

## **An 'extraordinary incursion': Compulsory periodic criminal record check policy for firefighters struck down by arbitrator**

Is a requirement that employees consent to provide periodic criminal record checks, on pain of discipline, an unwarranted invasion of privacy, or does it serve a legitimate employer interest? In the case of firefighters, an arbitrator has answered that such a policy is not permissible.

The policy being grieved in *Ottawa Professional Firefighters Association v. City of Ottawa* (September 14, 2007) was introduced by the employer in April of 2007 and required that all firefighters provide criminal record checks every three years. Prior to the 2007 implementation of the policy, only newly hired firefighters were required to submit criminal record checks.

The policy followed the introduction in 2002 of a policy for City employees requiring individuals in "designated positions" to consent to such checks every five years. Under the City-wide policy, approximately one half of municipal employees were subject to the periodic check policy. The City's policy applied to employees working with the "vulnerable sector," such as employees working with children and those dealing with assets and money.

The union did not object to the pre-existing policy in respect of new hires, but took exception to the blanket ongoing disclosure requirement, noting that no other major Ontario municipality had such a policy. It argued that an individual's right to have such information kept confidential was recognized in the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* and that access to such information after an employee has been hired should be restricted to only those circumstances where the employer has reasonable grounds to request it.

The employer countered that the policy was appropriate for employees such as firefighters who hold a position of trust. The City analogized the requirement for criminal record checks to the requirement that employees who operate vehicles produce updated driver's abstracts.

### **GRIEVANCE ALLOWED**

The arbitrator allowed the grievance, declaring that the policy exceeded the employer's management rights. He directed the employer to discontinue the application of the policy. The arbitrator noted that while Ontario has not yet created a common law tort of invasion of privacy, the provincial legislature has moved to limit the use and disclosure of personal information by means of such legislation as the *Municipal Freedom of Information and Protection of Privacy Act*. After reviewing the rules in the legislation surrounding permissible disclosures of personal information, the arbitrator noted that these rules did not support the employer's position:

"It is not insignificant [...] 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 [...] As a matter of law, therefore, employers do not have a presumptive right of access to the criminal history of their employees."

### **NEW HIRES, CURRENT EMPLOYEES**

The arbitrator drew a distinction between the requirement for job applicants to supply criminal record checks and the continuing obligation the employer was seeking to impose. Job applicants approach the employer as a "stranger", about whom the employer usually knows little or nothing. This contrasts with the situation of a current employee:

“The employment relationship presupposes a degree of ongoing, and arguably increasing, familiarity with the qualities and personality of the individual employee. The employer [...] is not without reasonable means to make an ongoing assessment of the fitness of the individual for continued employment [...] 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.”

## **DIFFERENT JOBS, DIFFERENT REQUIREMENTS**

The arbitrator acknowledged that for other types of employment, such as airport security, an ongoing criminal record check obligation may be appropriate. The same is true for other jobs involving sensitive functions. However, where the employment is less security-sensitive, the case for ongoing disclosure is less compelling. The situation of firefighters revealed no such compelling employer interest in maintaining this level of ongoing scrutiny.

As well the arbitrator expressed the view that certain circumstances may allow the employer to properly demand that the employee provide consent to the disclosure of a criminal record check. Such circumstances would include when the employer becomes aware that an employee may have been convicted of a criminal offence that could have implications for his or her ongoing employment. In such a case an employee who refused to provide consent would do so at his or her own peril.

However, in this case there was no justification in either the collective agreement or any legislation for the challenged policy, which the arbitrator characterized as an “extraordinary incursion” into the employees’ privacy. Accordingly the grievance was upheld.

### **In Our View**

One interesting aspect of privacy law that was discussed in this decision is the fact that records which are considered “public” in one context may become private and confidential in another. In this case conviction information is generated during a public process, and records of such convictions may be located in court files. However, the legislation, and this decision, recognize that when such information is compiled and maintained in more accessible forms, including computerized databases, in other governmental institutions, it is presumed that the information is, for most purposes, private.

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