections will ensure that non-conviction information is not disclosed in routine record checks. These subsections also protect against the disclosure of irrelevant non-conviction information when a ‘vulnerable sector check’ is performed.¹⁷⁵

¹⁷³ *Uniform Police Record Checks Act*, (2018), online: <ULCChttps://www.ulcc.ca/images/stories/2018_pdf_en/2018ulcc0007.pdf> at 2 [*Uniform Police Record Checks Act*].

¹⁷⁴ *Uniform Police Record Checks Act* at 5.

¹⁷⁵ *Uniform Police Record Checks Act* at 11.

Subsection 10 (3) mentions that: “when disclosing a record containing non-conviction information authorized for exceptional disclosure, the police record check provider shall ensure that the record contains the definition of ‘non-conviction information’ found in this Act and that the information is clearly identified as such.”¹⁷⁶

As for reconsideration of a decision to disclose:

Subsections (4) & (5) set out the requirement for a ‘reconsideration’ process. Reconsideration allows the applicant to make submissions to the police record check provider regarding whether the non-conviction information meets the criteria for exceptional disclosure in subsection 10(2). Reconsideration affords a measure of procedural fairness which helps ensure that only truly relevant non-conviction information is permitted to be disclosed.¹⁷⁷

While some of these provisions appear in *Ontario’s Police Record Checks Reform Act*, it does not currently appear that any other jurisdictions are moving to adopt the ULCC’s recommendations.

¹⁷⁶ *Uniform Police Record Checks Act* at 12.

¹⁷⁷ *Uniform Police Record Checks Act* at 12.

VIII. Recommendations

The Alberta Civil Liberties Research Centre makes the following suggested recommendations for law and/or policy reform.

A. Carding/Street Checks

1. The Alberta Government (and other provincial governments) should enact a Regulation similar to the one in Ontario on collecting identifying information from individuals. The Regulation should ban police from collecting identifying information arbitrarily. Police should not stop or question individuals and collect personal information from them except when they have reasonable grounds to do so.
2. Police officers should be trained and educated on the *Canadian Charter of Rights and Freedoms*, *Alberta Human Rights Act* and any law or regulation covering police street checks and carding.

B. Police Record Checks

1. The ULCC *Uniform Police Record Checks Act* should be adopted by the federal and provincial governments so the disclosure of non-conviction information can be limited to situations where it is necessary and relevant.
2. Alternatively, Alberta's government should enact legislation like Ontario's *Police Record Checks Reform Act*. The legislation should cover the collection, retention and release of non-convictions records. It should limit police disclosure of non-conviction records by not allowing the release of personal information unless it is necessary.
3. The *Criminal Records Act* should be amended to introduce a section protecting individuals with non-conviction records. The current Act does not provide any protection for individuals who have non-conviction records. It only protects those with absolute and conditional charges.
4. Non-conviction information should be disclosed only in exceptional circumstances where there are reasonable grounds to believe that disclosure of this information is necessary for public safety.
5. Employers and organizations should not request police record checks unless it is inevitable and necessary to hire or keep an employee or applicant; for example, the job requires this kind of record check. As mentioned earlier, only individuals who will be working with vulnerable people should be subject to a vulnerable sector search.

6. Individuals with mental health issues should be protected from any release of their records. If police checks disclose individuals' mental health information, then this will be violating privacy laws—particularly the *Health Information Act*.

7. Non-conviction records should not be retained by police indefinitely. They should be purged by police on a regular basis.

8. The Privacy Commission should perform a privacy audit of police departments, focusing on the collection, use, storage, use and destruction of personal information by police.

C. Other

1. The *Alberta Human Rights Act* should be revised to prohibit discrimination against individuals with police records, similar to human rights acts in some other provinces/territories. This protection should include non-conviction records, conviction records, mental health police contacts, pardoned and suspended charges.

2. Alberta's privacy laws should be amended to cover individuals who are not already protected by those laws. As mentioned previously, there should be a balance between protecting the privacy of individuals with non-conviction records and protecting the interest of the public.

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