

POLICE RECORD CHECKS AND RIGHTS-RESPECTING HIRING

A guide for businesses and not-for-profit organizations

A wide range of organizations are requiring employees and volunteers to provide police record checks. Privacy, human rights and employment law limits how much personal information organizations can collect from applicants, volunteers and employees, as well as how the results of a police check can be used. These record checks can be very privacy invasive and lead to discriminatory treatment, so it is important to know what laws apply to organizations requesting police record checks. This guide was produced by the Canadian Civil Liberties Association and is intended to help individuals learn the basic contours of the applicable laws. It also suggests best practices that organizations can implement to ensure their processes are rights respecting, regardless of which specific laws apply in their jurisdiction. It is important to remember that this guide does not provide legal advice – if you need advice about a specific situation, you should contact a lawyer.

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1. A quick primer on police record checks: What kind of information is contained in police records, and what are the different levels of record check?

What kind of information is contained in police records?

Police have access to local, provincial and federal databases that contain a wide range of information. The records go far beyond just a list of criminal convictions and findings of guilt. People can come into contact with the police as victims, persons with mental health needs, witnesses, “persons of interest” or the targets of investigations into crimes alleged by others. Police records can include details of alleged incidents where no charges were laid, apprehensions under provincial mental health legislation, withdrawn charges (via diversion, Crown assessment of no reasonable prospect of conviction, or as not in the public interest), stays of proceedings and acquittals. While none of these dispositions or records involves a formal finding of guilt, they nonetheless generate “police records” or “criminal court records” and, depending on the specific policies of the policing service, can be disclosed on a “record check.” Throughout this guide, we call these types of records “non-conviction records.”

What are the different levels of record check?

There are many different types of police record checks in Canada, and, depending on the kind of check you request, you can get very different amounts of information. We have grouped police record checks into three general categories: criminal record checks, police information checks, and vulnerable sector checks. Unfortunately, police services use different names for the different checks they run – a “criminal record check” provided by a particular police service may not match what we have labelled a criminal record check below. You should talk to your local police service to find out exactly what types of record checks they offer and what kinds of records might be revealed by these checks.

Police criminal record check

This is the least privacy invasive level of record check. It will disclose criminal convictions that have not received a record suspension (or pardon) and absolute and conditional discharges within one- and three-year time frames, respectively. Often people will be given a form asking them to self-disclose whether they have any of these records. This form is submitted to the police, who will simply confirm whether their records match what the person has disclosed. Sometimes police services will print out a complete list of these records – an individual may be asked to provide their fingerprints to get the detailed list. Not all police services offer this level of check.

Police information check

The next level of background check, which we will refer to as a police information check, can include a broader range of information. Generally, the police information check can include a search of local and federal police databases, court records, and a query of records management systems in other police agencies' jurisdictions. The results of this search can disclose many different types of records, including:

- outstanding charges, warrants, judicial orders;
- peace bonds, and probation and prohibition orders;
- absolute and conditional discharges;
- family court restraining orders;
- dispositions including, but not limited to, withdrawn, dismissed, and not criminally responsible by reason of mental disorder; and
- occurrence reports and other police contact information, including allegations that did not result in charges, 911 calls and mental health-related apprehensions.

The extent to which some or all of the above information will be included in a police information check and the format of the disclosure depends on the local police service's policies and procedures. As these policies and procedures are frequently determined and applied by police service management and staff, individual judgment and discretion can play a significant role in determining whether certain information is included in a background check. The results of a police information check are generally released to the applicant, who may then pass the record check along to a prospective employer, volunteer agency or other requesting organization. Again, not all police services provide this level of check.

Police vulnerable sector check

The third level of background check is the police vulnerable sector check. This type of check will include all of the information in a standard criminal record check or police information check, as well as any information about select sexual and violent offences for which the offender has received a record suspension (formerly called a pardon). The extent to which non-conviction information is disclosed on this level of check depends on the specific police service. The results of a vulnerable sector check can be released only to the applicant or, if authorized by the applicant, to the requesting organization. In addition to having to provide fingerprints to confirm the existence of a criminal record, individuals whose gender and birthdate match a record in the pardoned sex offender registry are required to submit fingerprints.

2. Is my organization legally obliged to get a police record check from a prospective volunteer or employee?

The vast majority of organizations are not legally obliged to conduct police record checks for their employees or volunteers.

Statutory obligations

Some categories of organizations are statutorily required to conduct police record checks. In British Columbia, for example, the *Criminal Records Review Act (CRRRA)* requires doctors, nurses, hospital employees, dentists, teachers, non-teaching staff in schools, registered students in a post-secondary program who will work with children or vulnerable adults as part of their practicum, early child care educators, daycare employees and employees in long-term care facilities and other facilities that provide health services to vulnerable adults to go through the *CRRRA* screening process.¹ Other provinces also have clear statutory and regulatory provisions requiring certain classes of organizations to record check their employees and volunteers. Depending on the jurisdiction, statutes and regulations may require licensed teachers, employees in long-term care facilities, daycare operators, registered social workers, pharmacists and police officers to provide record checks. There are also a number of licensing processes that specifically mention criminal record checks in the legislation or regulations setting out the regulatory framework: taxi drivers, real estate agents, driver training school operators, charity lottery and gaming license applicants, liquor license applicants and others may need to submit record checks. Various professional regulatory bodies are also authorized to conduct criminal record screening.

Common law obligations

Even if an employer is not explicitly required to record check by statute, however, could an organization be liable if it did not perform a criminal record check and an employee or volunteer went on to commit a criminal offence? In the United States some courts have found employers liable in negligent hiring for failing to conduct sufficient background checks, including police record checks, when hiring certain classes of employees.²

While there is a tort of negligent hiring in Canada, there are very few reported cases where an organization has been held liable for failing to conduct sufficient pre-hire screening. There is one appellate case on negligent hiring, but it sets out a narrow doctrine that does not support widespread police record checks as a standard part of employee or volunteer screening.³ This is not to suggest that record checks are never prudent screening measures: jobs in high-security sites and those with unsupervised positions of trust in relation to vulnerable populations will justify more detailed employee vetting, of which a record check may be one justifiable component. Legislation imposing criminal record checks should also be followed. Ultimately, however, we are not aware of any

Canadian cases where an employer has been found liable for failing to conduct a criminal record check, and, in many workplaces, asking for detailed police record checks will violate privacy and human rights legislation. It is also important to keep in mind that, in addition to negligent hiring, an employer may also be liable if it is negligent in its training or supervision of employees or volunteers.

Employers can also be vicariously liable for the criminal acts of their employees, meaning that the employer will be responsible for the wrongful acts of the employee even if the employer has done nothing wrong. Normally, vicarious liability will be imposed if the employee's wrongful act falls within the scope of the employment duties. Most criminal acts will not be sufficiently connected to the legitimate job-related functions for employers to be held directly liable.

Vicarious liability may also apply where there is “a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act.”⁴ This doctrine applies only to select types of workplace harms and to select employees within those workplaces. A court must analyze whether the specific “job-created power and duties” given to an employee increased the risk of the employee's wrongdoing.⁵ Simply creating a situation that gave an employee the opportunity to commit wrongful acts by employing them in a workplace where vulnerable persons were present is not sufficient: “[i]t must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.”⁶ The simple fact that a person was employed in a school or another setting with passing or regular contact with the vulnerable sector will not be a sufficient basis for imposing vicarious liability.

Some legal summaries appear to suggest that an employer can minimize the risk of having vicarious liability imposed by conducting criminal record checks on prospective employees. However, performing police record checks will not prevent an employer from being held vicariously liable, as this form of liability is unrelated to whether the employer was at fault in the hiring or supervision of employees. These suggestions, therefore, are not strategies to minimize an employer's exposure to liability but, rather, aim to prevent a criminal act from occurring during the course of employment. Unfortunately, however, there is no evidence showing that police record checks are an effective tool to prevent work-related crimes.

Workplace health and safety

Some organizations may think that statutory workplace health and safety obligations impose a duty on employers to conduct police record checks to identify potentially violent employees. This particularly appears to be the case in Ontario where there are relatively new statutory provisions requiring employers to address violence and harassment in the workplace.⁷ As explained by the Ontario government, however, an employer's duty to proactively identify workplace risks focuses on dangers inherent to the nature and characteristics of the workplace setting and the job duties: high stress levels, extended periods alone, workers transporting large amounts of cash, etc. The Ontario government's guide to understanding the law on workplace violence and harassment specifically states that “the *Occupational Health and Safety Act* does not require employers or supervisors to do criminal background checks or to otherwise seek out information on workers or other people who are likely to be in the workplace.”⁸

3. Are there legal limits on when I can ask for a record check and what type of information I should be asking for?

Yes!

Many employers' ability to request police record checks from applicants, employees and volunteers will also be limited by human rights, privacy and employment law. Generally, privacy law can prevent employers from collecting unnecessary or unreasonably privacy-invasive information from applicants. Human rights laws can prohibit discrimination against applicants, volunteers and employees on the basis of a police record. All Canadian human rights laws prohibit discrimination on the basis of a mental health police record. If record checks are not specifically mentioned in employment agreements, employers may not be able to unilaterally impose this requirement on existing employees without renegotiating the contract.

There are clear legal limits on when you can request a vulnerable sector check. A vulnerable sector check can be legally provided only if:

- the request is made by a person or organization responsible for the well-being of a child or vulnerable person;
- the request is made in the context of a specific application for a paid or volunteer position;
- the position being applied for is one of trust or authority towards a child or vulnerable person; and
- the applicant has given their consent in writing.

A vulnerable person is a person who, because of their age, a disability or other circumstances, is in a position of dependency on others or is at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them. Not every position that involves contact with a vulnerable person will meet the requirements for a vulnerable sector search. The position must be one that creates either authority (power) over, or special trust with, a vulnerable person.

In general, however, the precise legal limits that apply will vary depending on the jurisdiction, the type of workplace, and the specific employment contracts in place. Even in provinces or workplaces where human rights and privacy laws are not as comprehensive, however, it is good employment practice to respect the privacy and human rights of your employees. Some types of record checks are more privacy invasive than others: the more sensitive the information you are requesting, the higher the burden is on you, the employer, to justify why you need the information. The BC Information and Privacy Commissioner, for example, has found that from a privacy perspective it is never justifiable for employers to ask for record checks that will reveal prior suicide attempts and that non-conviction information should not play a role in hiring decisions outside the vulnerable sector. The best practice tips for employment and volunteer record checks outlined below will help you establish rights-respecting screening and employment practices, regardless of what specific statutes apply to your workplace.

4. Are there limits on the type of information I can receive on a record check?

In general you cannot receive any information from the police without the full, informed and voluntary consent of the volunteer or employee. While there are times when the police can release information without a person's consent, police record check services generally operate based on the consent of the applicant. You should make sure that your consent forms are detailed enough to let a person know exactly what kind of check will be run. You should also make sure that a person has enough time and space to read and understand the forms, think about their decision, and provide truly voluntary consent.

Even with someone's consent, there are many laws and policies that restrict the information you will receive from the police on a record check:

- The *Criminal Code* prohibits the disclosure of any information about diverted charges.
- The *Criminal Records Act* prohibits the disclosure of conditional and absolute discharges after certain periods of time. It also sets out a process whereby certain convictions can get a record suspension (formerly called pardon). These records are not to be disclosed on standard police record checks. A small selection of convictions that have been sealed by a record suspension can be disclosed on a vulnerable sector check.
- The *Youth Criminal Justice Act* has complex rules about who can access certain youth records. In many cases, while a young person can request his or her own record, it is illegal for the youth to pass that information on to an employer or volunteer organization. Employers should not ask youth to provide these records.
- Police services will have policies about what records they will and will not release. Some services will not release police contact or non-conviction records. Even where police services will release non-conviction information, they will frequently have policies allowing them to refuse to release records that could prejudice ongoing investigations.

5. Are there legal limits on what I can do with the information I receive from an applicant's record check?

There are both privacy and human rights limits on what you can do with police record checks.

From a privacy perspective, the results of a police record check can disclose sensitive personal information and must be treated as confidential. If it is justifiable to request a record check as part of the hiring process, it should be used only for the hiring decision and other consistent employment uses. The results of the record check should be disclosed only to those in the organization who absolutely need to know for approved employment purposes. Personal information should not be kept for longer than necessary; in many organizations, it will be enough to simply review the check

provided by the applicant, return the original to the applicant and note on a form that the record check has been received and reviewed.

In several jurisdictions, human rights legislation prevents employers from discriminating on the basis of a police record. In these provinces and territories, it is illegal to deny a person employment if the person's record is not related to the position. Employers are also prohibited from discriminating against applicants based on mental health-associated police contact. The onus is on the employer to establish that the existence of the criminal conviction is related to the job and the consequences that might follow if an individual has a relevant record. See Question 6g below for a list of questions that human rights commissions and tribunals have outlined to determine whether a record is related to a job requirement.

Where discrimination is based on a criminal charge, the evidentiary onus on an employer will be greater; the employer must clearly demonstrate that the risk to the public, co-workers or the employer's business is so severe that the mere possibility of a conviction warrants the discriminatory employment decision.

Studies have shown that after a few years a person with a criminal conviction is at no greater risk of reoffending than any other member of the population. In the work context specifically, studies have shown *no correlation* between a past conviction and the likelihood to commit a work-related offence. We have found no evidence that a non-conviction record is relevant to an employee's conduct or likelihood to commit a criminal offence.

6. Establishing rights-respecting volunteer and employment practices: A summary of best practice steps

The precise legal limits that apply will vary depending on the jurisdiction, the type of workplace and the specific employment contracts in place. Even in provinces or workplaces where human rights and privacy laws are not as comprehensive, however, it is good employment practice to respect the privacy and human rights of your employees. The best practice tips for employment and volunteer record checks outlined below will help you establish rights-respecting screening and employment practices, regardless of what specific statutes apply to your workplace.

a. Is standard screening (resume, interview, references) enough, or does this position also require a record check?

Assess each job or volunteer position individually. First, you will need to know exactly what the job is that you want a person to do. What will the job involve? What will the duties be? What kinds of skills will you need? What kind of person are you looking for?

In order to try to find the right person for a position, you should make sure you have at hand all the standard screening tools. This includes a request for a resume and cover letter, reference checks, an interview, orientation sessions, job shadowing periods, follow-up reviews, feedback from clients, etc. There may be some other position-specific checks you can get. If a person will be driving as part of their job description, for example, you may want to ask them to provide a driving abstract to make sure they are a good driver.

Given the human rights and privacy concerns, however, a police record check should not be considered a “standard” part of the hiring process. For most jobs, a police record check is unnecessary. It is not a particularly good screening tool: having a past police record doesn't tell you much about what a person will do in the future, and in any event there will be many people who have committed illegal acts but simply were not caught. One study that specifically studied the work context found no correlation between a past conviction and the likelihood to commit a future employment-related offence. Instead of relying on record checks, most workplaces should try to be as safe as possible by putting in place policies and procedures that apply to all employees, regardless of whether they have a criminal record.

This is not to say that a record check will never be a prudent screening measure. There may be some high-security jobs where enhanced screening – including through a police record check – is reasonable. Positions where it may be more justifiable to use a criminal record check include those where:

- legislation requires your organization to conduct a record check for this position;
- having a criminal record would directly interfere with core job requirements (e.g., a person needs to access a correctional institution regularly for their job and would not be able to get clearance with a criminal record);
- the position involves control over large amount of organizational or client assets, and supervision, safeguards or auditing procedures are not feasible because of the nature of the work;
- the position is one where access will be given to a high-security environment (nuclear facility, airport, law enforcement, corrections, etc.); or
- the position involves unsupervised and ongoing contact with individuals in the vulnerable sector.

b. I think the position warrants not only standard employment screening but also knowing an applicant's criminal record. How should I get this information, and what level of check should I ask for?

Your first option if you think you need to know select information about an applicant or employee's criminal record is to use a self-disclosure form, where the individual simply certifies whether they have certain types of convictions. Many organizations, for example, use this method for current employees.

If you decide you need to ask for a formal police record check, there are several different levels of checks, and what is available to you will depend in part on what your local police provide. In general, if you need a record check, a basic criminal record check that discloses criminal convictions will be

enough (in fact, even that will probably be asking for too much information, since it will search for information about offences that are not relevant for the job the person will do). It is generally not justifiable to ask for a police record check that will include non-conviction records, like withdrawn charges or police contact. As explained by the BC Information and Privacy Commissioner, “[b]ecause it is at best highly doubtful that such record checks are at all effective for the employer’s purposes, there is no justifiable reason to include this information in checks for any [non-vulnerable sector] types of employment.”⁹

What about mental health–related police records?

You should avoid police checks that would disclose a person’s mental health history. The BC Information and Privacy Commissioner has found that it is never justifiable to ask for a record check that may reveal prior suicide attempts. The Ontario Human Rights Commission has said that you should not ask for these types of records unless there is a bona fide occupational requirement for the information – i.e., where a person’s mental health history is actually related to the requirements of the job the person will do. It is hard to imagine a circumstance where this would be true. One way of thinking about this is to ask yourself whether this is a question you would ask a person in an interview or if you would ask a person to get clearance from a mental health professional before starting the job. If you would not do this, you should not be asking for this information from the police, either.

What if the person will be working with the vulnerable sector?

There are very few jobs that do not have any contact with children, the elderly or other vulnerable populations. It does not make sense to require *everyone* who could come into contact with a vulnerable person to get a vulnerable sector check. In fact, doing that would contravene the legal limits on when organizations can ask for a vulnerable sector check. Although it is hard to draw the line, we suggest that organizations consider asking for a vulnerable sector check if the position will involve *unsupervised and ongoing contact* with individuals in the vulnerable sector.

c. What should the job posting look like?

You should inform applicants on the job posting that you will be asking for a record check, and you should specify the level of check. Unless the position you are offering is highly exceptional, there should be no automatic exclusion of a person with a record. You should let applicants know this by explicitly saying that an entry on their record will not prevent a person from obtaining employment. You should provide reasonable details about what types of offences you have decided are relevant and invite applicants to ask for your detailed policy or contact you if they have any concerns.

d. When should I ask for the check?

You should ask the applicant to provide the record check only once you are sure that this is the person you want to hire – i.e., after you have done all your other screening steps.

e. How should I ask for the check?

You need to get the applicant's consent for the record check – and that consent must be informed, knowledgeable and voluntary. Particularly in the employment context the idea of “voluntary” consent is problematic: people are often desperate for jobs and will feel they have no real choice but to agree to hand over the information. This means that you must do all you can to make sure the process is as voluntary as possible. Make sure that:

- you have a written consent form that clearly states what type of check is being requested and what information might come back;
- you take the time to explain what type of check is being requested, as well as why you are asking for the information, what kinds of records you consider relevant to the job and what might happen if something comes back on the check;
- they are given the time and space to read the consent form and consider whether they want to sign it; and
- the results of the check are sent first to the applicant, who can then decide whether to give it to you.

Wherever possible, the organization should pay for the record checks if there is a fee. It is not fair to ask job and volunteer applicants to pay for your human resource screening processes.

f. Who should look at the results of the check?

The information that is disclosed on a record check can be deeply personal and stigmatizing if it is shared in a workplace. This is personal information that ideally should be reviewed only by select people in the human resources department – not the individual's direct manager or supervisor. If your organization is not large enough to have a separate human resources department, only the people directly involved in the hiring should have access to the results of a record check. The information on a record check should not be shared with anyone else in the organization unless it is necessary for the employment process.

g. How do I make a decision based on the results of the check?

You should have a clear, written policy establishing what types of offences are relevant to the specific position and what other factors you will consider if a relevant offence is disclosed on a record check. Keep in mind that the evidence available shows *no correlation* between an individual's criminal record of convictions and the likelihood of committing an employment-related offence in the future. Non-conviction information and mental health records are even more questionable as useful indicators of future behaviour. One example of a bona fide requirement, for example, would be if you were hiring someone who would have to transport goods across the border and you know that individuals with certain types of criminal records are often refused entry to the United States. If there is a way that you can accommodate a person with a record by modifying the job description or providing other support services, you should do that instead of simply denying them a job.

Zero-tolerance policies – rejecting a person who has any notation on a criminal record regardless of what it is – are unfair and discriminatory. Even within a certain type offence there should be a

detailed assessment of whether the actual circumstances of the record are sufficiently related to the position to deny the person the job. If you are hiring a financial officer, for example, a recent prior fraud conviction may be relevant – but you perhaps would not be as concerned about the fact that someone stole something from a corner store ten years ago. To determine whether a particular entry on a person's record should prevent that individual from being hired, you should speak to the candidate to get more information. Human rights commissions and tribunals have outlined a number of questions that are relevant to determining whether a record is related to a job requirement:

1. Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?
2. What were the circumstances of the charge and the particulars of the offence involved – e.g., how old was the individual when the events in question occurred, and were there any extenuating circumstances?
3. How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Have they shown any tendencies to repeat the kind of behaviour for which they were charged? Has the individual shown a firm intention to rehabilitate themselves?
4. Has a pardon or record suspension been secured, or has a conditional discharge been successfully received?
5. Having considered all the above, was the severity of the particular action taken against the potential employee warranted by the nature and circumstances of the charge or conviction?

Where discrimination is based on a criminal charge, the evidentiary onus on an employer will be greater; the employer must clearly demonstrate that the risk to the public, co-workers or the employer's business is so severe that the mere possibility of a conviction warrants the discriminatory employment decision.

When deciding whether a past conviction is relevant to a person's suitability for a job, employers should keep in mind that after a few years a person with a criminal record is at no greater risk of committing an offence than any other member of the population, and there is no correlation between a past conviction and the likelihood to commit a future employment-related offence.

Even if you decide that a person is not suitable for the position as it was advertised because of their police record, you should try to accommodate that person – perhaps by finding them a different position in your organization or by modifying some specific duties or oversight procedures to allow the person to do the original job.

No matter what, you should always treat people with respect and dignity.

h. After the decision: What should happen to the information?

Personal information should not be kept for longer than necessary. In many organizations, it will be enough to simply review the check provided by the applicant, return the original to the applicant and note on a form that the record check has been received and reviewed. If you do need to keep a copy of the record check for employment purposes, you should keep it in a secure, locked area that is not generally accessible to others in the workplace. Make sure you have a policy on when and how you will destroy this information.

Notes

1. British Columbia Ministry of Justice, *Who Must Have a Criminal Record Check under the Criminal Records Review Act*, <http://www.pssg.gov.bc.ca/criminal-records-review/who-qualifies/>.
2. See, for example, *Ponticas v. K.M.S. Investments*, (1983) 331 N.W.2d 907.
3. *Wilson v. Clarica Life Insurance Co.*, 2002 BCCA 502. Much Canadian legal commentary about criminal record checks and negligent hiring speculates about whether the US jurisprudence will, at some point, be adopted in Canada.
4. *Bazley v. Curry*, [1999] 2 SCR 534 at para. 42.
5. *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 SCR 45 at 28–29.
6. *Bazley v. Curry*, [1999] 2 SCR 534.
7. Ontario Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009, came into force on June 15, 2010.
8. Occupational Health and Safety Branch, Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law* (Toronto: Occupational Health and Safety Branch, Ministry of Labour, 2010), 17. http://www.labour.gov.on.ca/english/hs/pdf/wpvh_gl.pdf.
9. Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F14-01: Use of Police Information Checks in British Columbia*, 2014 BCIPC No. 14, 36.

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This document was produced by the Canadian Civil Liberties Association in May 2014. The research that informed this document was supported by a grant from the Office of the Privacy Commissioner of Canada. Please note that this is legal information, not legal advice. If you need advice about your individual circumstances, please consult with a lawyer. For more information about the Canadian Civil Liberties and our work on police record checks please visit www.ccla.org.