

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

IN THE MATTER OF the *Municipal Freedom of Information and  
Protection of Privacy Act*, R.S.O. 1990, c. M.56

AND IN THE MATTER OF *A Special Investigative Report*  
issued by the Information and Privacy Commissioner of Ontario entitled  
“Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide  
Information to U.S. Border Officials via CPIC”

BETWEEN:

**INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO**

Applicant

- and -

**TORONTO POLICE SERVICES BOARD  
and WILLIAM BLAIR, CHIEF OF POLICE,  
TORONTO POLICE SERVICE**

Respondents

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

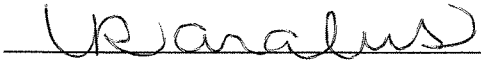
THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least 4 days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

June 5, 2014

  
Registrar, Divisional Court  
Osgoode Hall  
130 Queen Street West  
Toronto, ON M5H 2N5

TO: **TORONTO POLICE SERVICES BOARD**  
40 College Street  
Toronto, ON M5G 2J3

AND TO: **WILLIAM BLAIR, CHIEF OF POLICE**  
Toronto Police Service  
40 College Street  
Toronto, ON M5G 2J3

AND TO: **ATTORNEY GENERAL OF ONTARIO**  
Crown Law Office – Civil  
8th Floor, 720 Bay Street  
Toronto, ON M7A 2S9

## APPLICATION

1. **The applicant makes application for:**

- (a) an order declaring that s. 32 of the *Municipal Freedom of Information and Protection of Privacy Act* prohibits the respondent Toronto Police Services Board (the “TPSB”), acting on its own behalf or by or through its Chief of Police, Assistant Chiefs of Police, police officers, employees or agents (individually and collectively the “Toronto Police Service” or “TPS”), from disclosing personal information in its custody or under its control concerning the suicide attempts or threats of suicide made by identifiable individuals through the recording of such information on the Canadian Police Information Centre (“CPIC”) database without regard to the particular circumstances of each case and, more specifically, unless one of the following circumstances exist:
  - 1. The suicide attempt involved the threat of serious violence or harm, or the actual use of serious violence or harm, directed at other individuals;
  - 2. The suicide attempt could reasonably be considered to be an intentional provocation of a lethal response by the police;
  - 3. The individual involved had a history of serious violence or harm to others; or
  - 4. The suicide attempt occurred while the individual was in police custody.
- (b) an order permanently enjoining the TPSB, acting on its own behalf or by or through the TPS, from disclosing the personal information referred to in paragraph 1 above in non-compliance with s. 32 of *MFIPPA* by recording it in the CPIC database, other than in accordance with the circumstances specified in paragraph 1(a) above;

- (c) an order in the nature of mandamus or a permanent mandatory injunction compelling the TPSB, acting on its own behalf or by or through the TPS, to comply with s. 32 of *MFIPPA* by ensuring that one of the circumstances specified in paragraph 1(a) above applies prior to disclosing the personal information referred to in paragraph 1 on the CPIC database;
- (d) the Commissioner's costs of this application; and
- (e) such further and other relief as counsel may advise and this Honourable Court may permit.

2. **The grounds for this application are:**

A. **Overview of facts and issues**

3. This application raises questions concerning the circumstances in which the practices of police services in Ontario, and in particular the practice of the Toronto Police Services Board, acting on its own behalf or by or through the TPS, in disclosing on the CPIC database the personal information of individuals whom the police have identified as having made an attempt at suicide, comply or do not comply with the provisions of s. 32 of the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*"). Section 32 is a general prohibition against the disclosure of personal information by a public institution unless one of the exceptions enumerated at paragraphs (a) to (l) apply.
4. In fulfilling her statutory mandate under the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") and *MFIPPA*, the Commissioner determined in a special investigative report dated April 14, 2014 and entitled "*Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via*

*CPIC*” (the “Report”) that police disclosure practices in this connection do not comply with s. 32 of *MFIPPA* where they fail to take into account the individual circumstances of each case.

5. In particular, the practice followed by the TPSB and the TPS, as implemented and/or executed by its Chief of Police, William Blair, which entails automatically disclosing personal information concerning all incidents of attempted suicide and threats of suicide in the CPIC database, does not comply with s. 32 of *MFIPPA*. Such disclosure makes this information routinely available to other Canadian law enforcement agencies and the United States Federal Bureau of Investigation, the Department of Homeland Security and U.S. Customs and Border Protection Officials.
6. Section 32 of *MFIPPA* prohibits the disclosure by an “institution”, as defined at s. 2(1), of any personal information unless one of the exceptions under paragraphs (a) to (l) apply. The relevant exceptions under s. 32 in this connection are: paragraph (c) where disclosure is made for the purpose for which the information was obtained or compiled or for a consistent purpose; and paragraph (f) where disclosure is made (i) to a law enforcement agency in a foreign country under an arrangement, a written agreement, or treaty or legislative authority, or (ii) to another law enforcement agency in Canada.
7. In her Report, the Commissioner found that none of these exceptions applied where at least one of the following criteria (the “Mental Health Disclosure Test”) was not established.
  1. The suicide attempt involved the threat of serious violence or harm, or the actual use of serious violence or harm, directed at other individuals;
  2. The suicide attempt could reasonably be considered to be an intentional provocation of a lethal response by the police;

3. The individual involved had a history of serious violence or harm to others; or
  4. The suicide attempt occurred while the individual was in police custody.
8. The TPSB and TPS have failed or refused to comply with the requirements of s. 32 of *MFIPPA* as determined by the Commissioner in her Report.
9. In this application, the Commissioner seeks a declaration of this Court affirming her determination in this respect and making ancillary orders requiring the TPSB to comply with the requirements of *MFIPPA*.

**B. The Toronto Police Services Board and the Chief of Police**

10. The respondent TPSB is a municipal police services board under s. 27 of the *Police Services Act* (“*PSA*”) responsible for the provision of adequate and effective police services within the City of Toronto. Among other duties, it is responsible under s. 31 for determining after consultation with the Chief of Police, objectives and priorities with respect to police services in the City, establishing policies for the effective management of the police force, directing the Chief of Police and establishing policies respecting the disclosure by Chiefs of police of personal information about individuals.
11. The respondent TPSB is also an “institution” within the meaning of s. 2(1) of *MFIPPA* and, as such, is subject to the provisions of *MFIPPA* governing the collection, use and disclosure of personal information in its custody or under its control.
12. The respondent William Blair, Chief of Police for the TPS, has the duties under s. 41(1) of the *PSA*, among others, to administer and oversee that the operation of the Toronto Police

Service in accordance with objectives, priorities and policies established by the TPSB and to ensure that members of the police force carry out their duties in accordance with the *Police Services Act* and regulations.

**C. The Investigation leading to the Report**

13. In November 2013 and following, the Commissioner became aware of specific instances where individuals resident in Ontario were denied entry to the United States by U.S. Customs and Border Protection Officials (U.S. border officials) based on information concerning suicide attempts involving those individuals in the possession of border officials.
14. The Commissioner conducted an investigation and, receiving a sworn affidavit from the Ministry of Health and Long-Term Care that her Ministry was not disclosing attempted suicide information to any officials or agencies in the U.S., she determined that the source was the federal CPIC database maintained by the Royal Canadian Mounted Police ("RCMP"). The CPIC database contains a vast array of information, including personal information related to criminal activity, warrants for arrest, missing persons, suicide attempts or threats, and apprehension warrants under the *Mental Health Act*. This information originates with and is uploaded to and recorded on CPIC by various police services throughout Canada. In this case, personal information concerning suicide attempts was collected by police services and subsequently disclosed and recorded in the CPIC database in consequence of their interactions with individuals who had attempted or threatened suicide.
15. There is currently a Memorandum of Cooperation between the RCMP and the U.S. Federal Bureau of Investigation ("FBI") providing the FBI with access to CPIC data, including all

attempted suicide information found in Special Interest to Police (“SIP”) entries. The FBI in turn grants access to the CPIC database to the U.S. Department of Homeland Security, which encompasses U.S. Border Patrol officials.

**D. Submissions received in the investigation**

16. As part her investigation, staff in the Commissioner’s Office conducted extensive interviews, engaged in a thorough review of relevant documentation, and consulted with the Police Services in Toronto, the Region of Waterloo, Hamilton, and Ottawa, as well as the OPP and the RCMP. The Commissioner’s Office also conducted interviews with leading mental health professionals and organizations, including the Centre for Addiction and Mental Health, the Canadian Mental Health Association - Ontario, and the Mental Health Commission of Canada. The Commissioner invited the Police Services (including the TPSB and the TPS through its Chief of Police), mental health professionals and organizations and the Canadian Civil Liberties Association to submit representations on the issues under investigation. After considering their evidence and submissions, the Commissioner prepared and circulated a draft of the Report and invited the same organizations and professionals to provide their comments. The Report includes a consideration of all the representations and comments submitted during the investigation.
17. According to information provided by the RCMP, local Police Services have complete discretion as to whether information related to a suicide attempt is recorded in the SIP repository of the CPIC database. In her Report, the Commissioner confirmed that police services in Ontario are not required or compelled to disclose this information in the CPIC database.



18. The Commissioner found that there are significant variations in the way that police in Ontario treat attempted suicide information. Police Services in Hamilton, the Region of Waterloo, Ottawa, and the OPP all exercise some degree of discretion in determining whether to include such information on CPIC. As a result, information related to suicide attempts in these Police Services may be added to CPIC in some, but not all circumstances.
19. The Commissioner's investigation revealed that the TPS exercises no discretion. The TPS policy requires that police officers upload information related to every threat of suicide or suicide attempt to CPIC.
20. All the mental health professionals and organizations consulted by the Commissioner's Office were opposed to a "blanket" rule requiring the automatic disclosure of all suicide-related information via CPIC. They observed that many if not most suicide attempts involve circumstances that do not pose a risk of danger to police officers or the public. One organization produced a 2011 paper on mental health and violence which reported that people living with mental health conditions are no more likely to engage in violent behaviour than the general population.
21. There was a consensus among these groups regarding the extreme sensitivity of mental health-related information, the need for this information to be treated with considerable discretion and caution, the significant potential for stigma flowing from access to and use of that information and the risk that the information collected may be inaccurate or incomplete.

In its submission, the Mental Health Commissioner of Canada stated:

While it might be useful internally to a local police organization, we cannot see any reason why it would be appropriate to be on CPIC. The marginal potential benefit ... is far outweighed by the possible detrimental effects.

**E. The Special Investigation Report**

22. In her Report, the Commissioner observed: “The disclosure of police records that include information about an individual’s mental health may create barriers to accessing employment opportunities, educational placements, volunteer positions, and to securing professional qualifications .... [T]he disclosure of these records may also pose barriers to those seeking to travel to the U.S. for business, pleasure, or family purposes.”
23. The Commissioner observed that in the case of each of four individuals refused entry to the United States based on SIP entries, there was no suggestion that another individual’s safety was at risk or that the suicide attempt involved criminal behaviour or any wrongdoing.
24. Concerning the circumstances in which it may be appropriate for police to record attempted suicide information on CPIC, the Commissioner stated:

I recognize that there may be circumstances where a suicide attempt involves the use of weapons or occurrences of violence, where the safety of police officers and other members of the public may be at risk. In these limited circumstances, I acknowledge that one of the purposes of the collection is for officer and public safety. However, I do not agree that in **all** cases of attempted suicide the purpose of the collection is for officer and/or public safety reasons. The exercise of discretion will need to enter into the decision-making process. This will be of the utmost importance when my analysis turns to the question of whether the disclosure of this information via CPIC, once collected, is authorized. (Commissioner’s own emphasis)

**(i) Determinations under section 32 of MFIPPA**

25. The Commissioner found that the uploading and recording of information relating to suicide attempts or threats of suicide on CPIC resulted in the disclosure of personal information subject to the prohibitions and exceptions at s. 32 of *MFIPPA* and s. 42 of *FIPPA*. The Commissioner concluded that such disclosure is only permitted under these provisions in

limited circumstances where one of the four criteria of the “Mental Health Disclosure Test” is met, as follows:

1. The suicide attempt involved the threat of serious violence or harm, or the actual use of serious violence or harm, directed at other individuals;
2. The suicide attempt could reasonably be considered to be an intentional provocation of a lethal response by the police;
3. The individual involved had a history of serious violence or harm to others; or
4. The suicide attempt occurred while the individual was in police custody.

26. In arriving at her conclusions, the Commissioner made the following observations and determinations (among others):

- (a) Police Services have the authority to collect information related to suicide attempts pursuant to s. 28(2) of *MFIPPA* (mirrored at s. 38(2) of *FIPPA*) which states:

No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

- (b) The relevant exceptions to the general prohibition against the disclosure of personal information are found at ss. 32(c) and (f) of *MFIPPA* (mirrored at s. 42(1) of *FIPPA*) as follows:

An institution shall not disclose personal information in its custody or under its control except,

- (c) for the purposes for which it was obtained or compiled or for a consistent purpose;
- (f) if disclosure is by a law enforcement institution,
  - (i) to a law enforcement agency in a foreign country under an arrangement, a written agreement, or treaty or legislative authority, or

- (ii) to another law enforcement agency in Canada;
- (c) Section 2(1) of *MFIPPA* defines “law enforcement” to mean:
- (a) policing,
  - (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
  - (c) the conduct of proceedings referred to in clause (b);
- (d) Where information has been collected directly from an individual, a “consistent purpose” is defined at s. 33 of *MFIPPA* (mirrored at s. 43 of *FIPPA*) as follows:
- The purpose of a use or disclosure of personal information that has been collected **directly** from the individual to whom the information relates is a consistent purpose under clauses 31 (b) and 32 (c) only if the individual might reasonably have expected such a use or disclosure. (Commissioner’s own emphasis)
- (e) “Where personal information is collected indirectly, a consistent purpose is one where the purpose for the disclosure is ‘reasonably compatible’ with the purpose for which it was obtained or compiled.” [citing Privacy Complaint Reports MC-010032-1 and MC-010036-1]
- (f) “The purposes for which attempted suicide-related information may be obtained or compiled ... is relevant to the extent to which the eventual disclosure to other Canadian law enforcement agencies and to U.S. border officials is authorized under the *Act*.”
- (g) Those purposes “will vary depending on the circumstances of the incident. In all cases, one of the overriding purposes for which the information is obtained or compiled is to have a record of the incident. In other circumstances, one or more of the following additional purposes **may** be engaged:
- assisting officers in determining the appropriate response and actions to be taken when responding to a call for service;

- determining appropriate responses and actions in relation to individuals who may be in the custody of the police; and
- protecting the public, police officers, and the individual.” (Commissioner’s own emphasis)

**Section 32(c) – for the same purpose or a consistent purpose**

- (h) “There are limited circumstances where disclosure of suicide-related information to other law enforcement agencies in Canada would be appropriate under section 32(c). These circumstances include suicide attempts where there has been a threat of serious violence or harm, or the actual use of serious violence or harm directed at other individuals; the suicide attempt could reasonably be considered to be an intentional provocation of a lethal response by the police; the individual involved had a history of serious violence or harm to others; or the suicide attempt occurred while the individual was in police custody. [ ] If none of these circumstances apply, the information should not be recorded in [ ] CPIC.”
- (i) “In each of these cases, the purpose of the disclosure is the same as the purpose for which the information was obtained or compiled – public safety and officer safety. ...[T]he Police Service may need to alert other Police Services, and, in some cases, correctional facilities, of the circumstances surrounding a suicide attempt, as a matter of public and officer safety. In addition, in these public safety circumstances, the disclosure of the information to other Police Services may facilitate or instruct other police officers as to the appropriate response to the individual concerned, whether as a result of the transfer of custody, or as a result of a subsequent separate encounter with the individual.”
- (j) “[A]bsent these public safety circumstances, the purpose of the disclosure is not the same as the purpose for which the information was obtained or compiled, nor can it be said to be for a consistent purpose. ... [T]herefore, it is not permissible under the *Act*.” (emphasis added)

- (k) “With respect to any information that may have been collected *directly* from the individual, [there is] no basis for concluding that anyone in Ontario would reasonably expect that, as a result of an emergency 9-1-1 call for assistance in relation to a suicide attempt, the police would disclose their personal information about the suicide attempt [ ] via CPIC. This would especially be the case where the suicide attempt did not involve the threat of serious violence, or use of violence against others.” (Commissioner’s own emphasis)
- (l) “With respect to any information that was collected indirectly, [ ] the purpose of the disclosure is not reasonably compatible with any of the various purposes of collection that have been articulated by the police.”

**Section 32(f)(ii) – disclosure to another law enforcement agency in Canada**

- (m) Compliance with s. 32(f)(ii) requires that each of the following three conditions be met:
- The disclosing institution must be a “law enforcement” institution;
  - The receiving entity must be “engaged in law enforcement as a primary function;” and
  - Both the purpose(s) of the disclosure and the purpose(s) underlying the receipt of the same information must be to further a “law enforcement” purpose(s) within the meaning of section 2.
- (n) “Law enforcement practices that allow the disclosure of personal information for a purpose that cannot reasonably be said to be ‘law enforcement’ will not comply with [the third] condition and thus, will not comply with this section of the *Act*. ... [I]n determining compliance with this condition, it is necessary to consider both the *purposes of the disclosure and the purposes underlying the receipt of the information*. It must be demonstrated that both purposes are for ‘law enforcement,’ rather than to ‘allow unfettered, discretionary exchanges of information for any purpose.’” (Commissioner’s own emphasis)

- (o) While “the term ‘law enforcement’ [ ] encapsulates a broad range of functions and duties, and includes policing responsibilities ... it cannot be said that all suicide attempts raise either ‘law enforcement’ or public safety concerns ... in the context of the disclosure of information related to such an incident after the incident has been resolved.... In some cases, the circumstances of the suicide attempt may not pose a risk to the safety of officers or others. In many other cases, there may be no objective basis to conclude that the individual will pose a risk to the safety of officers, themselves, or the public in the future.”
- (p) “[T]he police authority to collect and use information does not translate into the authority to automatically disclose that same information in all cases.... [I]n some circumstances there is no law enforcement purpose to justify the disclosure of information in relation to suicide attempts to other law enforcement agencies. In other words, suicide-related information will not, absent limited circumstances, such as public or officer safety concerns, be relevant to the policing duties of other Police Services or relevant to the investigatory aspect of the definition of law enforcement in section 2(1) of the *Act*.”
- (q) “Viewed in this light, a practice of automatically recording all such incidents in the CPIC database and the consequent disclosure to Canadian law enforcement agencies is a disclosure practice that does not comply with section 32(f)(ii) of the *Act*. Equally, it is not sufficient to suggest that, because a receiving entity has, as its primary function, law enforcement duties, one Police Service may routinely disclose the information via CPIC on the basis that it may one day be relevant to the receiving entity’s performance of some unspecified law enforcement purpose. To conclude otherwise would, in effect, ‘allow unfettered, discretionary exchanges of information, for any purpose.’”
- (r) “Accordingly, [ ] the third condition [ ] is not met in those circumstances where Police Services in Ontario are disclosing to other Canadian law enforcement agencies via CPIC information relating to suicide attempts that **do not** provide an objective basis to conclude that there exists a public safety or officer safety

concern.... As all three conditions must be met in order to satisfy the exception in section 32(f)(ii), [ ] the disclosure to other Canadian law enforcement agencies, absent public or officer safety concerns, is not permissible under section 32(f)(ii).” (Commissioner’s own emphasis)

**Section 32(f)(i) – disclosure to a law enforcement agency in a foreign country**

- (s) Compliance with section 32(f)(i) requires compliance with each of the three conditions discussed under section 32(f)(ii), as well as a fourth condition as follows:
- The disclosure must be made “under an arrangement, a written agreement or treaty or legislative authority.”
- (t) “[T]he purpose to which the receiving entity is putting the suicide-related information at issue is, in part, to screen individuals who seek to travel to or through the U.S. As a result, in most cases of attempted suicide, the U.S. border officials are not using the information for a *policing* purpose within the meaning of paragraph (a) of the definition of law enforcement in section 2(1) of the *Act*. In some limited cases where one of the circumstances set out in the discussion on section 32(c) are present, [ ] there may be public or officer safety concerns or purposes that would be encompassed by policing. However, the purpose of the disclosure in most cases, does not fall within the investigatory aspect of the definition of law enforcement in section 2(1) of the *Act*. When an individual is turned away at the border, there does not appear to be any judicial or quasi-judicial proceeding in play, let alone one that could lead to a penalty or sanction. U.S. authorities simply refer concerned individuals to a limited list of panel of physicians in Canada who conduct a medical assessment.” (Commissioner’s own emphasis)
- (u) Absent the limited circumstances described above, the third condition has not been met and the disclosure of suicide-related information to U.S. border officials is not in compliance with section 32(f)(i) of *MFIPPA*.



- (v) “Given the access that border officials and other Canadian law enforcement agencies have to CPIC, the police should not enter information about suicide attempts into the SIP repository of CPIC other than in those limited circumstances.”

**(ii) Mental Health Disclosure Test – Recommendation 1**

27. The Commissioner’s Report summarized her conclusions in accordance with these findings and made recommendations, which included Recommendation 1 as follows:

Police Services in Ontario should:

1. Immediately cease the practice of automatically uploading or disclosing personal information relating to threats of suicide or attempted suicide via CPIC, by default. Before disclosing personal information via CPIC relating to a threatened suicide or attempted suicide, the Mental Health Disclosure Test (outlined below) must be met. This test requires that one of the following four circumstances exists before any suicide-related information is recorded in the SIP repository of CPIC:
    1. The suicide attempt involved the threat of serious violence or harm, or the actual use of serious violence or harm, directed at other individuals;
    2. The suicide attempt could reasonably be considered to be an intentional provocation of a lethal response by the police;
    3. The individual involved had a history of serious violence or harm to others; or
    4. The suicide attempt occurred while the individual was in police custody.
28. The Commissioner also reviewed the varying practices of Police Services in the retention and removal of suicide attempt information from SIP entries in the CPIC database and recommended that Police Services establish a process that is transparent and easy to navigate, employing the Mental Health Disclosure Test. This aspect of the Report is not directly at issue in this application.

**F. Responses to the Commissioner's draft and final report**

29. In response to a draft Report sent on February 21, 2014, the Commissioner received responses from several police services and other organizations with an interest in the matter.

30. On March 4, 2014, the Hamilton Police Service responded to the draft Report as follows:

The Hamilton Police Service respects and fully supports the work of the IPC and we will work to address the recommendations in their word, intent and spirit in relation to this critical issue. We have already directed that an immediate audit be conducted of all HPS – CPIC SIP entries and we also immediately implemented a temporary directive to ensure full compliance with the IPC recommendations. ... I assure you that the Hamilton Police Service is committed to fully complying with your recommendations.

31. On March 7, 2014, the Waterloo Police Service responded to the draft Report as follows:

We find your draft Report very thoughtful and instructive for the future application of Special Interest Police entries applied to the CPIC system. . . . We look forward to your final Report and the implementation of a more consistent approach, among police services, to the management of records as it relates to individuals living with mental health issues.

32. On March 6, 2014, the Centre for Addiction and Mental Health (“CAMH”) responded to the draft Report, stating:

CAMH has no concerns about the content of the report and agrees with how our organization's comments are captured. More importantly, we are in full agreement with the report's findings and support the recommendations you have put forward.

33. Following the release of the final Report, CAMH affirmed their support for the Report's findings, stating:

The record of a person's suicide attempt is personal health information that should be protected to the greatest extent possible. ... CAMH is in full agreement with the findings of this investigation and we strongly support the recommendations that the Commissioner has put forward.

34. Following the release of the final Report, the Mental Health Commission of Canada (“MHCC”) posted a statement on their website supporting the Report. MHCC’s release states:

The [MHCC] supports the findings in Ontario Information and Privacy Commissioner Dr. Ann Cavoukian’s special investigation “Crossing the Line: Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC.”

The MHCC, along with other key members of the mental health community in Canada, was consulted as part of the investigation and agrees with the report findings that the disclosure of police encounters with individuals who have attempted or threatened suicide is highly problematic and should only occur in very exceptional circumstances. Health information is deeply personal, and we are pleased that the commissioner recognizes that the current practice of disclosure to CPIC by some police departments can create a deterrent to help-seeking.

We look forward to the response from Ontario Police Services. Adoption of the report recommendations would be an important step towards the implementation of Canada’s Mental Health Strategy and improving police interactions with people with mental health problems or illness.

**G. Correspondence with TPSB/TPS concerning the investigation and compliance with MFIPPA**

35. On December 13, 2013, at the outset of her investigation, the Commissioner wrote to Deputy Chief Mike Federico of the Toronto Police Service, requesting a written statement of the position of the Toronto Police Service addressing a series of 26 questions. She also wrote separately to Dr. Alok Mukherjee, Chair of the Toronto Police Services Board, requesting a written statement of the position of the Toronto Police Services Board addressing the same 26 questions.
36. On January 2, 2014, Dr. Alok Mukherjee provided a response to the Commissioner’s December 13 letter, answering several of the questions but deferring a response on most questions “of an operational nature” to the Toronto Police Service.

37. On January 21, 2014, Chief William Blair of the Toronto Police Service responded to the Commissioner's December 13 letter, providing responses to each of the 26 questions.
38. On February 21, 2014, the Commissioner wrote separately to Dr. Alok Mukherjee and Chief William Blair providing a copy of a Draft Report and inviting comments from both the Toronto Police Services Board and Chief Blair by March 7, 2014.
39. The date for receipt of comments was subsequently extended to March 21, 2014.
40. On March 17, 2014, Dr. Alok Mukherjee wrote stating that "the present deadline does not provide us with sufficient time" to consider the matter and concluding that "we are neither ready nor able to support the IPC's recommendations."
41. On March 21, 2014, counsel on behalf of the Toronto Police Service provided representations on the Draft Report, stated that the TPS had not had an opportunity to fully review the issues and reserved the right to provide additional information or representations.
42. On April 14, 2014, the Commissioner publicly released her Special Investigation Report. In addition, the Commissioner's office provided copies to the TPSB and to Chief William Blair through TPS counsel.
43. On April 14, 2014, the Commissioner spoke with Chief Blair by telephone. In their telephone call, Chief Blair indicated that the TPS does not intend to change its practices in response to the recommendations in the Report.

44. On May 2, 2014, the Commissioner wrote to Chief Blair confirming that, when they last spoke, he had indicated that the Toronto Police Service did not intend to implement Recommendation 1. The Commissioner sought confirmation “whether this is still the position of the Toronto Police Service or whether steps have been taken to comply with this recommendation.”
45. On May 20, 2014, Deputy Chief Mike Federico of the Toronto Police Service replied stating “we continue to be of the view that the issue is not the recording of this information in CPIC, but the disclosure of this information to US Authorities, an issue for the Federal Government.”
46. As of the date of this notice of application, the TPSB and Chief William Blair have failed or refused to take steps to comply with provisions of s. 32 of *MFIPPA* by implementing or directing the implementation of the Mental Health Disclosure Test for the disclosure to CPIC of attempted suicide or threat of suicide information relating to identifiable individuals.
47. The response of the TPSB and its Chief of Police amount to a failure or refusal to comply with the requirements of s. 32 of *MFIPPA*.

#### **H. Additional expert evidence**

48. During the course of the Commissioner’s investigation and since, the Commissioner and her staff have spoken with psychiatrists, psychologists, and a former police chief about the mental health and policing issues associated with police encounters with people in real or perceived mental health crises.

49. As their sworn testimony will confirm, these professionals have advised that, in many cases involving mental illness, drug use, or other compromised health conditions, police often lack the training or qualifications to distinguish genuine suicidal behaviour from a host of other behaviours. For example, police may be unable to distinguish a drug overdose from an intentional suicide attempt, or assess the significance and lethality of a real or apparent suicide threat or attempt (e.g. 'attention seeking' suicide behaviours vs. borderline personality disorders vs. more serious mental illnesses, including those associated with behaviour intended to cause death by suicide). In addition, police generally do not follow-up on an allegedly suicidal individual, for example, after the individual has been attended to by medical staff or has been released from hospital.
50. In light of the resulting and significant potential for inaccurate, incomplete, and out-of-date information that 'attempt suicide' CPIC flags may convey, a policy of routine disclosures of all "attempted suicide" contacts to CPIC does not provide police with information that can be treated as useful for policing purposes. Moreover, the information in and associated with such "attempted suicide" flags is not relevant to the law enforcement duties of the police. At best, this information is health-related information which, if disclosed without a full appreciation of the surrounding circumstances, can result in an inappropriate response by law enforcement officials in future encounters with the individual.
51. Absent the presence of facts falling under one or more of the four criteria in the Mental Health Disclosure Test, the extent of any necessary and appropriate police involvement in a real or apparent suicide attempt or threat of suicide is confined to assisting the person in

obtaining access to medical services. In this context, police are asked to assist with a medical rather than a law enforcement issue.

**I. Ontario *Human Rights Code* and Canadian *Charter of Rights and Freedoms***

52. The sweeping and arbitrary disclosure of police records to CPIC relating to an individual's mental health, specifically with reference to real or perceived suicidal behavior, has human rights and *Charter* implications for individuals with mental health disabilities.
53. The provisions of *MFIPPA* that authorize the disclosure of personal information by one law enforcement agency to another (here, ss. 32(c) and (f)) must be interpreted and applied in a manner that is consistent with and does not contravene either the provisions of Part I of the Ontario *Human Rights Code* (the "*Code*") that protect against discrimination or sections 7, 8, or 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").
54. Section 47(2) of the *Code* provides that "where a provision in Act or regulation purports to require or authorize conduct that is a contravention of Part I this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act." Accordingly, the *Code* has primacy over all Ontario legislation that does not specifically provide otherwise. Further, the laws of Ontario must be interpreted in a manner consistent with the *Code*.
55. Section 1 of the *Police Services Act* expressly reinforces this conclusion in a policing context in setting out the following declaration of principles:
  1. Police services shall be provided throughout Ontario in accordance with the following principles:
    1. The need to ensure the safety and security of all persons and property in Ontario.

2. The importance of safeguarding the fundamental rights guaranteed by the Canadian Charter of Rights and Freedoms and the Human Rights Code.
  3. The need for co-operation between the providers of police services and the communities they serve.
  4. The importance of respect for victims of crime and understanding of their needs.
  5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.
  6. The need to ensure that police forces are representative of the communities they serve.
56. A police services policy by which all suicide attempts or threats of suicide are recorded on CPIC, without an individualized assessment of actual health and safety risks to others, has an adverse impact on persons with mental health disabilities and cannot be justified as a bona fide requirement under the *Code*. Rather, there must be an individualized assessment of health and safety risks according to the principles of equal rights and opportunities free from discrimination due to mental health disabilities and addictions, including in areas such as employment and access to and receipt of services. These protected human rights grounds include past, present and perceived conditions.
57. Further, law enforcement officials must abide by the *Charter* in exercising any discretion granted them under a statute. Disclosure practices which deprive a person of the right to liberty or security of the person, intrude on a reasonable expectation of privacy, or infringe the right to equal protection under the law without discrimination based on mental disability, and which are arbitrary or disproportionate, do not comply with the *Charter*.



58. The Commissioner's interpretation and application of section 32 of *MFIPPA*, her findings with respect to the practice of the TPSB and TPS with respect to the disclosure of attempted and threatened suicide information to the CPIC database, and her Mental Health Disclosure Test, are consistent with the *Code* and the *Charter*. The TPSB/TPS disclosure practice in this connection is inconsistent with the *Code* and the *Charter*.

**J. Conclusion**

59. The above-described grounds warrant a declaration and orders of the Court in the terms set out at paragraphs 1(a), (b) and (c) above.
60. The above-described grounds also meet the test for an order in the nature of *mandamus* in the terms set out at paragraph 1(c) above. That test has been described as follows:

Before the remedy can be given, the applicant for it must show:

- (1) 'a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced'...;
- (2) 'The duty whose performance it is sought to coerce by *mandamus* must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform'...;
- (3) That duty must be purely ministerial in nature, 'plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers';
- (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy...

61. Sections 2(1), 28 to 33, 36, 37, 39(1), 46 of *MFIPPA*, R.S.O. 1990, c. M.56;
62. Sections 4, 38 to 43, 46, 47, 50(1), 58, 59 of *FIPPA*, R.S.O. 1990, c. F.31;
63. Sections 2, 6, 7 and 9 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1;

64. Rules 38 and 68 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194;
65. Sections 1, 27, 31 and 41 of the *Police Services Act*, R.S.O. 1990, c. P.15;
66. Section 402(1) of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A;
67. Sections 1, 7, 8, 15 and 52 of the *Canadian Charter of Rights and Freedoms, 1982*, R.S.C. 1985, App. II, No. 44, Sched. B;
68. Sections 1, 9, 10, 11, 13 and 47(2) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19;  
and
69. Such further and other grounds as counsel may advise and this Honourable Court may permit.
70. **The following documentary evidence will be used at the hearing of this application:**
  - (a) The Affidavit of Ann Cavoukian, sworn June 4, 2014;
  - (b) The Special Investigation Report issued by the Information and Privacy Commissioner, dated April 14, 2014, entitled "Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC";
  - (c) The Record of the Commissioner's Investigation;
  - (d) The affidavits of Dr. Mara Goldstein, Dr. Patrick Baillie and Professor Terry G. Coleman, to be sworn; and

- (d) Such further and other affidavits and materials as counsel may advise and this Honourable Court may permit.

June 5, 2014

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**INFORMATION AND PRIVACY COMMISSIONER  
OF ONTARIO**

- and -

**TORONTO POLICE SERVICES BOARD and  
WILLIAM BLAIR, CHIEF OF POLICE,  
TORONTO POLICE SERVICE**

Applicant

Respondents

**Court File No. 265/14**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

PROCEEDING COMMENCED AT: Toronto

**NOTICE OF APPLICATION  
FOR JUDICIAL REVIEW**

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