

Executive Summary

EXECUTIVE SUMMARY

On May 25, 2009, the *National Post* reported that, in Barrie, Ontario, police services had been conducting background checks on prospective jurors, at the request of Crown attorneys. Later media reports contained disturbing details regarding the nature of the background information, which included such comments as, “calls a lot for minor complaints,” “neighbour shot his cat,” and “dad is a drinker.”

Upon learning that the practice extended beyond Barrie to include other locations in the province, my office, the Information and Privacy Commissioner of Ontario, launched an investigation under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. We analyzed the practices of conducting background checks on prospective jurors, and whether these practices were permitted or violated the privacy provisions of these laws.

The Investigation

To ensure a comprehensive investigation, my office pursued multiple channels of inquiry:

1. We conducted in-person interviews at four different geographical locations with various parties: court staff, Crown attorneys, police officials and defence counsel;
2. We undertook an intensive province-wide empirical survey of all 55 Crown attorney offices;
3. We received sworn affidavits from senior Crown attorneys;
4. We retained the services of the Auditor General’s office to verify the document capture process involving jury panel lists; and
5. We also received four legal submissions from the Ministry of the Attorney General, the Ministry of Community Safety and Correctional Services, the Criminal Lawyers’ Association, the University of Toronto’s Asper Centre for Constitutional Rights, and the Canadian Civil Liberties Association.

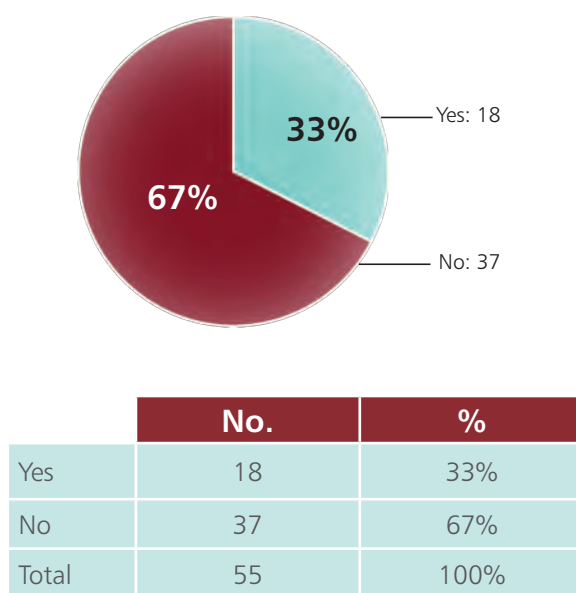
Our Findings

We discovered that this issue was first addressed in a court case in 1993, after Ontario Superior Court Justice David Humphrey questioned the appropriateness of jury background checks. Within weeks of Justice Humphrey’s decision, in March, 1993, a senior Crown attorney recommended to the Ministry of the Attorney General’s Management Committee that the practice of conducting background checks on prospective jurors should cease. All of this could have been put to a stop 16 years ago if that memorandum had been put into effect. What happened to it? Clearly, it was not acted upon. Why not? What caused the demise of this memorandum? These were some of the questions that my investigative team sought answers to.

On numerous occasions since March of 1993, the Ministry of the Attorney General engaged in internal discussions on the issue of background checks. However, it was not until *March of 2006* that the Ministry of the Attorney General actually issued its formal instruction to Crown attorneys, in what is known as a “Practice Memorandum.” Unfortunately, the Practice Memorandum fell short of what was required. It proved not to be sufficiently clear as to what practices were acceptable. As a result, we discovered that a wide range of opinions were held by the province’s Crown attorneys as to what background check practices were permitted and appropriate.

As a result of our investigation we learned that, since March 31, 2006, the date that the Practice Memorandum came into effect, one third of Crown attorney offices (18 out of 55) had received personal information about prospective jurors from the police that went beyond what was necessary to determine whether individuals were eligible for jury duty (see Figure 1.0). None of the 37 remaining Crown attorney offices had performed any background checks whatsoever during this time period.

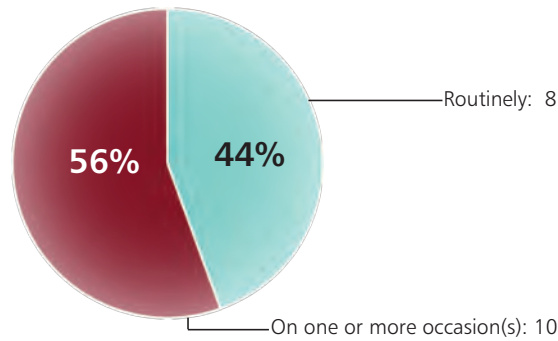
Figure 1.0 Did the Crown attorney office receive background information about prospective jurors from external sources?¹



Our empirical survey of Crown attorney offices also established that eight of the 18 Crown attorney offices that had received personal information about prospective jurors requested this information on a routine basis, while 10 Crown attorney offices requested personal information about prospective jurors on an occasional, or non-routine basis (see Figure 3.0). Further, in cases where personal information about prospective jurors had been received, we discovered there were varying practices as to how often Crown attorney offices had disclosed this information to defence counsel (see Figure 5.0). These results highlight the patchwork of practices that had developed across the province due to a lack of clear direction (for full survey results, see Chapter 6.0).

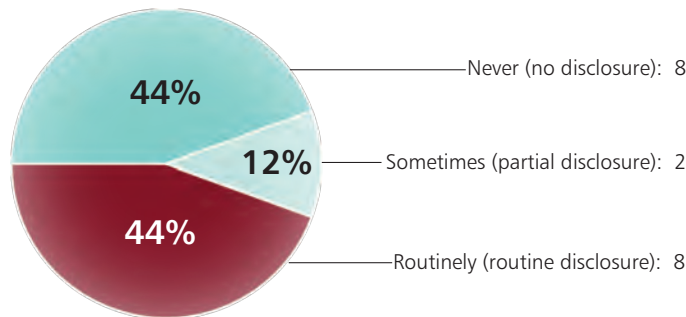
¹ While diagrams summarizing statistical information would normally be referred to as Figures, and charts summarizing statistical information would be referred to as Tables, for the purposes of this Order, figures and their corresponding tables will be collectively referred to as Figures.

Figure 3.0 How often did the Crown attorney office receive background information on prospective jurors?



	No.	%
Routinely	8	44%
On one or more occasion(s)	10	56%
Total	18	100%

Figure 5.0 How often did the Crown attorney office share background information on prospective jurors with defence counsel?



	No.	%
Never (no disclosure)	8	44%
Sometimes (partial disclosure)	2	12%
Routinely (routine disclosure)	8	44%
Total	18	100%

We concluded that, in conducting background checks on prospective jurors that exceeded determining whether these individuals had criminal convictions that may render them ineligible for jury duty under the *Juries Act* and the *Criminal Code*, both Crown attorneys and the police did not comply with the applicable privacy legislation. Our finding that the broader background checks were not appropriate is supported by a number of court decisions, dating as far back as 1993.

My Order and Recommendations

Based on these conclusions, I have ordered Crown attorneys to cease collecting any personal information of prospective jurors, beyond that which is necessary to determine criminal conviction information relevant to juror eligibility under the *Juries Act* and the *Criminal Code*. This Order will provide clear direction to Crown attorneys throughout the province as to what personal information may or may not be collected in the jury selection process.

Further, I am recommending a fundamental shift in the way that prospective jurors are screened in Ontario, in an effort to replace the existing varying practices of Crown attorneys across the province, as noted above. I am proposing a complete overhaul of the existing system in order to centralize the process of screening prospective jurors — namely that the Ministry of the Attorney General, through its Provincial Jury Centre (PJC), be the only central body to screen out jurors who are ineligible for jury duty, based on criminal conviction. As the single entity that is already in receipt of the names and personal information of all prospective jurors, the PJC is the obvious candidate to perform this role. Operating from a single location, the PJC is also in an ideal position to implement strict privacy and security measures that can be strongly enforced, thereby providing a consistently high degree of protection for personal information.

Most important, this centralized function would eliminate any need for localized screening of jurors to take place at any of the 55 Crown attorney offices across the province, engaging in disparate practices. Not only would no additional resources be required on the part of local Crown attorneys and police services, but a single, consistent practice, accurately reflecting “the rules” as set out below, would replace the variable practices, presently lacking in consistency.

In total, I made 22 Recommendations directed mainly to the Ministry of the Attorney General (MAG), some of which are presented below:

- Crown attorneys should cease the practice of requesting the police to provide criminal conviction information relating to prospective jurors, barring exceptional and compelling circumstances;
- Where Crown attorneys do obtain criminal conviction information relating to prospective jurors, they should share this information with defence counsel, in accordance with MAG policy;
- MAG should rewrite and redesign the existing jury service qualification questionnaire in order to make it more clear, transparent, and user-friendly for all prospective jurors;

- MAG should issue a new Practice Memorandum to all Crown attorneys that provides clear instructions on the appropriate manner in which to employ juror background checks;
- MAG should continue with its ongoing review of the *Juries Act* and regulation, and consult with the Office of the Information and Privacy Commissioner of Ontario as necessary;
- MAG should amend its jury manual and provide ongoing training to its staff; and
- MAG should develop and implement a policy for Crown attorneys on the appropriate retention and disposal of jury panel lists.

My Order and Recommendations will hopefully ensure that a number of important goals are met: juror privacy will be enhanced; all parties to a criminal proceeding will have equal access to relevant information on prospective jurors; and we will have far greater accountability surrounding the entire jury selection process.