

January 21, 2005

**HAND DELIVERED**

Pam McConnell  
Chair  
Toronto Police Services Board  
40 College Street  
Toronto, Ontario  
M5G 2J3

Dear Ms. McConnell:

**Re: Revised Board Policy for the Destruction of Adult Photographs,  
Fingerprints and Criminal History**

I am writing to provide feedback on Toronto Police Chief Julian Fantino's revised Report on the Destruction of Adult Photographs, Fingerprints and Criminal History.

First, I would like to thank the Chief of Police for addressing the concerns raised in my letter of August 4, 2004. For your information, I am attaching a copy of that letter to this correspondence. I am pleased that the revised Report now clarifies that, where an individual has been acquitted of an offence, the individual has a right to have his or her record expunged regardless of the nature of the charge, and that no fee will apply to the destruction of the record.

I am also pleased that this revised Report indicates that, should the policy be adopted, there will be a process in place whereby an individual may appeal a decision by the Toronto Police Service not to destroy a particular record.

I do, however, have several remaining concerns about this matter, which I will outline below.

**Discretionary Power to Deny Applications**

As drafted, the proposed policy would provide the Toronto Police Service with the discretionary power to retain the above-noted records of all individuals who had received non-conviction dispositions other than a finding of acquittal (such as a stay or withdrawal of charges), for any offences related to "violence, sexual issues, guns, weapons or explosives."

The presumption of innocence is a fundamental component of our criminal justice system. Accordingly, the judiciary and police services should strive to treat all individuals who have not been convicted of an offence in a uniform manner. As such, I am opposed to the notion that individuals who have received non-conviction dispositions other than acquittals should be treated differently than individuals who have been acquitted.

Innocent individuals may find themselves wrongfully charged with a criminal offence for a variety of reasons, and these charges may result in a range of potential dispositions (for instance, charges may be withdrawn in response to the Crown lacking sufficient evidence to proceed to trial). In my view, differentiating between various forms of non-conviction dispositions compromises the presumption of innocence.

While I indicated in my original letter and continue to support the notion that the Police may retain a limited discretion to refuse to destroy records in certain cases, I think the proposed policy should be worded narrowly to make it clear that applications would only be denied in very limited circumstances. I recommend adopting the following criteria to determine the limited circumstances under which an application could be denied.

Applications for destruction should only be denied in limited circumstances where:

- the individual in question has a prior conviction or may pose a known risk to the public;
- the record is required in an ongoing investigation; or
- the offence underlying the charge is of a serious nature that gives rise to a compelling public interest to retain the record.

### **Transparency and Independence of the Process**

I am also concerned with the transparency of the application process, or lack thereof, and the fact that there is currently no requirement to notify individuals of their right to submit an application for destruction.

In general terms, the notion that individuals have a right to be provided with a clear notice of any collection and use of their personal information is a generally accepted fair information practice. This concept has been adopted in a variety of settings by both public and private sector entities. The nature of the criminal justice process, and the important role that this process plays in the lives of individuals, adds to the need for a clear notification requirement.

In addition, the revised Report indicates that a right of appeal will exist for individuals who have had an application for destruction denied. However, the Report does not set out the procedural safeguards that will be put into place to ensure that the appeals process is fair and independent.

I therefore recommend that the Police provide a further explanation of this process, including an explanation of the mechanisms to ensure that records will only be maintained in limited circumstances, and in accordance with stated criteria.

If this policy is to be adopted by the Board, I recommend that, on disposition of a charge, there be a requirement that all individuals who have been charged and fingerprinted be notified that:

their fingerprints and photographs are being maintained;  
if not convicted, the individual has a right to apply to have his or her record destroyed;  
and  
there is a process in place to appeal a decision to refuse an application for destruction,  
and how this process may be initiated.

## **Fees**

I would also like to address the issue of fees. I am encouraged that the revised Report makes clear that no fee will apply in cases of applications pursuant to findings of acquittal. However, as indicated above, I do not see a legitimate rationale for drawing a distinction between different forms of non-conviction dispositions.

The \$50 fee related to non-conviction dispositions other than acquittal may pose a barrier to the right of individuals to submit an application for destruction. As such, I do not support an application fee for any form of non-conviction disposition (acquittal, stay, withdrawal of charges).

Thank you very much for considering my views on this matter. I appreciate the need to empower law enforcement to collect and retain information in order to carry out its duties. I am confident that this can be accomplished with due regard to the privacy rights of individuals.

I would be happy to meet with Chief Fantino or members of the Toronto Police Service to discuss the recommendations contained in this letter in greater detail.

Sincerely yours,

Ann Cavoukian, Ph.D.  
Commissioner

Enclosure