Ottawa (City) v. Ottawa Professional Firefighters Assn. (Criminal Records Check Grievance)

Ontario Labour Arbitration Awards

Ontario

Labour Arbitration

Panel: M.G. Picher (Arbitrator)

Heard: May 4, June 25, 2007.

Award: September 14, 2007.

[2007] O.L.A.A. No. 731 | *169 L.A.C. (4th) 84*

IN THE MATTER OF an Arbitration Between City of Ottawa, and Ottawa Professional Firefighters Association

(52 paras.)

Appearances

A.R. O'Brien and others, for the association.

D. White, M. Steele and others, for the employer.

AWARD

1 Can an employer require its employees, under pain of discipline, to provide written consent to the disclosure of their criminal records, on a repeated, periodic basis? That is the issue raised in this grievance. The Association has filed a policy grievance challenging the newly adopted policy of the City of Ottawa, as directed by its Fire Chief, whereby all firefighters are compelled to provide written consent to the disclosure of any criminal record which they may have, every three years, the results of which are recorded within an employee's personal file. The Association submits that the City's action constitutes an unwarranted invasion of privacy and may involve the gathering of information which has no legitimate employer interest but which may be prejudicial to the career of an employee.

2 At issue is the policy introduced by the City on April 18, 2007 under the authority of the Fire Chief. Titled "Police or Criminal Record Check Policy", it states as its purpose "to outline the process for the completion of Police Record Checks in accordance with the City of Ottawa's Police or Criminal Record Check Policy". The policy is said to apply to all members of the Association and to volunteer firefighters. The specific directive: "In accordance with the City of Ottawa Police or Criminal Record Check Policy, OFS is required to have an updated Police

Record Check on its Human Resources' file every three years." The policy goes on to state that all full time staff are to provide certain forms to Ottawa Fire Services, including "Consent Form A" described as the Police Clearance Consent form.

3 This matter came on for hearing on an expedited basis. At the initial hearing, on May 4, 2007, after hearing representations from the parties the Arbitrator directed that the enforcement of the policy be held in abeyance pending the outcome of this arbitration. In the result, consent forms have not been provided to the employer by the members of the Association and the policy has been stood down until such time as this award clarifies the mutual rights and obligations of the parties.

4 The specific directive of April 18, 2007 takes its root in the City's Police or Criminal Record Check Policy. That policy, which came into effect July 5, 2002 and was revised on September 14, 2006, contains the following Policy Statement and Statement of Purpose:

> Policy Statement
>
> It is the policy of the City of Ottawa to require individuals to complete a Police Record Check for service with the vulnerable sector or a Criminal Record Check (Police or Criminal Record Check) prior to being offered employment in a designated position, where it has been established that the check is a bona fide occupational requirement of the position.
>
> Employees occupying a designated position at the City of Ottawa, where the requirement to complete and maintain Police or Criminal Record Check was an original condition of employment, will be required to renew their check at a minimum of once every five (5) years.
>
> Purpose
>
> The purpose of this policy is to minimize the risk in safeguarding the City of Ottawa's employees, clients and assets.

5 The policy is said to apply to designated positions at the City Of Ottawa. It covers employees, job applicants, volunteers, special employment program participants, community partners, contractors and consultants and persons hired through temporary services. It appears that the designation of a position as one which requires a police or criminal record check is determined by the various departments of the City. That is reflected in the Policy Requirements which reads, in part, as follows:

> Policy Requirements
>
> The practice of conducting a Police or Criminal Record Check involves accessing the information made through the Canadian Police Information Computer (CPIC) system regarding a person's conviction for which a pardon has not been granted and regarding outstanding criminal charges.
>
> An Ad Hoc Review Committee shall be established when a candidate self-declares or the Police or Criminal Record Check is returned positive. Each positive check will be reviewed and dealt with on a case-by-case basis. The Ad Hoc Review Committee shall be comprised of a representative from Legal, Labour Relations, and hiring manager or

Division Representative, a Staffing and Client Relations Manager and at least one of the following: a Corporate Security Representative, or a Human Rights and Employment Equity Consultant.

Departments are responsible for determining which positions require a Police or Criminal Record Check. In some departments, where there is a bona fide occupational requirement for a clear criminal record, the responsibility lies with the department itself to establish how frequently they will reassess an employee's criminal status.

The initial cost of a Police or Criminal Record Check is the responsibility of the applicant. The cost of any subsequent renewal is the responsibility of the relevant Branch.

6 The ongoing obligations of employees who occupy designated positions and the role of the Ad Hoc Review Committee are also elaborated within the policy, as follows:

Employees Occupying a Designated Position

Employees occupying a designated position at the City of Ottawa, where the requirement to complete and maintain a Police or Criminal Record Check was an original condition of employment shall be responsible for:

* renewing their check at a minimum of once every five (5) years or more frequently as determined by their department;
* submitting their new Police or Criminal Record Check to their manager for tracking purposes; and
* immediately notifying their manager of any changes that would negatively affect their original Police or Criminal Record Check.

...

Ad Hoc Review Committee

The Ad Hoc Review Committee shall be responsible for:

* conducting a confidential investigation regarding the self-declaration or 'positive' Police or Criminal Record Check of a candidate;
* ensuring due diligence is exercised to gather all of the facts on a case-by-case basis; and
* recommending a course of action, on a case-by-case basis.

7 Finally, the consequences for failing to abide by the policy are clear, and are grounded in the fundamental management right of the City to apply discipline. In that regard, specific reference is made to the obligation to disclose any change in an individual's criminal record which could have a negative impact. That portion of the policy dealing with both new applicants and continuing employees states the following:

Failure by a job applicant to complete a Police or Criminal Record Check for a designated position shall result in their disqualification from the competition or placement process.

> Failure by an employee to notify the City of Ottawa of any change that would negatively affect their original Police or Criminal Record Check shall be considered grounds for disciplinary action, up to and including dismissal.

8 The positions of the parties are well articulated in the text of the Union's grievance and the City's grievance response. The grievance, dated April 11, 2007, contains, in part, the following:

> The Association contends that the Employer has no legitimate basis to require a renewal of a Police Record Check after an employee has been hired. This requirement has never before been applied to any current Fire Fighter in the City of Ottawa under this agreement or any former silo agreements.
>
> The Association acknowledges that the Employer may have the right to require such a check prior to the Employment but has no basis to make such an onerous and intrusive demand of bargaining unit members at any time let alone every five years. To do so is an unreasonable exercise of management rights. ...

9 The City's response, dated May 1, 2007, reads, in part, as follows:

> The City requires as an ongoing condition of employment that OPFFA members in designated positions produce and maintain a satisfactory police records check.
>
> The information received as a result of the Police Records Check will be kept strictly confidential. The documentation will reside in the personnel files.
>
> Access to the personnel files is strictly controlled and any request must be made through Employee Services.
>
> Should any employee receive a "positive" Police Record Check, in accordance with the policy the information will be sent to the Ad Hoc Review Committee, which will conduct a confidential investigation, ensure diligence is exercised to gather all the facts and determine a course of action. Each case is reviewed on a case-by-case basis.

10 The Association's President, Mr. Peter Kennedy, gave evidence with respect to the Association's concerns. Firstly, as indicated in the grievance document, prior to the adoption of the policy which is the subject of this arbitration there was no ongoing requirement upon the firefighters of the City of Ottawa, or upon the firefighters in the surrounding municipalities which have since merged into the single fire service of Ottawa, including such former "silo" services as Nepean, Kanata, Cumberland and Gloucester, which were independent fire forces prior to the amalgamation of the municipalities on January 1, 2001. According to Mr. Kennedy, to his knowledge, no fire fighting service anywhere in Canada is subject to an ongoing criminal records check of the kind introduced in Ottawa. He made that assertion based on a survey of approximately 140 firefighter associations in Canada. All of those which responded, said to number approximately 78, including all major municipalities within Ontario, indicated that they have never been subject to any such policy, either past or present.

11 When asked to elaborate on the concerns of the Association, Mr. Kennedy emphasized the issue of confidentiality. Describing the fire service as being "like a big family", he stressed that it is not uncommon for people to know the business of other people within that family. There is a

great fear that positive checks might become known among the members of the service, notwithstanding the best intentions of the policy.

12 It emerged from the evidence of Mr. Kennedy that, while it appears that some 60% of City employees have been made subject to the criminal records check policy, the Association was of the view that it had not been applied and would not be applied to firefighters. As emerged from the facts, however, it appears clear that the City considered that as the policy was first introduced in 2002, and that it requires re-certification after a minimum, of five years, all firefighters became due for criminal record checks effective 2007. Under cross-examination Mr. Kennedy did not suggest that there is no circumstance in which the City might not have a legitimate interest in what might otherwise be private background facts about an employee. He agreed that the loss of driving privileges, for example, and the obligation to provide a driver's abstract for firefighters who are required to operate vehicles, is not something the Association would challenge. With respect to general criminal record checks, however, he stated the view of the Association that the City should have reasonable grounds to ask any specific firefighter to provide consent to the disclosure of any ongoing criminal record check.

13 Evidence for the City was given by Mr. Jeffrey Byrne, Manager of Staffing and Client Relations. He explained that the purpose of the policy is to ensure the safety of employees, clients and the assets of the City. According to him the policy or similar policies existed in other municipalities prior to amalgamation in 2001.

14 Mr. Byrne explained that the City's complement of employees fluctuates between 17,000 and 15,000 people. In that context he noted that the designation of positions requiring police record disclosure numbers approximately 8,500. Mr. Byrne further distinguished between police record checks and criminal record checks. He noted that police record checks are resorted to in respect of employees who may deal with what he described as the "vulnerable sector", presumably employees such as social workers or others who might be in close contact with children or persons whose circumstances might render them vulnerable to certain kinds of abuse. Criminal record checks, he explained, would be directed to those employees who have dealings with assets or money. As examples of the kinds of employees who are covered by these categories, and whose positions have been designated, he cited paramedics, building inspectors, metre readers, nurses, day care workers and employees involved in children's programs. He further explained that a change to the Provincial Offences Act, *R.S.O. 1990, c. P.33* in 2006 prompted an expansion of the previous check, which had encompassed criminal record checks, to see the addition of police record checks.

15 According to Mr. Byrne the practice of making record checks for employees of municipalities dates back to the mid 1980s. He explained that upon hiring an employee a police record check is done, generally at a cost of $25, borne by the applicant, with subsequent renewals, for the same cost, being paid for at the expense of the City. He stated that criminal record checks can be obtained for $10.

16 He further explained that checks are outsourced to private firms which have access to the Canadian Police Information Computer (CPIC). If a check returns with a positive result the Ad

Hoc Review Committee is convened and determines whether the offence in question is viewed as being an impediment to the individual performing his or her duties. It appears that the Committee can operate by entail in simple cases, and can be formally convened in matters involving more serious criminal convictions. He noted that in some cases the Committee might recommend that an applicant for employment pursue obtaining a pardon to clear their record.

17 Under cross-examination Mr. Byrne confirmed that, to his knowledge, prior to July of 2002, the policy with respect to police or criminal record checks was limited to the point of hire. In other words, as he confirmed, there was no obligation on the part of employees to consent to a record check after the point of hire. In addition to the policy introduced in 2002 which involves continuing periodic criminal record checks, Mr. Byrne explained that the City's code of conduct for employees, apparently publicized on its website, also requires employees to keep the City advised of any new criminal convictions. When asked by counsel for the Association whether he was aware of any other municipalities which require renewal checks with respect to criminal records for firefighters Mr. Byrne could give no specifics, simply stating that he believed it to be in existence in other municipalities. When asked why, within the City of Ottawa, firefighters were subjected to a three year renewal standard, as opposed to the broader five year renewal established as the minimum under the policy, he responded that that was simply a matter for the Department itself to determine, taking into account such factors as the risk of harm and the vulnerability of the client group dealt with by the employees. He indicated that in some departments renewals are in fact on a two year basis.

ARGUMENT OF THE ASSOCIATION

18 Counsel for the Association stresses the private nature of an individual's police or criminal record. He notes to the Arbitrator's attention that no employer, including the City, can gain the information which it seeks under the policy which is here grieved without the express written consent of the employee, as mandated by the Municipal Freedom of Information and Protection of Privacy Act, *R.S.O. 1990, c. M.56*. He notes that under that statute if a person or organization seeks information about an individual's police or criminal record they must apply to the appropriate police force to obtain the information. Under the Act the police force in question may decline to release the information in the exercise of its discretion under section 14(5) of the Act. A refusal to provide such information is then subject to an appeal to the Privacy Commissioner of Ontario under section 39 of the Act. As evidence of the kinds of considerations which have resulted in police forces and the Privacy Commissioner declining to allow the production of police and criminal records counsel cites two decisions of the Privacy Commissioner: Order M-68 (Metropolitan Toronto Police Force, December 2, 1992) and Order M-222 (Stratford Police Services Board, November 23, 1993). Further, with respect to the underlying values which protect privacy interests in relation to police and criminal records, counsel for the Association cites the decision of the Supreme Court of the United States in United States Department of Justice v. Reporters' Committee for Freedom of the Press, 489 U.S. 749 (1989).

19 Counsel for the Association questions the basis upon which the City can purport to apply a rule which essentially imposes scrutiny on all firefighters, regardless of their personal circumstances. In his submission, while there may be circumstances in which the City can

properly ask a firefighter for written consent to obtain an update of his or her police or criminal record, he maintains that there should be reasonable grounds for any such request, analogizing to the limited right of an employer in a safety sensitive setting to request that an employee undergo a drug test. In that regard he cites, by way of analogy, the decision of this Arbitrator in Re Canadian National Railway Co. and C.A.W-Canada *(2000), 95 L.A.C. (4th) 341* (M.G. Picher). He submits that while reasonable grounds based scrutiny of the police or criminal records of employees may well be appropriate, depending on the individual circumstance, it is beyond an appropriate application of management's rights to simply require that all employees automatically provide written consent, allowing the City blanket access to such personally sensitive and statutorily protected information.

20 Counsel stresses that Ottawa appears to be the only municipality which has attempted to enforce such a broad policy of disclosure. He stresses that the Association has been unable to find any other municipality in Ontario which has instituted such a policy and indeed is unaware of any other municipality in Canada that has done so. He notes that the Association's assertion in that regard is essentially unrebutted by any contrary evidence brought by the City.

21 Counsel for the Association questions the motivation and legitimacy of the employer's initiative. He ask why, if a clear or appropriate criminal record is viewed as a bona fide occupational requirement, the City would have waited five years before applying the 2002 policy to the department. He notes that there is no triggering event or complaint which can be said have caused the policy to come into place and stresses that there is no evidence of firefighters being called upon to deal with individual clients in circumstances which would justify any substantial concern.

22 Counsel also submits that there is a genuine risk of prejudice to employees by the application of the policy requiring ongoing renewal of police and criminal record checks. Noting that any positive result goes into the personal file of the individual employee, counsel questions whether there is not a reasonable concern that such information might be misused. For example, he notes that a positive result might not disturb the continuing employment of a firefighter, for example where the Ad Hoc Committee is of the view that the offence does not compromise the individual's ability to do his or her job. Notwithstanding that, counsel argues, what guarantee is there that in the context of a promotion competition the person or persons assessing the same firefighter might not hold a prior criminal conviction, however irrelevant, against that individual? Counsel discusses the example of a firefighter who might, while on vacation in Western Canada, become involved in an altercation which results in a conviction for assault. What guarantee is there, he asks, that such a notation in the employee's personal file will not be used against him or her for reasons entirely unrelated to the purpose of the City's police or criminal record check policy, resulting in the passing over of someone for a promotion?

23 Counsel for the Association characterizes the City's policy, as applied to firefighters, as an unreasonable exercise of its management rights. He submits that there are less intrusive methods of dealing with the issue of access to police and criminal records, short of essentially coercing the consent of all employees in the Ottawa Fire Services. Counsel submits that the legitimate interests of the City are sufficiently protected if its ability to demand a written consent

to give it access to an individual's police or criminal records are confined to circumstances where there are reasonable grounds to do so.

ARGUMENT OF THE CITY

24 Counsel for the City begins his remarks by noting that all employees of the City, including firefighters, voluntarily submitted to police and criminal record checks at the time they were hired. He submits that the issue is whether people who hold a highly respected position, such as firefighters, should not be expected to maintain the same hiring standard by allowing continuing access to their police and criminal records.

25 Counsel notes the content of the Association's own code of ethics by which all firefighters are held to a standard which includes the following pledge: "I will at all times respect the property and rights of all people, the laws of my community and my country, and the chosen way of life of my fellow citizens." Counsel questions how the City's policy can be seen as other than sympathetic to the conduct standards espoused by the Association itself.

26 Counsel for the City also emphasizes that, while it is true that there may not be a great frequency of individual contact between firefighters and members of the public, there are nevertheless offences which, of their very nature, should be cause for substantial concern. By way of example, he cites the crime of arson. He further submits that the reasonable grounds alternative argued by the Association might fail to catch hidden offences in respect of which the employer would have no knowledge or reason for concern. He maintains that given the position of trust held by firefighters there is no reason why the City should not have access to the broadest records which would give full disclosure, not unlike the requirement of employees to produce a driver's abstract to the extent that their duties involve the operation of a vehicle.

27 Stressing that the only available means for the City to verify the ongoing status of employees with respect to police and criminal records is by the consent of the employees, he maintains that in a collective bargaining setting the requirement to provide such consent should not be viewed as prejudicial. In that regard he stresses that should any negative impact result to an individual firefighter he or she has the fullest protection of the grievance and arbitration procedures of the collective agreement to mitigate against any unjust result.

28 Counsel for the City stresses that holding a criminal record cannot be analogized to a protected status or disability. He notes, for example, that the Ontario Human Rights Code, *R.S.O. 1990, c. H.19*, differentiates between discrimination based on provincial offences, which is prohibited, and discrimination based on criminal code offences, which is not prohibited. He notes that the CPIC search done by the City yields only information concerning convictions under the Criminal Code, *R.S.C. 1985, c. C-46*, of Canada. He points out, in addition, that the City's own code of conduct imposes a standard of self declaration in respect of criminal convictions, as explained in the evidence of Mr. Byrne.

29 Counsel notes that there are some 8,500 designated positions in the various departments of the City, spanning a number of bargaining units represented by several unions. He emphasizes

that no other union has grieved the City's policy, and that only the firefighters have done so. He maintains that that is so because the Policy is, on its face, reasonable and applied in a manner which is discreet and preserves confidentiality.

30 In support of his arguments counsel draws to the Arbitrator's attention two prior arbitral awards: Ontario March of Dimes v. Canadian Union of Operating Engineers and General Workers, *[1999] O.L.A.A. No. 569* (QL) (Davie); Re Greater Toronto Airports Authority and P.S.A.C., Loc. 0004 (Kosta) *(2004), 135 L.A.C. (4th) 179* (Brent).

DECISION

31 The dispute at hand calls into question a balancing of interests as between the privacy rights of individual employees and the right of access of an employer to information which is arguably germane to the better administration of its operations. At issue is whether the rights of management under the instant collective agreement cannot extend to demand that an employee provide to the City, under pain of discipline, written consent giving access to computerized banks of information containing police records and records of criminal convictions on an ongoing and periodic basis. Is the City's policy an unwarranted interference with the privacy of the individual which goes beyond the legitimate scope of management's rights under the terms of the collective agreement?

32 At the outset it must be recognized that the information sought by the City is in fact information in the public domain. Criminal convictions, when they are registered, are a matter of public record available to general scrutiny through access to the files of the courts. However, in the age of computerized data banking, courts and legislatures alike have come to appreciate the value of maintaining the presumptive privacy of records which may be legitimately kept for the administration of justice, even though the information within those records was public when first recorded. That very important nuance is well reflected in the decision of the Supreme Court of the United States in the Reporters' Committee for the Freedom of the Press decision cited above. That case concerned an application by journalists under the Freedom of Information Act (5 U.S.C. s. 552) for access to the Federal Bureau of Investigation's "rap sheet" of a private citizen. Exemption 7(C) of the Act specifically exempts from disclosure records which are maintained for law enforcement purposes where it appears that the production of those records would constitute an unwarranted invasion of personal privacy. In dealing with the issue before it the Court noted the widespread protection of personal criminal history records found within the various states. At p. 783 Stevens J., writing for the majority, stated:

> Arrests, indictments, convictions, and sentences are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the contents of his or her rap sheet may be available upon request in that jurisdiction. That possibility, however, is present in only three States. All of the other 47 States place substantial restrictions on the availability of criminal-history summaries even though individual events in those summaries are matters of public record.

33 The concerns which underlie the state and federal protection of information of information relating to an individual's criminal history were further touched upon by the Court at p. 763:

> To begin with, both common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private. According to Webster's initial definition, information may be classified as "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole. The very fact that federal funds have been spent to prepare, index, and maintain these criminal-history files demonstrates that the individual items of information in the summaries would not otherwise be "freely available" either to the officials who have access to the underlying flies or to the general public. Indeed, if the summaries were "freely available," there would be no reason to invoke the FOIA to obtain acess to the information they contain. Granted, in many contexts the fact that information is not freely available is no reason to exempt that information from a statute generally requiring its dissemination. But the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.
>
> This conclusion is supported by the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information. That is, Congress has authorized rap-sheet dissemination to banks, local licensing officials, the securities industry, the nuclearpower industry and other law enforcement agencies. See supra, at 752-753. Further, the FBI has permitted such disclosure to the subject of the rap sheet and, more generally, to assist in the apprehension of wanted persons or fugitive. See supra, at 752. Finally, the FBI's exchange of rap-sheet information "is subject to cancellation if dissemination is made outside the receiving departments or related agencies". 28 U.S.C. 534(b). This careful and limited pattern of authorized rap-sheet disclosure fits the dictionary definition of privacy as involving a restriction of information "to the use of a particular person or group or class of persons." Moreover, although perhaps not specific enough to constitute a statutory exemption under FOIA Exemption 3, 5 U.S.C. s. 552(b)(3), these statutes and regulations, taken as a whole, evidence a congressional intent to protect the privacy of rap-sheet subjects, and a concomitant recognition of the power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within.

34 The common law, particularly in the United Kingdom and Canada, has been slow to recognize or develop a common law tort of invasion of privacy. Statutory torts of invasion of

privacy have been established in some jurisdictions, including British Columbia, Manitoba, Newfoundland, Quebec and Saskatchewan. As yet in Ontario there is no statutory protection against the intrusion into an individual's personal or private business. See, John D.R. Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" *(1997), 42 McGill L.J. 355*; and see generally, Canadian Privacy Law blog, April 8, 2007 (www.plivacylawyer.ca/blog/labels/tort.html).

35 Short of creating new statutory causes of action, however, the Legislature in Ontario has moved to limit the use of and access to personal information. To that end it has enacted the Freedom of Information and Protection of Privacy Act, *R.S.O. 1990, c. F.31*, and the Municipal Freedom of information and Protection of Privacy Act, *R.S.O. 1990, c. M.56*.

36 The Supreme Court of Canada has had occasion to comment on the interest of individuals in protecting the privacy of their personal information. In R. v. Dyment, *[1988] 2 S.C.R. 417*, La Forest J., reviewed the various interests of privacy protected by law, particularly in the context of the report entitled Privacy and Computers, the report of the Task Force established by the Department of Communications/ Department of Justice (1972). In that respect he stated in part:

> Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised roles and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the Privacy Act, S.C. 1980-81-82-83, c. 111.

37 The Ontario Legislature has addressed its mind to the dissemination of sensitive personal information, and in particular the dissemination of police and criminal records. The regulated protection of such records is provided for within the Municipal Freedom of Information and Protection of Privacy Act. Under section 2(1) of that Act personal information is variously defined, and includes "Information relating to the ... criminal ... history of the individual ...". Under that statute a municipal police services board is empowered to receive requests for the disclosure of an individual's criminal record. However, section 14(5) of that legislation provides, in respect of the head of a municipal police authority:

> 14(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

38 Where a head refuses to disclose the information sought, the parties seeking the information can appeal to the Privacy Commissioner of Ontario. Two decisions of the Privacy Commissioner give some indication of the recognition that banks of criminal records are viewed as protected

personal information, the disclosure of which may constitute an unjustified invasion of personal privacy.

39 A leading decision of the Office of the Privacy Commissioner, referred to as Order M-68 involving the Metropolitan Toronto Police, is instructive to the principles which apply in this area. In that case an individual sought information concerning the possible criminal record of four individuals. The police authority invoked section 14(5) of the Act, declining to indicate whether or not any such record existed for any of the persons concerned. In a decision dated December 21, 1992, Assistant Commissioner Mitchinson sustained the refusal of the police to disclose the information sought. The reasons for that decision read, in part, as follows:

> In her representations, the appellant states that disclosing a criminal record could have the effect of identifying an individual as someone who has engaged in a criminal activity and, further, that disclosure would identify the individual to society and, perhaps, to other victims.
>
> In their representations, the Police state:
>
> > ... A social stigma is still attached by most people in our society to those people known to possess a 'criminal record' although the fact that someone 'has a record' can mean only that they have single conviction for a minor crime committed ... years ago, and it can also mean multiple serious offences committed by a chronic offender.
>
> Although neither the Police nor the appellant have referred specifically to any section of the Act, in my view, their representations can be taken to relate to sections 14(2)(b) and 14(2)(f), respectively. These sections state:
>
> > A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
> >
> > (b) access to the personal information may promote public health and safety;
> >
> > (f) the personal information is highly sensitive;
>
> Section 14(2)(b) contains a factor which, if it applies, would favour disclosure of personal information; section 14(2)(f) on the other hand, contains a factor which favours the protection of personal information.
>
> Having reviewed the appellant's representations, in my view, she has not provided sufficient evidence to establish that disclosure of the criminal record of an individual, if it exists, would promote public health and safety, and I find that section 14(2)(b) is not a relevant factor in the circumstances of this appeal.
>
> As far as section 14(2)(f) is concerned, I agree with the submission of the Police, and find that the existence of a criminal record is properly considered as "highly sensitive", and that section 14(2)(f) is a relevant consideration. Accordingly, I find that disclosure of the criminal record of an individual, if it exists, would constitute an unjustified invasion of the personal privacy of the persons to whom the information relates, in the circumstances of this appeal.

> In reaching this decision, I am aware of the fact that the existence of a particular criminal conviction is a matter of public record, and that this fact would have been disclosed to the public during a trial or plea taken in open court.
>
> However, in my view, it does not necessarily follow that this information should be freely and routinely available to anyone who asks.

40 Order M-222 involved a request made to the Stratford Police Services Board by a litigant who sought information concerning the possible prior conviction of an individual for the purposes of challenging the character of a person during the course of a civil action. In that circumstance Inquiry Officer Anita Fineberg ruled, in her order dated November 23, 1993, that "... disclosure of the record would constitute an unjustified invasion of the personal privacy of the affected person, the individual to whom the information relates."

41 It is not insignificant, in the Arbitrator's view, that the Legislature did not carve out any exception for employers, including municipalities, in circumscribing the privacy interest which attaches to police and criminal records or, to use the words of the Act, records of criminal history. As a matter of law, therefore, employers do not have a presumptive right of access to the criminal history of their employees. They can, of course, make application to a municipal police authority, with a right of appeal to the Privacy Commissioner, to gain such information should the employee decline to give their own consent to its disclosure.

42 As a general rule employers such as the City have no difficulty obtaining from a job applicant a written consent under the Municipal Freedom of Information and Protection of Privacy Act, authorizing the disclosure of the individual's criminal history. At the point of hire, that consent becomes a condition precedent to getting the job. The issue raised in these proceedings is whether the continued renewal of that consent can fairly be said to be a condition for continuing to keep the job, or to put it differently, whether as an ongoing condition of employment the City can demand that employees provide the consent to disclose their criminal history failing which they may be disciplined, presumably to the point of discharge.

43 In approaching this issue the Arbitrator considers that there is a significant distinction between the point of initial hire and the normal course of business in an ongoing employment relationship. The person who presents himself or herself at the door of a business or other institution to be hired does so as a stranger. At that point the employer knows little or nothing about the person who is no more than a job applicant. In my view, the same cannot be said of an individual who has, for a significant period of time, been an employee under the supervision of management. The employment relationship presupposes a degree of ongoing, and arguably increasing, familiarity with the qualities and personality of the individual employee. The employer, through its managers and supervisors, is not without reasonable means to make an ongoing assessment of the fitness of the individual for continued employment, including such factors as his or her moral rectitude, to the extent that it can be determined from job performance, relationships with supervisors and other employees, and such other information as may incidentally come to the attention of the employer through the normal social exchanges that are common to most workplaces. On the whole, therefore, the extraordinary waiver of privacy

which may be justified when a stranger is hired is substantially less compelling as applied to an employee with many months, or indeed many years, of service.

44 Are there work settings in which it can be said that the rights of management must, absent clear and unequivocal language to the contrary within a collective agreement, be taken to understand that the employer can demand that the employee provide periodic consent to the disclosure of his or her ongoing criminal history? I think that the answer must be in the affirmative. There are obviously some types of employment which, by their very nature, justify ongoing scrutiny of the criminal record of an employee. It is therefore not surprising that in Greater Toronto Airport Authority and Public Service Alliance of Canada, Local 0004, cited above, Arbitrator Brent found that it was reasonable for the employer to maintain a policy requiring all employees to maintain their security clearance as a condition of ongoing employment. Given the security dimensions of airport operations, particularly in the management of restricted areas, the handling of valuables passing through the airport, as well as issues of contraband and terrorism, renewed periodic security checks appear as a reasonable, indeed necessary, condition of employment. In the Arbitrator's view the same might be true of persons employed as civilians within a police force, particularly if they have access to sensitive law enforcement information. It might well also apply within the framework of municipal employment. While the question is not four square before us in the case at hand, it would not be surprising for an employer to demand periodic consent to review the criminal history of social workers who work closely with vulnerable children, for example. Similar considerations might apply to persons employed as security guards. The common thread running through these examples is relatively obvious: the employment, by its very nature, is such as to require continuing scrutiny with respect to the character and trustworthiness of the person exercising a particularly Sensitive function.

45 To the extent that a position is less security sensitive, the employer's legitimate interest in ongoing disclosure of criminal records is obviously less compelling. The mere fact that an employee may have personal contact with individuals during the course of their work, or that they may occasionally be called upon to visit or enter private premises is, of itself, questionable as a basis for justifying a full waiver of the statutory Protections of Privacy which the Legislature has seen fit to attach to an individual's criminal record. If it were otherwise, legions of employees, from house movers to appliance repairmen and couriers, would effectively be stripped of any statutory protection under the Municipal Freedom of Information and Protection of Privacy Act.

46 In support of the application of its policy to firefighters the City has called little or no evidence to give any specificity to the interests which it maintains are to be protected by demanding that firefighters provide a written waiver of their protections under the Act. The Arbitrator is referred in general terms to the position of respect held by firefighters and their stature within the community. Reference was briefly made that firefighters might, for example, speak to students, perform the inspection of private premises or enter businesses and homes in the course of their duties. With respect, in the Arbitrator's view, that renders them essentially indistinguishable from a myriad of tradespersons and professionals whose work would involve the normal attendance at a variety of premises. In my view that, standing alone, falls substantially short of the

compelling employer interest in demanding an ongoing security check, as might for example be justified in highly sensitive police or airport services, or as might be expected the services which involve security guards or the handling and transportation of substantial sums of money or other valuable goods. On what basis can it be argued that a firefighter who visits a classroom needs criminal security clearance to do so when the teacher who occupies that same classroom is held to that standard only by extraordinary and specific legislation. (See, e.g. The Education Act, *R.S.O. 1990, c. E.2* -- *O.Reg. 521/01*)

47 It does not appear disputed that the Arbitrator can properly assess the instant dispute, including the limits of management's rights, in accordance with an implied principle of reasonable contract administration and interpretation (see Council of Printing Industries of Canada and Toronto Printing Pressmen & Assistants' Union No. 10 *(1983), 149 D.L.R. (3d) 53*, *42 O.R. (2d) 404* (C.A.)). On what responsible basis can it be concluded that the parties to the instant collective agreement should be taken to have agreed, if not expressly then implicitly, that the employer's right to manage extends to demanding a suspension of the protections of the privacy rights of firefighters under the Municipal Freedom of Information and Protection of Privacy Act? I can see no compelling basis on the facts before me to conclude that any such agreement is to be implied, or to find that a balancing of interests would, in the case at hand, favour the City's right to demand that its firefighters provide periodic written consent to criminal history checks as a condition of their employment. There is simply no evidence to sustain the conclusion that the duties and responsibilities of firefighters are such as to require or justify such a blanket invasion of privacy.

48 That is not to say that the City is without some substantial measure of protection. I must agree with counsel for the Association that there may well be circumstances in which the City can properly demand of an individual firefighter that he or she consent to the disclosure of his or her ongoing police records or criminal records. Where, for example, information comes to the attention of the City which would indicate that a firefighter may have been the subject of a criminal conviction, the nature of which might bear meaningfully on his or her ongoing employment or the performance of his or her duties, the demand of an updated record check, on consent, might be fully justified. An employee who would decline to give consent in that circumstance would obviously do so at his or her own peril. Beyond the standard of reasonable grounds, however, the Arbitrator cannot affirm the position of the City in these proceedings, which is that it is entitled, by reason of management rights, to demand a blanket consent of all of its firefighters, regardless of their personal circumstances, to gain access to confidential information concerning their possible criminal or police record.

49 The management rights clause of the instant collective agreement, found at article 3.01, is silent on its face as to the right which the employer seeks to enforce through the policy which is challenged in this grievance. That article reads as follows:

> 3.01 Subject to the Fire Protection and Prevention Act, 1997, and the Regulations thereunder as amended, the Association recognizes that it is the exclusive function of the Employer to maintain order, discipline, and efficiency to plan, direct and control operations; to hire, promote, and for just cause to suspend, discharge or otherwise discipline Employees. The Employer agrees that its functions, rights and obligations

aforesaid will not be exercised in a manner inconsistent with the aforementioned Act or the terms of this Agreement.

50 The City has directed the Arbitrator to nothing within the Fire Protection and Prevention Act, 1997, *S.O. 1997, c. 4*, nor any other provision of the collective agreement, which would justify the extraordinary incursion into the privacy of firefighters which would result from the application of its policy.

51 For the foregoing reasons the grievance is allowed. The Arbitrator finds and declares that the Police or Criminal Record Check Policy of the City, as applied to firefighters, constitutes an infringement on the privacy rights of individual firefighters which is in excess of the management rights accorded to the City under the terms of the collective agreement. That conclusion is obviously without prejudice to the right of the City to demand that an employee sign the consent form necessary for access to such information where reasonable grounds justify it, and is equally without prejudice to the obvious right of the City to apply for the disclosure of such information on a case by case basis, as it deems appropriate, as contemplated by the Municipal Freedom of Information and Protection of Privacy Act. The City is therefore directed to suspend, forthwith, the application of the Police or Criminal Record Check Policy to firefighters.

52 I retain jurisdiction in the event of any dispute respecting the interpretation or implementation of this award.
