



Information and Privacy
Commissioner of Ontario
Commissaire à l'information et à la
protection de la vie privée de l'Ontario

VIA ONLINE SUBMISSION

September 11, 2023

Molly McCarron
Director, Community Safety and Animal Welfare Policy
Ministry of the Solicitor General
25 Grosvenor Street,
George Drew Building, 9th Floor
Toronto, ON M7A 1Y6

Dear Molly McCarron:

RE: [Police Record Checks Reform Act, 2015 Legislative Review \(Proposal Number: 23-SOLGEN015\)](#)

The Information and Privacy Commissioner of Ontario (the IPC) is pleased to contribute this submission in response to the Consultation Paper (the consultation paper) issued by the Ministry of the Solicitor General (the Ministry). The paper invites feedback from the public to help the Ministry complete the required five-year review of the [Police Record Checks Reform Act, 2015](#) (*PRCRA* or *the Act*).

The consultation paper states, “the purpose of the review is to determine whether the *PRCRA* is achieving its policy intent of standardizing the police record check (PRC) process while balancing public safety and privacy rights.” The paper raises nineteen questions under four themes: balancing public safety and privacy rights (questions 1-10); service delivery (question 16); impact on volunteering and employment opportunities (questions 17-18); and additional feedback (question 19).

In preparing this submission, the IPC has focused its comments and recommendations on the privacy, transparency, and accountability issues that arise in the context of this review. Our goal is to help the Ministry complete the review in a manner that addresses objective public safety concerns, while also protecting privacy and other fundamental rights. The IPC has worked closely with the Ministry, the Ontario Human Rights Commission (OHRC), police leaders, and others for many years to help ensure that PRC-related laws, regulations and practices achieve these dual aims. As you move forward, the IPC encourages the Ministry to continue to consult the public and relevant entities and experts, including both the IPC and the OHRC, on the development of the recommended improvements.



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BACKGROUND

As indicated in the consultation paper, a PRC “reflects the results of a search of information in police databases about an individual at the point in time when the search is conducted” and “are often used as part of a screening process for employment or volunteering, entering education or a profession, adoption, licensing, and access to programs or services, etc.”

The pre-*PRCRA* era demonstrated that the absence of clear, comprehensive, and binding rules leads to:

- Inconsistent PRC practices, with attendant risks to the protection of privacy and safety;
- The disclosure of sensitive personal information – including non-conviction and non-criminal information – without adequate justification; and
- Associated human rights injuries, including those tied to police reliance on record systems that may reflect discriminatory policing practices (e.g., disproportionate rates of police documenting members of Indigenous and racialized communities in the context of carding, street checks, mental health and addictions response, search, seizure, arrest, charging, etc.).

In response to these compelling concerns, the *PRCRA* secured three critical advancements for Ontarians. First, it established binding rules that set province-wide boundaries and processes within which police and other authorized PRC providers must operate (see sections 5-12 and 14). These rules include prohibitions against disclosing information in response to a request for a PRC unless the individual provides written consent to the particular type of PRC and the disclosure is in accordance with the Authorized Disclosure Table (the Table). Together with sections 8, 9, and 10 of the *PRCRA*, the Table prescribes the three permissible checks and the increasing amounts of information that may be disclosed for each type of check:

- A criminal record check;
- A criminal record and judicial matters check; and
- A vulnerable sector check.

In this context, it is important to highlight that the only information permitted to be disclosed under the *PRCRA* is criminal information, i.e., information that directly relates to the fact that the person being subjected to a PRC has been convicted of, or in certain circumstances, charged with a listed criminal offence. “Non-conviction information” – information about cases where a person was acquitted or had their charges withdrawn or stayed before a court – may only be disclosed in a vulnerable sector check, and only if police are satisfied that the “exceptional circumstances” criteria in section 10 of the *PRCRA* have been satisfied. A key component of the “exceptional circumstances” criteria is that police must be satisfied that the relevant police records provide reasonable grounds to believe the individual has “engaged in a pattern of predation indicating that the individual presents a risk of harm to a child or a vulnerable person.”

Secondly, the *PRCRA* established that individuals have the right to: see the results of their PRC before anyone else (sections 7 and 12); seek correction of errors or omissions in PRC-related information (section 15); and seek reconsideration of any decision to disclose non-conviction information (section 10).

Thirdly, the *PRCRA* established critical privacy, transparency and accountability related requirements designed to ensure that:

- The Solicitor General (the Minister) is informed about PRC practices (see section 16 and the police duty to provide the Minister with statistics) and is in a position to issue directives to PRC providers (section 20) and conduct a thorough review of the *PRCRA* (section 21);
- Police service boards are able to ensure third party PRC providers comply with the *PRCRA* (see sections 17 and 18 and duties associated with third parties and related agreements); and
- Organizations, officials, and other entities that receive the results of a PRC do not use or disclose the information for an unauthorized purpose (see section 13 and the related offence in section 19).¹

However, it is critical to acknowledge that the safeguards and controls secured with the enactment of the *PRCRA* do not apply when it comes to: 1) PRCs that are exempted from the above rules by way of regulations to the *Act*, and 2) police searches that are excluded from the *Act* altogether.

1) *Exempted PRCs*

The *PRCRA* gave the Lieutenant Governor in Council the power to “make regulations exempting any person or class of persons from any provision of [the *PRCRA*] and attaching conditions to the exemption.” [O. Reg. 347/18](#), the *exemptions regulation* that came into force on July 1, 2021, grants an exemption to “the entire *Act*” to PRCs conducted in a variety of predominately public sector settings, including those associated with:

- adoption, residential and foster care;
- schools and child care providers;
- the administration of justice; and
- inspections, investigations, and enforcement related to compliance with the law.²

In every public sector setting granted a full exemption from the *PRCRA*, the applicable entities may seek, and PRC providers may disclose, a wide range of non-conviction and non-criminal information in addition to the kinds of information set out in the *PRCRA* Table.

¹ In addition, we note that in 2022, the *PRCRA* was amended to reduce barriers for volunteers, including by requiring that, with the exception of vulnerable sector checks, police conduct and provide the results of PRCs to volunteers at no charge.

² See sections 1-19 of the *exemptions regulation*. At the same time, a focused exemption was also granted with respect to section 12 of the *PRCRA* (see sections 20 -21 of the *exemptions regulation*). As a result, the relevant entities requiring the conduct of a PRC receive the results of the PRC without having to wait for the affected individuals to see those results.

However, in response to the IPC's recommendations, sections 0.1 to 0.5 of the *exemptions regulation* codify several *PRCRA*-like safeguards. One of the most important safeguards is the criteria designed to limit and control the disclosure of non-conviction and non-criminal information. The consultation paper describes this and the other safeguards and controls as measures "to ensure that the use of exemptions is based on clear and compelling public safety needs that balance privacy rights and mitigate the risks of discrimination and bias."³

2) *Excluded Police Record Searches*

The *PRCRA*-based safeguards and controls do not have any application to the kinds of police record *searches* that are entirely excluded from the *PRCRA* (per section 2(2)). These police record *searches* are required or conducted in relation to, for example:

- certain child protection related proceedings;
- the performance of the functions of a children's aid society;
- the administration of the *Juries Act* and *Firearms Act*;
- duties of Crown Attorneys and provincial prosecutors under the *Crown Attorneys Act*; and
- the functions carried out by the Attorney General under the *Ministry of the Attorney General Act*.

This means that many such police record *searches* may be continuing to cause harms associated with the pre-*PRCRA* era.

COMMENTS AND RECOMMENDATIONS

Since the *PRCRA* and the *exemptions regulation* regime came into force in 2018 and 2021 respectively, they have helped to standardize the conduct of PRCs in the province and reduce the privacy intrusive impact of PRCs. However, more work needs to be done to ensure the consistent protection of public safety and privacy across Ontario. Here below, are my office's comments and recommendations on how the regime can be improved going forward to better balance the Ministry's dual aims of protecting public safety, while also protecting Ontarians' privacy and other fundamental human rights.

Recommendation 1: Enhance rather than diminish privacy and human rights protections

As the Ministry conducts its five-year review of the *PRCRA*, the IPC recommends that, absent compelling evidence that any further intrusions on privacy are required, the Ministry should generally strive to maintain or enhance rather than diminish the privacy and human rights protections in the *PRCRA* and its regulations.

³ The other safeguards and controls provided for under the *exemptions regulation* require the individual's written consent to initiate a PRC, provide individuals with qualified rights to obtain, correct, and receive reconsideration of the results of their PRCs, require police to prepare and maintain the statistical information required by the Minister in connection with PRC requests and provide that information to the Minister on request, and require police to comply with directives issued by the Minister.

Recommendation 2: Adopt baseline privacy protections for police record searches

The IPC recommends that the Ministry consider whether any police record *searches* excluded from the *PRCRA* under section 2(2) should be brought within the *exemptions regulation*, such that they would, at a minimum, be subject to the safeguards and controls in sections 0.1 to 0.5. For those not brought within the *exemptions regulation*, the Ministry should work with relevant government partners (e.g., the Ministry of the Attorney General and the Ministry of Children, Community and Social Services) to ensure that all such checks are, to the greatest extent possible, subject to safeguards and controls comparable to those codified in the *exemptions regulation*.

Recommendation 3: Ensure police properly vet and purge non-criminal information

Significant concerns remain regarding the police retention, use, and disclosure of legacy “street check” information and other non-criminal information in the context of the PRC regimes governed by the *exemptions regulation* and the police record *searches* entirely excluded from the application of the *PRCRA*.

As I recommended in my *PRCRA*-related submission of [March 15, 2021](#), my office continues to maintain that the Ministry should take steps to ensure that police record holdings are properly vetted and appropriately purged, subject to the right of access or other applicable legal requirements. These steps are required to address longstanding and widespread concerns raised by the OHRC, among others, about the disproportionate rates of police documenting members of Indigenous and racialized communities, and those suffering from mental illness. This is particularly the case in the context of police practices related to, for example, carding, street checks, traffic stops, mental health and addictions response, and search and seizure. Only by regularly purging information that is inaccurate, inappropriate, or no longer relevant or required, would it make sense to continue authorizing any such disclosures.

In addition, the IPC recommends that the Minister issue a directive to PRC providers pursuant to section 20 of the *PRCRA* restricting PRC-related access to and disclosure of non-criminal information once defined periods have elapsed since the information was last updated. For example, it should be made clear that access to:

- mental health information should be restricted after two years (this approach is consistent with the approach to limiting the disclosure of mental health information via [CPIC](#)); and
- street check information should be restricted after five years (this approach is consistent with the approach to limiting police access to street check information under section 9 of [O. Reg. 58/16](#), the street check regulation).

Comparable rules should be put in place with respect to the police record *searches* regimes excluded from the *PRCRA* per section 2(2).

Recommendation 4: Ensure that personal information is not used or disclosed for PRC-related purposes unless police first take steps to ensure the information is accurate and up-to-date

A recent decision of the Ontario Superior Court of Justice highlights the importance of police updating the status of criminal proceedings in their record systems to reflect that charges have been disposed of in favour of the accused (see *Shanthakumar v. CBSA*, [2023 ONSC 3180 \(CanLII\)](#)). In Ontario, section 40 of the *Freedom of Information and Protection of Privacy Act* and section 30 in its municipal counterpart require institutions to “take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date.” When they were enacted over thirty years ago, these provisions made an exception for “personal information collected for law enforcement purposes.” While these exceptions remain in effect, they cannot be justified for the purposes of operating a PRC system. Consider, for example, that police risk contravening section 9 of the *PRCRA* – and even the offence provision of the *Act* – if their PRC disclosures describe criminal charges as being “outstanding” after those charges have been withdrawn, stayed or dismissed based on an acquittal.

In this context, the IPC recommends that the Ministry work with relevant government partners to enact a section 22(1) *PRCRA* regulation requiring police services to “take reasonable steps to ensure that personal information on the records of the institution is not used for the purpose of a PRC unless it is accurate and up to date.”

Recommendation 5: Enact rules governing when each kind of PRC may be used

Each type of PRC impacts privacy and other fundamental rights differently, in terms of the amount of information that can be disclosed and the degree to which disclosure decisions are subject to controls. A criminal record check – which is restricted to information about convictions – is the least intrusive. In criminal record and judicial matters checks, further information about absolute and conditional discharges and pre-trial charge-related information may also be disclosed. Vulnerable sector checks are more intrusive; they expand the amount of information to be released to include non-conviction information. *Exempted* PRCs and *excluded* police record searches – which are subject to fewer or no controls at all – are even more intrusive.

Other than under the *Juries Act*, there are no rules in force that clearly dictate which type of PRC or police record *search* an entity may ask for or a PRC provider may perform. In our view, such rules are necessary to help ensure greater consistency in PRC practices and thus enhance public confidence in the protection of both public safety and privacy.

In this context, the IPC recommends that the Ministry work with relevant government partners to define in what circumstances criminal record checks, criminal record and judicial matters checks, vulnerable sector checks, *exemptions regulation* checks, and excluded police record *searches* may be used. Rules defining those circumstances should be enacted under a section 22(1) *PRCRA* regulation and under other statutes associated with the section 2(2) excluded police record *searches* regimes.

Recommendation 6: Enact rules governing the secure retention and destruction of PRC records by entities in receipt of PRC results

While police services and other PRC providers may be subject to the privacy controls provided for under privacy legislation and the *PRCRA*, the same cannot be said for all of the entities that seek and receive the results of a PRC. In our view, it is critical that all entities in receipt of PRC results, whether in electronic or paper formats, be required to take reasonable steps to safeguard personal information in their custody or control, including implementing physical, technical and administrative safeguards to secure the information, as well as establish clear retention and disposal schedules. Various entities in receipt of PRC results may be subject to privacy legislation, however others are not (e.g., volunteer or not-for profit organizations). In addition, the privacy rights of employees and job applicants are not protected under any public or private sector privacy statutes currently in effect in Ontario. Such gaps must be filled by amendments to the *PRCRA* and/or under another statute.

In this context, the IPC recommends that the Ministry work with relevant government partners to ensure that binding rules are put in place to protect the privacy of personal information received by all the entities entitled to request a PRC in Ontario.

Recommendation 7: Require transparent annual statistical reporting regarding the operation of the *PRCRA*

Section 22(2)(b) of the *PRCRA* allows the Minister to make regulations respecting statistical information that police services and other PRC providers must prepare and maintain in connection with PRC requests. Section 16 requires every PRC provider to prepare and maintain the prescribed statistical information and provide it to the Minister on request. In addition, in March 2021, my office recommended and the Ministry agreed to amend the *exemptions regulation* to ensure that the Minister's power to establish these reporting requirements was incorporated into that regulation (section 0.5). To date, however, none of these regulation making powers have been used and, as a result, no one has had the benefit of the insights that such data collection requirements might have allowed.

Meanwhile, back in [November 4, 2015](#), the IPC recommended that the *PRCRA* be amended to require annual public reporting of the statistical information provided to the Minister to enhance transparency and public trust. Had this recommendation been adopted, the Ministry would have had important information on hand to help assess the policy and operational impacts of the *PRCRA* and Ontarians would have access to critical information to help inform public debate in the context of this five-year review, as well as going forward.

The IPC recommends that the Minister enact a regulation pursuant to section 22(2) of the *PRCRA* requiring police services and other PRC providers to prepare and maintain specific classes of statistical information each year, including statistics associated with the annual performance of PRCs and the handling of reconsideration and correction requests under both the *PRCRA* and the *exemptions regulation*. Such a regulation should also require that the statistics be provided to the Minister and made public (e.g., on an annual basis). If this cannot be accomplished through regulation, it should be accomplished through an amendment to the *PRCRA*.

Recommendation 8: Complete the review process in a transparent manner

In our November 4, 2015 submission to the Standing Committee studying the *PRCRA* bill, the IPC acknowledged that the requirement for a legislative review was an important feature of the bill, and recommended further amendments to require that public consultation and public reporting be part of the review process. While that recommendation was not adopted, the IPC is pleased to see that the Ministry has published the consultation paper and invited feedback from the public.

Given the importance of the issues and the need for transparency and accountability in reviewing the *PRCRA*, the IPC recommends that the Ministry make the findings of the five-year review public, or at least provide the public with a detailed summary of what it heard and how the findings may inform future policy work.

CONCLUSION

The IPC is grateful for the opportunity to participate in this consultation.

In the spirit of transparency, we will be posting our submission on the IPC website. Please do not hesitate to contact my office with any questions or for further engagement.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patricia Kosseim', with a stylized flourish at the end.

Patricia Kosseim
Commissioner