

POLICE RECORD CHECKS IN EMPLOYMENT AND VOLUNTEERING

Know your rights

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 is intended to help you learn the basic contours of your rights if an organization asks you for a record check. 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. What are the types of police record checks employers might ask for, and what kind of information might show up?

There are many different types of police record checks in Canada. We group them 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. Employers may also ask people to sign more general background check consents, which may or may not include a police record check. You should read the details on the consent form to find out exactly what type of check you are consenting to.

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 or not their records match what they have 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 (PIC), can include a broader range of information. Generally, the PIC can include a search of local and federal police databases and court records, as well as 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 PIC and the format of the disclosure depend 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 also play a significant role in determining whether certain information is included in a background check. The results of a PIC 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 police criminal record check or PIC, 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. Does privacy legislation apply to job applicants, employees or volunteers in my workplace?

Provincial and federal privacy legislation limits organizations' ability to collect private information in the employment context. Unfortunately, however, the application of privacy legislation in the employment relationship is quite varied. If you work for a government, government agency or public institution, your privacy as an employee is likely protected by legislation. The government's actions will also be restricted by section 8 of the *Charter of Rights and Freedoms*, which guarantees freedom from unreasonable search and seizure.

Private sector workplace privacy is covered by provincial legislation in British Columbia, Alberta and Quebec. Private companies that are federal works, undertakings and businesses are covered by federal legislation. These include telecommunications companies, banks, airlines, nuclear companies, broadcasting companies, interprovincial or international transportation companies, and all local businesses in Yukon, Nunavut and Northwest Territories.

In addition to privacy legislation, employment law and human rights legislation may provide protection for employee privacy in the workplace.

The following chart should help you decide what privacy legislation might apply to employee information in different workplaces – although you should contact your local privacy commissioner or ombudsman if you have questions about whether your specific workplace is covered.

POLICE RECORD CHECKS IN EMPLOYMENT AND VOLUNTEERING (Cont'd)

Jurisdiction	Type of workplace	Privacy law relevant to employee information	For more information...
Federal	Government workplaces	<i>Privacy Act</i>	Privacy in the workplace http://www.priv.gc.ca/resource/fs-fi/02_05_d_17_e.asp
	Federal works, undertakings, and businesses (for example, telecommunications companies, banks)	<i>The Personal Information Protection and Electronic Documents Act</i>	Application of the <i>Personal Information Protection and Electronic Documents Act</i> to employee records http://www.priv.gc.ca/resource/fs-fi/02_05_d_18_e.asp
Yukon, Nunavut and the Northwest Territories	Private sector workplaces	<i>The Personal Information Protection and Electronic Documents Act</i>	Application of the <i>Personal Information Protection and Electronic Documents Act</i> to employee records http://www.priv.gc.ca/resource/fs-fi/02_05_d_18_e.asp
British Columbia	Private sector workplaces	<i>The Personal Information Protection Act</i>	<i>PIPA</i> and the hiring process: Frequently asked questions http://www.oipc.bc.ca/guidance-documents/1444 Use of police information checks in British Columbia http://www.oipc.bc.ca/investigation-reports/1631
	Public sector workplaces	<i>The Freedom of Information and Protection of Privacy Act</i>	Use of employment-related criminal record checks: Government of British Columbia http://www.oipc.bc.ca/investigation-reports/1247
Alberta	Private sector workplaces	<i>The Personal Information Protection Act</i>	<i>The Personal Information Protection Act (PIPA)</i> – A summary for organizations http://www.oipc.ab.ca/Content_Files/Files/Publications/PIPASummary.pdf
	Public sector workplaces	<i>Freedom of Information and Protection of Privacy Act</i>	Frequently asked questions from employees http://www.servicealberta.ca/foip/documents/faq-employees.pdf

POLICE RECORD CHECKS IN EMPLOYMENT AND VOLUNTEERING (Cont'd)

Jurisdiction	Type of workplace	Privacy law relevant to employee information	For more information...
Saskatchewan	Public sector workplaces	<i>The Freedom of Information and Protection of Privacy Act</i> <i>The Local Authority Freedom of Information and Protection of Privacy Act</i>	<i>Your Right of Privacy</i> – pamphlet http://www.oipc.sk.ca/webdocs/YourRightofPrivacyPamphlet.pdf
Manitoba	Private sector workplaces	Manitoba has proposed privacy legislation that is not yet in force.	
	Public sector workplaces	<i>Freedom of Information and Protection of Privacy Act</i>	<i>FIPPA</i> for public bodies – resource manual http://www.gov.mb.ca/chc/fippa/public_bodies/resource_manual/index.html
Ontario	All workplaces	No general legislative privacy protection	
Quebec	Private sector workplaces	<i>Act respecting the protection of personal information in the private sector</i>	La Commission d'accès à l'information du Québec http://www.cai.gouv.qc.ca/
	Public sector workplaces	<i>Act respecting access to documents held by public bodies and the protection of personal information</i>	La Commission d'accès à l'information du Québec http://www.cai.gouv.qc.ca/
New Brunswick	Public sector workplaces	<i>The Protection of Personal Information Act</i>	An introduction to the <i>Protection of Personal Information Act</i> http://archives.gnb.ca/documents/POPI.pdf
Nova Scotia	Public sector workplaces	<i>The Freedom of Information and Protection of Privacy Act</i> and Part XX of the <i>Municipal Government Act</i> .	The Nova Scotia Freedom of Information and Protection of Privacy Review Office http://foipop.ns.ca/
Prince Edward Island	Public sector workplaces	<i>The Freedom of Information and Protection of Privacy Act</i>	Prince Edward Island Information and Privacy Commissioner http://www.assembly.pe.ca/index.php3?number=1013943
Newfoundland	Public sector workplaces	<i>Access to Information and Protection of Privacy Act</i>	Office of the Information and Privacy Commissioner http://www.oipc.nl.ca/default.htm

3. Does human rights legislation protect me against discrimination based on my police record check?

All human rights legislation prohibits discrimination on the grounds of a disability, including a mental illness. In jurisdictions where police record checks disclose police contact, 911 calls or mental health apprehensions, asking for and making decisions based on a police record check may constitute prohibited discrimination on the grounds of disability.

Human rights legislation can also prohibit employers and services providers from discriminating against individuals with criminal records. Different jurisdictions provide different levels of protection:

- Yukon prohibits discrimination on the basis of “a criminal record or criminal charges” unless the history is relevant to the job.
- In British Columbia, Newfoundland and Prince Edward Island an employer cannot discriminate against a person who has been convicted of an offence that is unrelated to the actual or intended job. The British Columbia human rights tribunal has found that this type of provision also prohibits discrimination on the basis of non-conviction records such as allegations of criminal acts, charges, or findings of guilt where no conviction is registered.
- The *Quebec Charter of Human Rights and Freedoms* prohibits an employer from dismissing, refusing to hire or otherwise penalizing a person because of a criminal conviction that is unconnected with the employment or if the person has obtained a pardon.
- Ontario, Northwest Territories and Nunavut human rights statutes protect individuals from discrimination if they have a pardoned conviction (now known as a record suspension). Ontario also provides human rights protection for individuals who have a conviction for any provincial offence.
- The federal *Human Rights Act* and the provincial human rights codes in Alberta, Saskatchewan, Manitoba, Nova Scotia and New Brunswick do not explicitly address whether they protect individuals from discrimination on the grounds of a criminal record.

Just because a particular code does not explicitly protect some or all criminal records does not necessarily mean that employers are free to discriminate on these grounds. The Manitoba *Human Rights Code*, for example, has a general clause protecting some classes or groups of people on the basis of personal characteristics that are not specifically listed. The Manitoba Human Rights Commission has stated that “discrimination in employment on the basis of a criminal charge or conviction may constitute the basis of a complaint” under this general provision.

4. Can an organization ask me to provide a criminal record check in a job or volunteer application?

An employer should not get a police record check on you without your consent. Frequently, however, employers ask job or volunteer applicants to sign consent forms before they are hired. Individuals may also be sent to the police station directly, where they will be asked to consent to the disclosure of information.

In many workplaces getting an applicant's consent will not be enough to justify asking for a record check. Where privacy legislation applies, employers generally must ensure that they are not collecting more information than is necessary or reasonable to determine suitability for employment for each specific position. This means that many employers cannot automatically subject every employee they hire to a criminal record check.

Deciding when a record check will be reasonable or necessary will depend on the job position and workplace, the employer's statutory obligations and other relevant factors. The BC Information and Privacy Commissioner, for example, has ruled that public sector workplaces may not request a criminal record check for positions where the sole reason for the check is responsibility for accessing personal information; the protection of personal and confidential information and assets; conducting financial, operational and performance audits; or investigations required only by police or other third parties. Alberta's Information and Privacy Commissioner has ruled that various statutory regulatory bodies may conduct police record checks on potential and existing licensees where these checks relate to the regulator's statutory purpose.¹ The federal Privacy Commissioner has found that background checks can be reasonable for positions in high-security environments, including for pilots or workers at atomic energy plants, ports, airports or other security- and safety-sensitive positions.

Some police record checks reveal more information than just criminal convictions and can disclose mental health-related police contacts and unproven allegations. The more privacy intrusive and broader the record check, the more difficult it will be for the employer to justify requesting the information. The BC Information and Privacy Commissioner has ruled that it is not reasonable for employers to request police checks that will reveal suicide attempts and less formal police contact because of the breadth of irrelevant information that is searched for on these checks. There are also specific legislative restrictions on asking for police vulnerable sector checks (see Question 5, below).

Human rights laws also restrict whether organizations can ask for a record check. In many provinces individuals with criminal records are, to some extent, protected against discrimination. Disability, including mental illness, is also a protected ground under human rights statutes. Organizations should not ask for a record check unless the information they might receive is related to an actual requirement of the job. In any event, record checks should be asked for only as a last step in the screening process, once a conditional job or volunteer offer has been given.

The onus is on the employer to establish whether the existence of the criminal conviction is related to the job and what consequences might follow if an individual has a relevant record. 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, employers should keep in mind that after a few years a person with a criminal record is at no greater risk of reoffending than any other member of the population. Another study that specifically studied the work context found *no correlation* between a past conviction and the likelihood to commit a future employment-related offence.

5. When can an organization ask me to provide a vulnerable sector check?

A vulnerable sector check is a police record that, in addition to the standard results, will also reveal some convictions that have otherwise been sealed by a record suspension (formerly called a pardon). Because of privacy and human rights concerns, the *Criminal Records Act* imposes strong legal limits on when an organization can ask for this search. A vulnerable sector check can only be legally provided 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.

6. I am already employed or working as a volunteer. Can an organization ask me to provide a vulnerable sector check?

In some workplaces privacy laws will restrict the information an organization can collect (see above). Even where it is justifiable to ask for a record check in the employment process, this does not mean that an employer can demand a renewed check at any point in time. The BC Information and Privacy Commissioner has found that, because employees are subject to ongoing oversight in their jobs, it is not justifiable to request renewed record checks more than once every five years.

Employment contracts, either between an employer and an individual employee or in the form of a collective agreement, may restrict an employer from imposing a criminal record check policy. If the employment agreement does not explicitly allow an employer to conduct record checks, an employer may not be able to impose this requirement on current employees without renegotiating the contract or collective agreement. The Supreme Court has ruled that, in a unionized workplace, “any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union . . . must be consistent with the collective agreement and be reasonable . . .”² An assessment of whether police record checks are a reasonable exercise of unilateral management rights can include multiple aspects of the proposed policy, including:

- whether the check is relevant to the specific position,
- whether there are privacy protections for employee information,
- how much notice is given to affected employees,
- how the information is used in the employment context, and
- whether employees who are not cleared have access to an appeal mechanism.

Policies that do not comply with applicable privacy and human rights legislation will not be reasonable. Again, there may be particular positions in safety-sensitive workplaces, such as airport security officers or social workers dealing with young children, that will justify the imposition of criminal record checks. Multiple arbitrators, however, have found that overbroad background screening programs or blanket policies unilaterally imposing police record checks on employees who are not in such sensitive positions are unreasonable.

7. What can an organization do with my police record check?

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.

It is best practice for organizations to receive the record check after the applicant has had the opportunity to review the results and consent to their disclosure. Ideally the record check should be reviewed by one person in the human resources department – not the individual's direct manager or supervisor. 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.

8. I think an organization is asking for too much information from applicants or employees. What can I do?

Organizations that ask job or volunteer applicants for too much information may be in violation of privacy or human rights legislation. You may be able to launch a privacy or human rights complaint. You should contact your local privacy commissioner or ombudsman to see if your workplace is protected by privacy legislation. You can also contact your local human rights commission or a legal clinic that deals with human rights complaints.

9. I think an organization is discriminating against me based on information they saw on my police check. What can I do?

All Canadian human rights legislation prohibits discrimination on the basis of a mental illness. If you think you are being discriminated against based on a mental health–related entry on your police record check, you should contact your local human rights commission or a legal clinic that deals with human rights complaints.

Some provinces and territories also provide human rights protection for individuals with criminal records or police contact. You can contact your local human rights commission or a legal clinic that deals with human rights complaints to find out the process for filing a human rights complaint.

Notes

1. *Order F2002-029*, 2003 CanLII 71667 (AB OIPC) (regulatory body with delegated governmental function authorized to collect criminal records under applicable public sector privacy legislation because governing statute allows for refusal to grant license owing to relevant criminal convictions); *Order P2009-004*, 2009 CanLII 90945 (AB OIPC) (Real Estate Council of Alberta is authorized to collect information about convictions, as the collection is reasonably related to its statutory purpose, which includes licensing members and suppressing mortgage fraud; where certain information is not used in the licensing process, however, the collection of that information is not reasonable); *Order P2011-004*, 2011 CanLII 96591 (AB OIPC) (Real Estate Council of Alberta (RECA), as a regulatory body issuing a license under a statutory scheme, is not subject to s. 7(2) of Alberta's *Personal Information Protection Act*. The collection of certified criminal record checks is "reasonable for meeting the purposes for which the information is collected," and it may be obtained without the individuals' consent, as the *Real Estate Act* authorized RECA to make rules respecting a requirement for a criminal record check.)
2. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para. 24.

About this document

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.