ICDPPC
International Conference of Data Protection & Privacy Commissioners

Global Privacy and Data Protection Awards 2017

Entry Form

Deadline 21 April 2017

1. **Contact details for this entry**:
   a. Name and email address of person completing this form:
   Andrea Corlett
   Director of Communications
   info@ipc.on.ca
   b. Name of Data Protection or Privacy Authority:
   Office of the Information and Privacy Commissioner of Ontario, Canada (OIPC)

2. **Eligibility**: By submitting this entry I confirm that:
   a. The Authority is a member of the International Conference of Data Protection and Privacy Commissioners.
   b. The initiative described in this entry was undertaken during 2016 or 2017.
   c. I am aware that the information in the entry (other than the contact details in 1(a) above) will be publicised by the ICDPPC Secretariat.

3. Please indicate which **category or categories** you wish to enter (delete those that do not apply; you can enter multiple categories):
   Category: Dispute resolution, compliance and enforcement
   OIPC Nomination: *Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC*

4. **Description of the initiative**
   a. Please provide a brief summary of the initiative (no more than 75 words):

An OIPC investigation revealed that Ontario police services were disclosing information about suicide attempts to U.S. agencies under an international data-sharing agreement. Subsequent court action and settlement discussions led to privacy-protective changes to national computer systems (Canadian Police Information Centre (CPIC)), the removal of a majority of such Toronto police generated information from CPIC, the suppression of all but a few such entries from U.S. access and fairer CPIC entry and removal procedures.

   b. Please provide a full description of the initiative (no more than 350 words):

In 2016, the OIPC resolved its legal action with the Toronto Police Service (TPS) after procedures developed with OIPC input were put in place to protect the privacy of people whose suicide attempts led to *Mental Health Act* apprehensions and may lead to related CPIC disclosures. The new measures restrict the disclosure of suicide-related information to U.S. officials, allow for time-limited public safety disclosures to police in Canada, and provide affected individuals with a right to seek early removal from CPIC.

This initiative originated in 2014, when the OIPC recommended that all Ontario police services restrict CPIC disclosures under the Mental Health Disclosure Test (MHDT), set out in its investigation report: *Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC*. After the TPS refused, we sought a court order stopping the overbroad disclosure of suicide-related information to U.S. agencies via CPIC.

In response to our report and court action, the TPS worked with the RCMP to create a new mechanism allowing all Canadian police to suppress suicide-related entries from being accessed by U.S. CPIC users. In-depth collaborative dialogue between OIPC-TPS counsel, privacy, mental health and human rights stakeholders from 2015-2016 led to additional public interest changes. Under new model police procedures endorsed by OIPC and TPS leadership:

- Disclosure to U.S. CPIC users is restricted to entries that meet the MHDT.
- The TPS' flagging system more clearly differentiates between suicide attempts and threats that include harm to others.
- All suicide-related entries are subject to a default rule requiring their removal from CPIC after two years (if no other attempt or threat has been made) and periodic audits.
- Suicide-related information may be disclosed to police in Canada via CPIC if the MHDT is met, or if it relates to a police apprehension and confirmed involuntary admission under the *Mental Health Act.*
- Individuals have the right to learn about and request the removal of a suicide-related CPIC entry. Requesters can submit relevant information for review by senior TPS staff and will receive a decision in writing (with reasons if their removal request is denied).

c. Please explain why you think the initiative deserves to be recognised by an award (no more than 200 words)

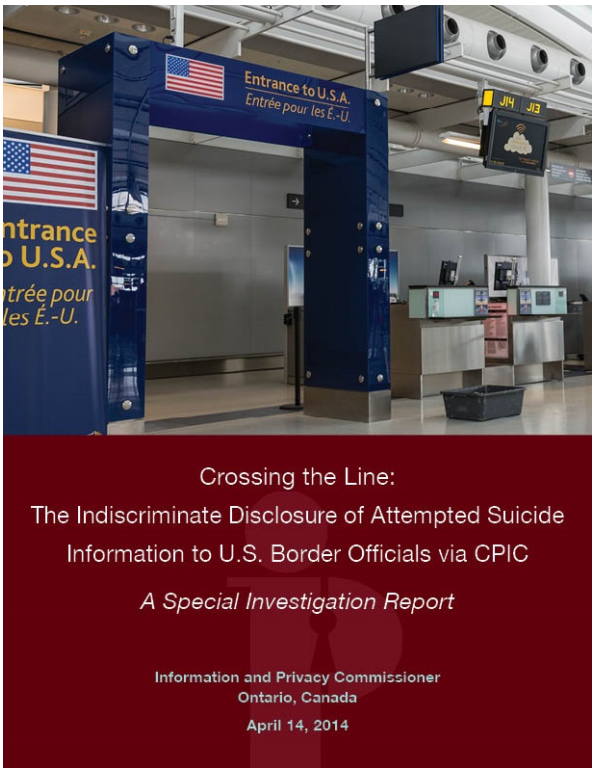
A police practice of routinely disclosing attempted suicide information to national police computer systems had led to people being denied entry to the U.S. with attendant financial, emotional and human rights-related costs.

The compliance and enforcement activities of the OIPC and related dispute resolution efforts of the OIPC and the TPS have helped to ensure that the disclosure of this sensitive information will be carefully controlled, while allowing police to share limited information for the purpose of assisting officers in Canada to respond appropriately to subsequent mental health related encounters.

This was made possible by the compliance, enforcement, and dispute resolution efforts of the OIPC, which brought greater clarity and discipline to police disclosure practices. By seeking input from police, privacy, mental health and human rights stakeholders and working collaboratively with the TPS, the OIPC was able to help develop privacy controls beyond those that could have been achieved by litigation alone. Other police services now have the benefit of a comprehensive model that allows them to readily incorporate the new safeguards into their own suicide-related CPIC disclosure procedures. This initiative has also demonstrated what can be achieved when privacy and public safety leaders work together in the public interest.

d. Include a photograph or image if you wish (note this will help illustrate the description of the entry on the ICDPPC website; the image can be pasted into the entry or send as an attachment or

a link may be provided):



e. Please provide the most relevant link on the authority's website to the initiative (if applicable) (The website content does not need to be in English):

https://www.ipc.on.ca/wp-content/uploads/Resources/indiscriminate_disclosure.pdf

f. Please provide any other relevant links that you wish that help explain the initiative or its impact or success (e.g. links to news reports or articles):

http://globalnews.ca/news/2819629/privacy-watchdog-drops-case-against-toronto-police-over-attempted-suicide-info/

https://www.ipc.on.ca/newsrelease/information-and-privacy-commissioner-withdraws-legal-action-against-toronto-police/

http://rightswatch.ca/2016/07/13/ontarios-ipc-drops-legal-action-against-toronto-police-over-information-sharing-with-the-us/

https://www.thestar.com/news/gta/2015/05/28/new-background-check-restrictions-put-a-twist-in-privacy-watchdogs-case-against-police.html

https://www.theweeklynews.ca/news-story/6763639-toronto-police-adopt-new-procedures-to-stop-attempted-suicide-info-being-made-available-to-united-states-border-officials/

http://www.nationalnewswatch.com/2016/07/12/privacy-watchdog-drops-case-against-toronto-police-over-attempted-suicide-info/#.WPjlYtryuUk

http://www.metronews.ca/news/toronto/2015/05/28/toronto-polices-new-background-check-restrictions-put-twist-in-court-case.html

Court File No. 265/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N :

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Applicant

- and -

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

Respondents

FACTUM OF THE APPLICANT
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

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Court File No. 265/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N :

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FACTUM OF THE APPLICANT
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PART I – OVERVIEW

1. This application concerns the decisions of the Toronto Police Service Board (TPSB) and the TPS Chief (the Chief) to adopt a policy for disclosing suicide-related information to the Canadian Police Information Centre (CPIC) database where it is routinely available to other law enforcement agencies throughout Canada and, as well, may be available to the United States Federal Bureau of Investigation (FBI), the Department of Homeland Security and U.S. border officials.

2. The decisions at issue are: (1) the decision of the TPSB under s. 31(1)(f) of the *Police Services Act* (*PSA*), in acceding to the decision of the Chief, to establish a policy requiring the disclosure of all suicide-related information to CPIC; and (2) the decision of the Chief, acting under s. 41(1)(a) of the *PSA*, to devise this policy. The policy requires that suicide-related information be disclosed via CPIC in every case without regard to the circumstances or law enforcement purpose for each disclosure (the TPS disclosure policy).

3. The decisions adopting and implementing this policy amount to an invalid and unreasonable exercise of administrative decision-making for the reasons that:

(i) The TPSB cannot delegate to the Chief its duty under the *PSA* to establish policies for the disclosure of personal information by the Chief.

(ii) The TPS disclosure policy fails to take into account considerations highly relevant to the objectives of the *PSA* and *MFIPPA* and frustrates those objectives.

(iii) The policy is in breach of the prohibition against the disclosure of personal information at s. 32 of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*).

(iv) The policy unreasonably limits the rights under ss. 7, 8 and 15 of the *Charter*.

4. With reference to *Charter* rights, the disclosure of suicide-related information to CPIC: (1) intrudes on the reasonable privacy expectations of individuals with respect to their mental health

information; (2) impinges on their right to be secure from state-imposed psychological stress; and (3) is discriminatory in imposing burdens based on real or perceived mental disability.

5. Recent changes in CPIC and TPS procedures for entering suicide-related information do not affect the issues raised in this application. The use of new facially neutral entry criteria does not alter the fact that the TPS disclosure policy continues to target persons perceived to be a threat to themselves by reason of having a mental health issue or having attempted or threatened suicide.

PART II – FACTS

A. Canadian Police Information Centre (CPIC)

6. CPIC is a database to which police services throughout Canada enter a vast array of law enforcement-related information. The Royal Canadian Mounted Police (RCMP) is the custodian of CPIC as part of its mandate to provide operational support to law enforcement agencies in Canada.[1]

7. The RCMP has promulgated a Policy Manual for the operation of CPIC which establishes procedures regarding its use by police services, as well as access to CPIC information by three categories of agencies. The Policy Manual provides that the police service that uploads information to CPIC is responsible for its accuracy, modification, timeliness and removal. Access to, use and disclosure of CPIC information must "be in accordance with existing federal, provincial, territorial or municipal legislation, directives or policies related to privacy and access to information." Access rights are established in memoranda of understanding between the RCMP and each agency. Police services in Canada have access to all of CPIC. Other agencies, such as the courts, parole boards, Correctional Services and Canadian Border Services, have access based on their legislated mandate. There is also a Memorandum of Cooperation between the RCMP and the FBI which provides the FBI, and in turn Homeland Security and U.S. Border officials, with access to CPIC data. [2]

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[1] RCMP/CPIC submission to Commissioner, *Application Record*, Vol. 3, Tab E-36, pp. 742-743.
[2] CPIC Policy Manual (May 2015 Draft), "3. CPIC Data Banks", "11.2. Access, Use and Disclosure", *Supplemental*

8. The CPIC User Manual provides instructions on use of the database and directs where information is to be placed. One of the categories of information entered in the CPIC Investigation databank is Special Interest to Police or "SIP" which records data on persons of particular interest, including an individual "known to be dangerous to police, himself/herself or other persons." [3]

9. Prior to November 2014, the User Manual designated two SIP entry categories for persons "known to … have threatened or attempted suicide" or "known … or [ ] likely to be a threat to himself/herself or someone else" by reasons of "an apparent emotional or mental disorder."[4] Effective November 2014, a new User Manual has replaced these two SIP entry categories with a single "Observed Behavior" (OB) category for persons who have "demonstrated behavior which is a cause of concern with respect to their safety or the safety of others." The new OB category includes a person "who has a history of violence toward police, himself/herself or other persons."[5]

10. According to the RCMP, local police services have the discretion whether or not to record a given suicide-related encounter CPIC:

> … The decision to enter a suicide attempt on CPIC is a discretionary one which requires thoughtful consideration by the front line officer. There may be reasons for which an officer will decide that entry onto CPIC is not required in a particular circumstance. However, the underlying principles behind the CPIC system will only function as intended if all public safety information is properly entered by the CPIC user community... [6]

Application Record (*Supp. Record*), Tab 7E, pp. 309-319. The CPIC database is divided into 4 databanks or sections: Investigation, Intelligence, Identification, and Ancillary. RCMP/CPIC submission to Commissioner, *Application Record*, Vol. 3, Tab E-36, pp. 742-746; Memorandum of Cooperation, *Private Application Record*, Tab 1.

[3] "New" CPIC User Manual (current to May 2015), s. 1.10 Special Interest Police, *Supp. Record*, Tab 7-D, p. 301.

[4] Suicide-related entries were to be retained for 2 years and "Mental health" entries for 2 years, each subject to necessary extensions. "Old" CPIC User Manual, III.4.1.10, *Supp. Record*, Tab 7-A, pp. 279-280; and TPS Representations, *Application Record*, Vol. 2, Tab D-25, p. 628.

[5] OB entries are to be retained for a period of 5 years, subject to yearly purging where no longer relevant or extension where still considered pertinent. New CPIC User Manual, s. 1.10 Special Interest Police, Conditions 2, 3, 6, *Supp. Record*, Tab 7-D, pp. 302, 304. And see OB Note: "The potential danger or threat to the safety of the individual, the police or others is the determining factor as to whether the information should be added to the system rather than whether there has been an attempted suicide."

[6] RCMP/CPIC submission to Commissioner, *Application Record*, Vol. 3, Tab E-36, p. 743.

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

(i) *Police Services Act*

11. The TPSB is a municipal police services board established under s. 27 of the *PSA*. It is responsible under s. 31 for determining objectives and priorities with respect to police services in the City of Toronto, establishing policies for the effective management of the police force, and directing the Chief of Police. Under s. 31(1)(f) police services boards have the duty to "establish policies respecting the disclosure by chiefs of police of personal information about individuals."[7]

12. The TPS Chief is appointed by the TPSB. Pursuant to s. 41(1)(a) of the *PSA*, the Chief administers the TPS and overseas its operations "in accordance with the objectives, priorities and policies established by the board under subsection 31(1)". The Chief has the duty to ensure that TPS officers carry out their duties in accordance with the *PSA* and regulations.[8]

(ii) TPSB mental health-related policy

13. According to the TPSB, the most pertinent policy it has established relating to police interaction with individuals experiencing mental health issues is its "Police Response to Persons who are Emotionally Disturbed or Have a Mental Illness or a Developmental Disability." This policy delegates broad decision-making authority to the Chief as follows:

> 1. The Chief of Police will establish procedures and processes in respect of police response to persons who are emotionally disturbed or have a mental illness or a developmental disability; … [9]

14. The TPSB has not itself established a policy governing the disclosure by the Chief of personal information about individuals who have had mental health or suicide-related encounters with the TPS to other law enforcement agencies. Rather, it has left this policy to the Chief to decide.

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[7] *Police Services Act*, R.S.O. 1990, c. P.15 (*PSA*), ss. 27, 31(1)(f). And see *PSA*, ss. 31(3) and (4).
[8] *PSA*, s. 41(1)(a) and (b). Note: The *Disclosure of Personal Information* regulation under the *PSA*, O. Reg. 265/98, applies only to individuals charged, convicted, found guilty of or under investigation for an offence.
[9] TPSB representations**,** *Adequacy Standards Regulation* LE-013, *Application Record*, Vol. 2, Tabs D-18, 18-A, pp. 320, 323.

(iii) TPS policy regarding disclosure of suicide-related information to CPIC

15. The TPS disclosure policy has been to apply CPIC User Manual criteria for making SIP entries in every case. In all "confirmed" cases of threatened or attempted suicide – meaning "when an officer has reason to believe that a person has threatened or attempted to commit suicide" – an entry would be made to the SIP category of CPIC. The TPS explained that "**all** cases of attempted suicide are potentially relevant to a future incident" and should be "readily accessed by all first responders" via CPIC for "officer and/or public safety as well as the safety and wellbeing of the individual involved." (original emphasis) Not sharing this information "would be irresponsible." The TPS does not provide individuals with notice that this information will be entered in its own databases or on CPIC in order to "protect[ ] the integrity of police investigations."[10]

C. Background to this application

(i) Commissioner's investigation

16. The Information and Privacy Commissioner of Ontario (Commissioner) is an Officer of the Legislative Assembly charged with overseeing, adjudicating and reporting on the compliance of institutions with the access to information and individual privacy provisions of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) and *MFIPPA* and to make recommendations concerning the practices of institutions. He is given order-making authority in appeals from the decisions of institutions involving access requests, and in relation to the collection of personal information by institutions in contravention of the statutes, including the authority to order its destruction. He is not given order-making authority in relation to the disclosure of personal information outside the context of an access request. [11]

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[10] TPS representations, *Application Record*, Vol. 2, Tab D-25, pp. 627-630; TPS counsel letter dated March 21, 2014, *Application Record*, Vol. 3, Tab E-57, p. 850.

[11] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (*FIPPA*), ss. 50 to 54, 58(1), 59(b), (c); *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (*MFIPPA*). ss. 39 to 43, 46(b),(c). And see: *Ontario (Ministry of Health & Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 at paras. 28-39 (C.A.); *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at pp. 780-783 (Div. Ct.).

17. In November 2013, the Commissioner became aware of Ontario residents being denied entry to the United States by U.S. border officials based on information about prior suicide attempts obtained from CPIC. This information originated with occurrence reports of encounters these individuals had with the TPS, a subset of which was then entered into CPIC. In each case examined, there was no suggestion that the safety of others was at risk or that the encounter involved any wrongdoing. As a result, the Commissioner commenced an investigation into the practices of Ontario police services in the handling of personal information relating to encounters with individuals with mental health issues, including threatened or attempted suicide. The outcome of this investigation is set out in a Special Investigation Report dated April 14, 2014 (the Report).[12]

18. As part of the investigation, the Commissioner heard from the police services in Toronto, Waterloo, Hamilton and Ottawa, the Ontario Provincial Police (OPP), the RCMP, the Centre for Addiction and Mental Health (CAMH), the Canadian Mental Health Association (CMHA) and the Mental Health Commission of Canada (MHCC).[13]

(ii) CPIC disclosure policies of other Ontario police services

19. The OPP and the police services in Hamilton, Waterloo and Ottawa each advised that their officers exercise discretion in deciding whether to enter suicide-related information on CPIC. The Hamilton Police, for example, advised that its officers consider the individual's history, the severity of the incident, the danger he or she may pose to themselves or others and the need to avoid criminal sanctions for behavior best dealt with as a health issue. The OPP advised that its officers consider similar factors, as well as individual's privacy rights under related legislation.[14]

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[12] Affidavit of Commissioner Ann Cavoukian sworn June 4, 2014, paras. 20-22, 32; *Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC* (the "Report"), pp. 1-2, 5-6, *Application Record*, Vol. 1, Tabs 3, 3-B, pp. 84-85, 88, 113-114, 116-117.

[13] Cavoukian affidavit, para. 25, *Report*, p. 13, *Application Record*, Vol. 1, Tabs 3, 3-B, pp. 86, 124.

[14] Hamilton Police, OPP, Ottawa Police, Waterloo Police representations, *Application Record*, Vol. 2, Tabs D-20A, D-22A, D-28, D-29, pp. 354, 465, 654, 661; OPP representations, Vol. 3, Tab E-34, p. 734. And see: *Report*, p. 21, *Application Record*, Vol. 1, Tab 3-B, p. 132.

(iii) Commissioner's Special Investigation Report – findings and recommendations

20. In the Report of the investigation, the Commissioner found that the indiscriminate disclosure of all suicide-related information to CPIC, without regard to the circumstances of each case, contravened s. 32 of *MFIPPA*. In order for any given entry to be permissible, the disclosure must fall within one of two pertinent exceptions at s. 32(c) and (f) of *MFIPPA*, as follows: [15]

> 32. 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;

21. Personal information is defined at s. 2(1) of *MFIPPA* to include "information relating to … the medical, psychiatric [or] psychological [ ] history of the individual". The definition of "law enforcement" and the meaning ascribed to a "consistent purpose" are as follows: [16]

> 2. (1) "law enforcement" means:
>
> (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);
>
> 33. 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.

22. The Commissioner observed that police are permitted to collect personal information related to suicide attempts pursuant to s. 28(2) of *MFIPPA* where the information is "used for the purposes of law enforcement". In a suicide-related encounter, such purposes would include proper police

[15] *MFIPPA*, ss. 32(c), (f); and see *FIPPA*, ss. 42(1) (c), (f).
[16] *MFIPPA*, ss. 2(1), 33.

record-keeping and providing immediate assistance, such as facilitating the safe transport of the individual to a medical facility. Where suicide-related information is collected for these purposes alone, disclosure via CPIC would not be permitted under the exceptions at s. 32(c) or (f).[17]

23. The Commissioner observed that there are other law enforcement purposes for which suicide-related information may be collected, in cases where:

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.

In these cases, the Commissioner found that both the collection of suicide-related information and its disclosure to other law enforcement agencies is permissible for public or officer safety and to facilitate a transfer of custody. These four circumstances comprise the elements of what the Commissioner referred to in the Report as the "Mental Health Disclosure Test". [18]

24. The Commissioner explained that, absent one or more of these circumstances, affected persons would not reasonably expect the disclosure of their personal information via CPIC, nor would disclosure be reasonably compatible with the purpose of the collection. Accordingly, the disclosure of suicide-related information via CPIC would not be for the same purpose for which it was collected or for a consistent purpose, and would not fall with the ambit of s. 32(c). [19]

25. Further, absent one or more of these circumstances, the exception at s. 32(f) would not apply. The Commissioner explained that s. 32(f) does not permit the unfettered disclosure of

[17] Cavoukian affidavit, paras. 35(a), (h) - (j), (p), *Report*, pp. 19, 30-31, 34-35, *Application Record*, Vol. 1, Tabs 3, 3-B, pp. 89, 91, 93, 141-142, 145-146.
[18] Cavoukian affidavit, paras. 34, 35(f) to (i), *Report*, pp. 30-31, 37-38, *Application Record*, Vol. 1, Tabs 3, 3-B, pp. 89-91, 141-142. 148-149
[19] Cavoukian affidavit, paras. 35(j) to (l), *Report*, pp. 30-32, *Application Record*, Vol. 1, Tabs 3, 3-B, pp. 91-92, 141-143.

personal information from one law enforcement agency to another, whether foreign or domestic, for any purpose whatsoever. Rather, it must be shown that a specific law enforcement purpose justifies the releasing agency disclosing the information and the recipient agency receiving it.[20]

26. The Report summarized the Commissioner's findings in this regard and made several recommendations. The Commissioner concluded that no disclosure of suicide-related information to CPIC should be made unless one of the elements of the Mental Health Disclosure Test was met. As a result, Ontario police services should:[21]

> 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 [ ] must be met. This test requires that one of the [ ] four circumstances exists before any suicide-related information is recorded in the SIP repository of CPIC...

(iv) TPS and other responses to the Commissioner's Report

27. The TPSB and the Chief did not agree with the Report's findings and refused to change the TPS disclosure policy and related practices to bring them into line with the Report's recommendations.[22] Other police services consulted generally supported the Report's findings and confirmed that they were prepared to implement its recommendations.[23]

28. Recently the TPS has signaled that its existing CPIC entries are retained and new CPIC entries are added whenever a subject has been apprehended under s. 17 of the *Mental Health Act* and "admitted" to hospital.[24] If so, this is not a significant change. From the outset, the TPS disclosure policy has flagged on CPIC persons taken to hospital by TPS officers for perceived

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[20] Cavoukian affidavit, paras. 35(m) to (v), *Report*, pp. 32-36, *Application Record*, Vol. 1, Tabs 3, 3-B, pp. 92-94, 143-147.
[21] Cavoukian affidavit, paras. 36-37, *Report*, pp. 44-46, *Application Record*, Vol. 1, Tabs 3, 3-B, pp. 95, 155-157.
[22] Correspondence between the Commissioner and the TPS dated May 2 and 20, 2014, *Application Record*, Vol. 3, Tabs E-63 and 64. And see: Cavoukian affidavit at paras. 49 to 55, *Application Record*, Vol. 1, Tab 3, pp. 98-99.
[23] Letters from Hamilton Police, OPP, Waterloo Police, and Ottawa Police, *Application Record*, Vol. 3, Tabs E-39, E-42, E-47, E-50, E-56, pp. 805, 811, 815, 822-824, 831, 846.
[24] TPS counsel email dated June 3, 2015, *Supp. Record*, Tab 7-F, pp. 321-322. TPS also advised that it "has changed the expiration date from 5 years to 2 years." And see: *Mental Health Act*, R.S.O. 1990, c. M.7, ss. 17, 18, 33.

mental health or suicide-related concerns.[25] The same group of persons will continue to be entered into CPIC by the TPS under the new "Observed Behavior" category.

D. Evidence of mental health and law enforcement professionals; other evidence

29. The MHCC, CAMH and CMHA each opposed the "blanket" disclosure of all suicide-related information via CPIC.[26] The substance of their submissions is generally reflected in the affidavits of Dr. Mara Goldstein, Dr. Terry Coleman and Dr. Patrick Baillie summarized below.

30. Dr. Mara Goldstein is an Emergency Services psychiatrist at St. Michael's Hospital with extensive experience dealing with persons brought to hospital by police for apparent threatened or attempted suicide. Dr. Terry Coleman is a former police chief and Deputy Minister of Corrections, Public Safety and Policing in Saskatchewan and is currently a consultant to the MHCC. Dr. Patrick Baillie is a psychologist who advises the Calgary Police on mental health and policing issues and supports police negotiators and tactical teams in "stand-offs".[27]

31. These deponents agree that a policy of routine disclosure of suicide-related contacts to CPIC does not provide police officers with information that can be considered useful or relevant to their policing duties. They observe that police officers generally lack the training to identify genuine suicidal behavior or assess the significance or acuity of an apparent suicide threat or attempt.[28]

32. Absent criminality or actual or threatened violence or harm to others, the extent of police involvement in a real or apparent suicide attempt or threat is generally to assist the person in getting medical care. In this context, police are asked to assist with a medical rather than a law enforcement matter; and the information they record is considered health-related information. Without a full

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[25] TPS representations, *Application Record*, Vol. 2, Tab D-25, pp. 617-623, questions 1-3.
[26] MHCC representations and CAMH representations, *Application Record*, Vol. 2, Tabs D-26 and 27, pp. 636-649; CMHA representations, *Application Record*, Vol. 3, Tab E-49, pp. 827-830.
[27] Affidavit of Dr. Terry Coleman, *Supp. Record*, Tab 2; Affidavit of Dr. Mara Goldstein, *Supp. Record*, Tab 4; Affidavit of Dr. Patrick Baillie, *Supp. Record*, Tab 5.
[28] Goldstein affidavit, paras. 15-23, 36, Coleman affidavit, paras. 13-14, 70; Baillie affidavit, paras. 9, 25-30, 33, 48; *Supp. Record*, Tabs 4, 2 and 5.

appreciation of the circumstances, the disclosure of this information to other law enforcement agencies or officials via CPIC can result in: (1) inappropriate police responses in future encounters with the individual; and (2) significant harms to the individual from stigmatization, discriminatory treatment, psychological stress and interference with medical or therapeutic treatment.[29]

33. Given the great potential for inaccurate, incomplete and out-of-date information that CPIC 'suicide' flags convey and the potential harm to affected individuals, a policy of routinely disclosing suicide-related encounters to CPIC cannot be considered an acceptable policing practice. To the extent that certain disclosures may be appropriate in some cases, the Commissioner's Mental Health Disclosure Test provides an objective and rational basis for doing so.[30]

(i) Dr. Mara Goldstein

34. Dr. Goldstein observes that distinguishing between a possible and actual suicide attempt and between different levels of acuity of suicidal ideation is part of a medical assessment.[31] Given police officers' lack of training and the need to err on the side of caution, police observations cannot be considered a reliable assessment of risk of suicide:[32]

> … [T]he threshold applied by the police in deciding to bring the individual to hospital is necessarily low. The police officers' observations are frequently limited by whatever can be inferred from the scene and the exigencies of a given situation, including the need to respond and act quickly. They may also rely on the observations of others. The officers' judgement calls may be considered accurate in terms of identifying whether there is a question of suicide, but for safety reasons they need to "over-call" it. What that means in terms of actual risk of suicide is that it would be unreasonable for these judgement calls, on their own, to be considered accurate.

35. An issue that first presented as a suicide attempt or threat may, on assessment, reveal itself to be something else entirely. Dr. Goldstein describes the circumstances which bear on the ability of

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[29] Goldstein affidavit, paras. 8-9, 11, 53-57, Coleman Affidavit, paras. 19, 64, 66, 70-73; Baillie affidavit, paras., 35-43, *Supp. Record*, Tabs 4, 2 and 5. And see: MHCC and CAMH representations, *Application Record*, Vol. 2, Tabs D-26 and 27, pp. 636-649; CMHA letter, *Application Record*, Vol. 3, Tab E-49, pp. 827-830

[30] Coleman Affidavit, paras. 16-18, 78-79; Baillie affidavit, paras. 25-43, 48, 60-62, *Supp. Record*, Tabs 2 and 5.

[31] Goldstein affidavit, paras. 13-14, 24-32, *Supp. Record*, Tab 4.

[32] Goldstein affidavit, paras. 8-11, 35-45, *Supp. Record*, Tab 4.

the police to accurately identify a threatened or attempted suicide, including the following:[33]

(i) cases where the police "over call" the risk of self-harm and transport the individual to hospital;

(ii) individuals for whom the crisis will pass quickly so they can be safely released;

(iii) cases where a person apprehended by the police has falsely disclosed suicidal thoughts, preferring hospital to arrest and charges;

(iv) cases where the police do not distinguish a true threat of suicide from one where the individual is contemplating suicide, but not planning to carry it through;

(v) drug overdose cases which are assessed at the hospital to be accidental;

(vi) people with chronic suicide ideation whose encounters with the police will usually not entail an immediate threat of suicide;

(vii) persons lacking support mechanisms who seek out emergency services to get their needs met, sometimes through apparently suicidal behaviours; and

(viii) individuals acting erratically and "out of control" in public who may threaten to kill everyone including themselves.

36. Police will seldom, if ever, know the results of an assessment. In any of the above cases, the police may believe they are dealing with suicidal behaviour and record the matter accordingly, producing a substantial number of "false positives". What others accessing CPIC end up seeing is not necessarily a prior attempt or threat, but a case where self-harm was raised as a possibility.[34]

37. In Dr. Goldstein's view, the disclosure of suicide-related information via CPIC can cause substantial harm to an individual's mental health and prospects for treatment. When a 911 call is placed the expectation is that emergency services will take the person to hospital, not that a police 'record' will be generated and disclosed to other agencies. Where individuals are treated differently by the authorities as the result of being flagged on CPIC, this can cause a real risk of shame, humiliation, distress and loss of faith in emergency services. Any such event could adversely affect the person's mental health and ability to seek or continue with necessary care.[35]

[33] Goldstein affidavit, paras. 35-44, *Supp. Record*, Tab 4.
[34] Goldstein affidavit, paras. 35-47, *Supp. Record*, Tab 4.
[35] Goldstein affidavit, paras. 53-62, *Supp. Record*, Tab 4.

(ii) Dr. Terry Coleman and Dr. Patrick Baillie

38. Dr. Coleman believes that police suicide-related observations are not an appropriate trigger for placing people on what is in essence a "watch list". CPIC flags are "blunt tools … clothed with an aura of objectivity" that provide little or no information about the underlying occurrence or the individual's current mental health. They group together persons perceived to be threats to themselves and persons known to be a danger to others. Given the stigma prevalent in police culture – over-estimating "dangerousness" associated with mental health issues – many officers will be more likely to use coercive methods with flagged individuals, such as arrest and excessive force, and less likely to employ strategies that promote safe and effective resolutions or investigate their claims as witnesses or victims. The system thus impedes effective policing decisions as to whether an encounter calls for containment and de-escalation or a more rapid or forceful response.[36]

39. Dr. Baillie deposes that, even where a CPIC flag is accurate – which will not be known – the police response should focus on the individual's current behaviour. Officers should assess the situation as they encounter it with the benefit of proper training and, if needed, the aid of mental health professionals. He also comments on the new CPIC procedures that collapse mental health risk and suicide-related categories into a single Observed Behaviour flag. He states that this relabeling does not make the underlying information any more accurate or useful, or reduce the potential for stigmatization and inappropriate police responses. Mental health and suicide-related encounters will still be flagged under the new category based on subjective police assessments.[37]

40. Both of these deponents agree with Justice Iacobucci's recommendation in his report to the TPS, *Police Encounters with People in Crisis* (July 2014), that health information should "be treated as such, [ ] not as police information," and "be segregated from existing police databases and

[36] Coleman affidavit, paras. 15, 18, 33, 62-66, 74, Baillie affidavit, para. 46, *Supp. Record*, Tabs 2 and 5.
[37] Baillie affidavit, paras. 25-29, 33, 35-46, 50-54, *Supp. Record*, Tab 5.

... [not] passed on to other law enforcement, security and border services agencies."[38]

(iii) Lois Kamenitz – an individual's experience with a CPIC flag

41. The Report took into account the experience of Lois Kamenitz who was flagged on CPIC by the TPS in 2006 after being taken to hospital for an overdose of pills. She learned of this flag in 2010 when she was barred from flying to the U.S, photographed, fingerprinted and escorted out of the airport, an experience she found embarrassing, intimidating and frightening. In order to travel to the U.S. in future, she had to submit to an intrusive U.S. State Department examination of her personal medical information.[39] While the CPIC flag was removed after she settled a civil proceeding against the TPS, the damage had been done. She has no idea how far this information has been disseminated or may yet negatively affect her. On several occasions she has chosen not to travel for fear of again being denied entry. She believes the TPS policy puts people to a choice between protecting their privacy and accessing emergency services. She also believes that many in her position are unable to challenge the TPS because personal and other costs are too high.[40]

(iv) Commissioner Brian Beamish

42. Following the Commissioner's Report, and in response to requests that it do so, the TPS removed the CPIC entries for two of the three other persons referred to in the Report "without prejudice to our position that your Mental Health Disclosure Test is too narrow to address the potential threats to the safety of the individuals involved." The TPS refused to remove the entry for the fourth person (Mr. Doe), a lawyer practicing in Ontario. Mr. Doe was flagged in CPIC and barred from travelling to the U.S. after a 911 call led TPS officers to take him to hospital for an overdose of pills. Mr. Doe has since been fearful of travelling to the U.S. with clients, colleagues or

[38] Coleman affidavit, para. 16, Baillie affidavit, paras. 50, 55-58, *Supp. Record*, Tabs 2 and 5. And see: Hon. Frank Iacobucci *Police Encounters with People in Crisis* (July 2014), pp. 111-112.
[39] Affidavit of Lois Kamenitz, paras. 8-18, *Supp. Record*, Tab 3.
[40] Kamenitz affidavit, paras. 19, 21-23, 29-33, *Supp. Record*, Tab 3.

supervisors, as a further incident would likely force him to explain any denial of entry. [41]

43. A significant obstacle people like Mr. Doe face in seeking to protect their privacy is the risk that litigation poses for public exposure, loss of reputation and associated psychological stress. Even if some materials are sealed or a publication ban is ordered, there remains the risk that identifying information will find its way into the public realm. Other persons with mental health issues, most in need of protection, will often not have the resources needed to pursue their rights.[42]

44. In the Commissioner's view, compliance with *MFIPPA* requires that police services: (i) do not upload suicide-related encounters to CPIC unless a clear factual basis justifies specific entries under the Mental Health Disclosure Test; and (2) establish a fair and timely process for individuals to learn and seek removal of their suicide-related entries from CPIC. [43]

PART III – ISSUES AND LAW

45. This application raises the following issues:

(i) Are the decisions of the TPSB and the Chief to adopt and implement the TPS disclosure policy invalid and unreasonable for the reasons that:

(a) the TPSB failed to perform its duty under s. 31(1)(f) of the *PSA* by improperly delegating that authority to the Chief;

(b) the TPS disclosure policy fails to take into account considerations relevant to the objectives of the *PSA* and *MFIPPA* and frustrates those objectives;

(c) the policy fails to comply with s. 32 of *MFIPPA*; and

(d) the policy unreasonably limits the rights of individuals under ss. 7, 8 and 15 of the *Charter*?

(ii) If the answer to (i) is "yes", what are the appropriate remedies?

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[41] Affidavit of Commissioner Brian Beamish, paras. 9-13, *Supp. Record*, Tab 6.
[42] Beamish affidavit, paras. 14-18, *Supp. Record*, Tab 6.
[43] Beamish affidavit, para. 19, *Supp. Record*, Tab 6.

A. Standard of review and respect for Commissioner's interpretation of *MFIPPA*

46. The exercise of decision-making authority by the respondents must be made within the limits and comply with the requirements of the *PSA* and *MFIPPA*. To the extent that their decisions engage interpretative questions under those statutes, the standard of review is correctness. In contrast, the Court will show a measure of deference to the decisions of a municipal body on the potential effectiveness of its legislative initiatives provided it is acting within the scope of its statutory authority.[44] The application of this standard is discussed more fully below.

47. The Commissioner's interpretation of the personal privacy provisions of *MFIPPA*, including s. 32, is entitled to a considerable measure of deference and judicial comity. In *Cash Converters v. Oshawa*, the Court of Appeal adopted the interpretation of s. 28(2) of *MFIPPA* advanced by the Commissioner as an intervener in that case. The Court stated:

> The Commissioner has recognized expertise in the interpretation and application of the statutes relating to personal information and the protection of privacy [and] is given primary responsibility under the privacy statutes … for supervising compliance... In most cases [ ] it is the Commissioner, not the courts, who determines whether the collection of private information contravenes *MFIPPA*...
>
> The Commissioner's approach is both logical and effective in implementing the purposes of the privacy legislation. By using the same approach, the effect is to apply the *Act* in the same way whether an issue arises by complaint to the commission or in this context, where the court is asked to determine a conflict between, in this case, a by-law and *MFIPPA*. [45]

B. The administrative decisions at issue

48. The TPS disclosure policy is a product of two levels of decision-making. First, the TPSB has the duty under s. 31(1)(f) of the *PSA* "to establish policies respecting the disclosure by chiefs of police of personal information about individuals." The Chief, in turn, has the duty under s. 41(1)(a) to administer and oversee the TPS and its operation in accordance with the TPSB's policies.

49. The TPSB has not established a policy for the disclosure by the Chief of suicide-related

[44] *Cash Converters Canada Inc. v. Oshawa (City)*, [2007] O.J. No. 2613 at paras. 20-22 (C.A.).
[45] *Cash Converters Canada Inc.*, *supra* at paras. 28, 36-38, 40, 45.

personal information to other law enforcement agencies. By its inaction, it has effectively delegated the establishment of such a policy to the Chief.

C. TPS policy not established in accordance with *Police Services Act*

50. The TPSB's acquiescence in the Chief's disclosure policy amounts to an impermissible delegation to the Chief of its duty to establish policies for disclosures by the Chief. Their decisions together thus constitute an invalid exercise of discretionary statutory authority.

51. Absent express or implied statutory authorization, the recipient of a discretionary power delegated by statute cannot sub-delegate that power to another. Where the legislation specifies that a certain act can only be performed by a particular body, any attempt to further delegate that authority will be unauthorized and invalid. This principle applies equally to the grant of authority to adjudicate, to promulgate subordinate legislation or to exercise an administrative decision-making authority involving significant discretionary power.[46]

52. Where the power is "legislative" or "judicial" in nature, as opposed to administrative, the authority to sub-delegate it will not readily be implied. In making this determination, the courts will take into account the amount of discretion called for, the attributes of the body granted the authority, whether the sub-delegate possesses similar attributes, the degree of control retained over the sub-delegate and the importance of individual rights affected by the exercise of the authority.[47]

53. The legislature clearly intended that policy decisions concerning the disclosure of personal information are to be made by the police services board as a civilian oversight body comprised of

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[46] Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Thomson Reuters Canada Ltd., 2014) (Brown & Evans), pp. 13-15 to 13-16; and generally: pp. 13-14 to 13-24, and 13-28 to 13-35; *Vic Restaurant Inc. v. Montreal (City)*, [1958] S.C.J. No. 69 at paras. 63-64, 69, 72-73, 83, 91, 136-139; *London Property Management Assn. v. London (City)*, 2011 ONSC 4710 at para. 95; *Municipal Parking Corp. v. Toronto (City)*, [2009] O.J. No. 5017 at paras. 47-49 (S.C.J.).

[47] *Regina v. Sandler*, [1971] 3 O.R. 614 at paras. 8, 11-13, 18 (C.A.): The Court found an invalid delegation of legislative power where a municipality's fire regulation by-law permitted its fire chief to exercise a significant degree of policy-making discretion that went well beyond technical considerations. And see: *Re Minto Construction Ltd. and Township of Gloucester* (1979), 23 O.R. (2d) 634 at p. 5 (Div.Ct.); *Collins v. 1660524 Ontario Inc.*, 2013 ONSC 4960 at paras. 15-19 (Div. Ct.); Brown & Evans, *supra* at pp. 13-20 to 13-21, 13-31 to 13-32.

elected members of the municipal council and other persons specified at s. 27(9) of the *PSA*. The legislature also intended that such policy decisions should be made in meetings open to the public and on proper notice, to ensure transparency and facilitate public scrutiny.[48]

D. Limitations on the exercise of discretion in administrative decision-making

54. Discretionary administrative decisions must respect the limits of the governing legislation and be based on a weighing of considerations pertinent to the statute's objectives. The decision-maker must turn its mind to all factors relevant to fulfilling its function; and the failure to take into account highly relevant considerations will render the decision invalid. Further, the exercise of discretion cannot be used to frustrate the objectives of the statute under which it is conferred. The Court's task on review is to determine whether the decision-maker has acted within the constraints imposed by the legislature and the Constitution.[49]

55. Discretion in administrative decision-making must also be exercised in a manner consistent with any *Charter* values underlying the grant of discretion. Where *Charter* values are engaged, the issue for the court is "whether the exercise of discretion … unreasonably limits the *Charter* protections in light of the legislative objective of the statutory scheme."[50]

56. In *Dore v. Barreau du Quebec*, the Court described how an administrative decision-maker should apply *Charter* values. Adopting a balancing framework analogous to the *Oakes* test under s. 1 of the *Charter*, the decision-maker should first ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This proportionality exercise "requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory

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[48] *PSA*, ss. 27(9), 31(1)(f), 35(3). And see: *Public Government for Private People: The Report of the Commission on Freedom of Information and Protection of Individual Privacy/1980*, Vol. 3 (Toronto: Queen's Printer, 1980) (*Williams Commission Report*) at p. 701: The legislative history stressed the importance of written and clearly understood limitations on law enforcement sharing practices subject to legislative and public scrutiny.

[49] *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29 at paras. 171-172 and authorities cited therein; *Ontario (Ministry of Health & Long-Term Care)*, supra at para. 37.

[50] *Doré v. Barreau du Quebec*, 2012 SCC 12 at para. 24; *R. v. Clarke*, 2014 SCC 28 at para. 16.

objectives." On judicial review, the question for the Court is whether the decision reflects a proportionate balancing of the *Charter* protections at play given the nature of the decision and the statutory and factual contexts. If the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.[51]

57. In this case, the analysis requires consideration whether, in light of the objective to ensure the safety and security of individuals, the decisions to adopt and implement the TPS disclosure policy best protects the *Charter* values at issue. In the Commissioner's submission, those decisions cannot be considered reasonable either generally or under the proportionality test.

(i) The TPS policy frustrates the statutory objectives of the *PSA* and *MFIPPA*

58. Section 1 of the *PSA* sets out a declaration of principles, the first two of which are of primary relevance here:[52]

> 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*.

59. The purpose of *MFIPPA* engaged in this case, as set out at s. 1(b), is "to protect the privacy of individuals with respect to personal information about themselves held by institutions..." [53]

60. The statutory objectives at play in this case parallel one another. The *PSA* requires that decisions concerning the disclosure of personal information safeguard individual *Charter* and human rights while ensuring the safety and security of persons. *MFIPPA* protects the privacy rights of individuals while yielding to disclosures made for legitimate law enforcement purposes.

61. Under the *PSA*, as at common law, the police have a duty to protect life and safety and give

[51] *Doré v. Barreau du Quebec*, *supra* at paras. 55-58.
[52] *PSA*, s. 1.
[53] *MFIPPA*, s. 1(b).

aid to persons in distress. This duty extends beyond the detection and prevention of crime and preserving the peace. It is engaged, for example, when a 911 call is received which may justify the police taking extraordinary measures, such as a forced entry into a dwelling, to determine the nature of the emergency. It is also engaged where there is an immediate need to protect an individual from threat of self-inflicted injury or death. However, not every act of a police officer in carrying out the duty is necessarily justified. Police do not have authority to further intrude on privacy interests beyond dealing with the exigent circumstances. Having forced entry into a dwelling and dealt with the situation, for example, the police do not have further permission to search the premises.[54]

62. Comparable considerations arise in this case. Having come to the aid of persons who have apparently threatened or attempted suicide, the question is whether, in aid of ensuring the safety of the individuals after the emergency has passed, the police are justified in uploading suicide-related information to CPIC or whether this incursion on privacy rights goes beyond the permissible scope of their authority. The countervailing objectives of the *PSA* and *MFIPPA* – namely safeguarding *Charter* rights and protecting individual privacy – counsel that a disclosure policy that does not take into account an individual's actual circumstances and privacy interests is unreasonable.

63. The TPS disclosure policy allows for no consideration of privacy concerns associated with the disclosure of highly sensitive health information. The rationale offered by the TPS for its policy fails to explain why discretion cannot be exercised in the circumstances of each case given the significant privacy implications and harms associated with CPIC disclosures.

(ii) The TPS policy fails to comply with *MFIPPA*

64. The key statutory measure for assessing the reasonableness of the TPS decisions at issue here is found in the personal privacy regime set up under *MFIPPA*.

[54] *R. v. Godoy*, [1999] 1 SCR 311 at paras. 8, 16-17, 22-23, 28; *R. v. Dietrich*, [1978] B.C.J. No. 1099 at paras. 4-6, 8, 10-12 (B.C.S.C.).

(a) Interpretation of privacy legislation

65. The Court has characterized privacy legislation as quasi-constitutional given the critical role privacy plays in a free and democratic society. As with the privacy rights protected under ss. 7 and 8 of the *Charter*, the fundamental principle governing the legislation is that privacy rights are to be compromised only where there is a compelling state interest in doing so.[55] Exceptions from statutory privacy rights must be interpreted narrowly and not used to undermine the purpose of the legislation. Strict construction in this context entails two components: (1) privacy rights ought not to be frustrated except on the clearest grounds, with any doubt resolved in favour of preserving the right; and (2) the burden of persuasion should rest on the person asserting the exception.[56]

66. The Court of Appeal counsels that privacy rights are to be interpreted in the context of the legislative history and of the treatment of that right by the courts. That Court has cited public concerns identified in the *Williams Report* about the practices of government agencies sharing personal information and building comprehensive files on individuals.[57] The *Williams Report* identifies the "particularly difficult issues of privacy protection" raised by the "gathering and handling of personal information by law enforcement agencies... [I]t is widely accepted that there are limits on the extent to which the public interest in privacy protection should be sacrificed to the public interest in effective law enforcement." The Report observes that, where personal information is collected indirectly or outside the context of a specific law enforcement investigation, "the unverifiable nature of some of the information which may find its way into the system gives rise to classic information privacy problems and suggest[s] that the scope of such surveillance should be

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[55] *H.J. Heinz of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13 at paras. 26, 28; *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53, per Gonthier J. at para. 24; *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 at paras. 65, 66, 71.

[56] *Lavigne v. Canada (Commissioner of Official Languages)*, *supra* at paras. 30-31. And see: *Cash Converters Canada Inc.*, *supra* at paras. 29-30.

[57] *Cash Converters Canada Inc.*, *supra* at paras. 29-30; *Williams Commission Report*, *supra* at pp. 504-505, 667.

carefully limited to cases where a clear need for it can be demonstrated."[58]

(b) The statutory limits imposed by *MFIPPA*

67. Sections 28 to 33 of *MFIPPA* govern the collection, use and disclosure of personal information by government institutions by means of prohibitions, subject to statutory exceptions. These provisions are not themselves the source of government's authority to handle personal information. That authority flows from an explicit grant of power under a statute, as ancillary to a lawfully authorized government activity or, as with certain law enforcement activities, as a function of the common law.[59] Police authority to disclose lawfully obtained information to other law enforcement agencies arises at common law and is limited to legitimate law enforcement purposes. The exceptions at s. 32(c) and (f) preserve, but do not enlarge, this common law power. [60]

68. The Commissioner has observed that the legislature's intention in allowing transfers of personal information between law enforcement agencies is "to further law enforcement purposes, rather than to allow unfettered, discretionary exchanges of information for any purpose":

> … [I]t would be inconsistent and irrational for the legislature to have intended that law enforcement agencies may rely on section 28(2) and 29(1)(g) only where the collection is for law enforcement purposes, but permit the same agencies to share information with each other for any purpose whatsoever, even if unrelated to a law enforcement purpose. [61]

69. This interpretation conforms with the approach the Supreme Court of Canada has taken to inter-agency law enforcement disclosures under s. 8 of the *Charter*:

> Where an individual voluntarily discloses sensitive information to police, or where police uncover such information in the course of an investigation, it is reasonable to expect that the information will be used for the purpose for which it was obtained: the investigation and prosecution of a particular crime. Similarly, it is reasonable to expect individual police officers to share lawfully gathered

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[58] *Williams Commission Report*, *supra* at pp. 553-554, 557-558.
[59] *MFIPPA*, ss. 28 to 33. And see, in particular, s. 28(2).
[60] *R. v. Spencer*, 2014 SCC 43 at paras. 62, 65, 70-73; *Wakeling v. United States of America*, 2014 SCC 72, per McLachlin at para. 97.
[61] Privacy Complaint No. MC-040012-1, *Sarnia Police Service*, [2005] O.I.P.C. 28 at para. 28; *Report*, p.33, *Application Record*, Vol. 1, Tab 3-B, p. 144.

> information with other law enforcement officials, provided the use is consistent with the purposes for which it was gathered. [62]

70. In *Cash Converters,* the Court held that *MFIPPA* imposed similar limits in the context of other law enforcement disclosures. In that case, the Court quashed a City by-law for non-compliance with s. 28(2) of *MFIPPA* which prohibits the collection of personal information unless it is used for the purposes of law enforcement or is necessary to administer a lawfully authorized activity. The by-law required second hand goods dealers to collect personal information from vendors – "mostly innocent but some unscrupulous" – for transmission to a police database where it was "available for use and transmission by the police without any restriction and without any judicial oversight." The Court expressed "significant concern in [ ] the wholesale transmission to the police of a significant amount of personal information about individuals ... with no limit as to its use by the police or by those to whom the police may share the information." [63] (emphasis added)

71. The same concerns arise under s. 32(c) and (f). Even where personal information is collected for a law enforcement purpose, there must be restrictions to ensure that subsequent disclosures are also made for law enforcement purposes, as well as oversight mechanisms to prevent misuse. These principles were recently affirmed in *Wakeling v. USA*, discussed below.

(iii) The TPS policy does not accord with *Charter* values and the test of proportionality

72. The *Charter* values engaged in this case are the right to be free from unreasonable state intrusion on reasonable expectations of privacy, the right to security of the person and the right to be free from discrimination based on real or perceived mental health disability.

(a) The reasonable expectation of privacy under s. 8 of the *Charter*

73. The Supreme Court of Canada has held that information may be shielded by s. 8 from disclosure by the police to other law enforcement agencies. Individuals involved in a criminal

[62] *R. v. Quesnelle*, 2014 SCC 46 at para. 39.
[63] *Cash Converters Canada Inc.*, *supra* at paras. 38-39, 51-53.

investigation retain a reasonable expectation of privacy in information lawfully gathered by the police and do not forfeit their privacy rights for all future purposes. More specifically, individuals may reasonably expect that personal information in police occurrence reports will not be disclosed in unrelated matters. Equally, a person may divulge information to the police with the expectation that it will be used only for a specific purpose.[64]

74. Section 8 extends heightened protection to sensitive health information for which there is a very high expectation of privacy. The Court has recognized that "[t]he disclosure of police occurrence reports that contain intimate personal information – such as details of previous allegations of sexual assault – may do particularly serious violence to the dignity and self-worth of an affected person."[65] As Dr. Goldstein deposes, similar harms may result from the disclosure of personal information in the context of threatened or attempted suicide.

75. Where police gather information in the course of coming to the aid of someone in distress and in need of medical assistance, there is a heightened expectation of privacy. The disclosing law enforcement agency must balance the purpose of disclosure against any adverse consequences that may result. It is not enough to say that the information may at some future point be accessed for an unknown purpose. Where no specific law enforcement purpose would be served, and where the information may be misused or result in mistreatment, s. 8 will shield it from disclosure.

- ***Wakeling v. USA* – common law and *Charter* s. 8 constraints on inter-agency sharing**

76. In *Wakeling v. U.S.A.,* the Court examined whether the disclosure of lawfully obtained wiretap information by Canadian to U.S. law enforcement officials for use in a drug trafficking investigation breached the appellant's s. 8 rights. A majority of the Court found no breach. An exception to the offence of disclosing wiretap information was reasonable. It preserved and did not

[64] *R. v. Mills*, [1999] 3 SCR 668 at para. 108; *R. v. McNeil*, 2009 SCC 3 at para. 12; *R. v. Quesnelle*, *supra* at paras. 29, 37-44; *Wakeling v. USA*, *supra* at para. 131.
[65] *R. v. Quesnelle*, *supra* at paras. 33-40. And see: *R. v. McNeil*, *supra* at paras. 12, 19; *R. v. Dyment*, [1988] 2 SCR 417 at paras. 29, 34; *R. v. Colarusso*, [1994] 1 SCR 20 at paras.42-43, 48, 70, 74-76, 79-81, 86-87.

enlarge the common law power of police to share lawfully gathered information with domestic and foreign law enforcement agencies for legitimate law enforcement purposes.

77. In majority reasons, Moldaver J. articulated several principles pertinent here: (1) law enforcement officials are not permitted to make "near-limitless" disclosures of information; (2) "disclosure must be for a legitimate law enforcement purpose"; (3) a subjective belief that a legitimate purpose exists must be tested against objective facts; (4) where it is known or should be known that information can be misused or facilitate discrimination or other human rights violations, disclosure will generally not be permitted; and (5) effective accountability mechanisms, such as notice and corrective measures, assist in keeping the disclosure regime within reasonable limits.[66]

78. Karakatsanis J., dissenting, added to this list of general principles: (1) privacy concerns are heightened where "intimate details" may be revealed, such as physical and mental health, substance use, and encounters with police; (2) the state's interest in law enforcement must always be balanced against significant privacy interests; and (3) the *Charter* must be construed to prevent unreasonable intrusions on privacy and their potential consequences before they occur.[67]

79. The TPS disclosure policy does not reflect a consideration of, let alone respect for, these principles. It takes no account of the significant privacy interest individuals retain in mental health and suicide-related information recorded by the police. Disclosure of this information to other law enforcement agencies via CPIC cannot be unlimited. It must be justified on a case-by-case basis by a legitimate law enforcement purpose. Police officers' subjective and frequently inaccurate beliefs concerning perceived suicidal behaviors are not objectively tested. It is known, or should be known, that a recipient's use of this information can result in significant harm and discrimination. In the absence of effective accountability mechanisms, such as notice to the individual and corrective

[66] *Wakeling v. USA*, *supra* per Moldaver J.at paras. 55, 62, 45, 80, 67, 72; and per McLachlin C.J.C. at para 97.
[67] *Wakeling v. USA*, *supra* per Karakatsanis J. at paras. 115, 121, 123, 129.

measures, there is a heightened need for objectively measurable criteria such as those set out in the Mental Health Disclosure Test. Disclosure in the absence of such criteria unreasonably impinges on the reasonable privacy expectations of affected individuals.

(b) Privacy as a facet of security of the person under s. 7 of the *Charter*

80. In *Blencoe v. British Columbia*, the Supreme Court of Canada affirmed that the right to security of the person in s. 7 of the *Charter* extends privacy protection to highly sensitive health information which, if disclosed, would likely cause an individual to suffer serious psychological stress and interfere with therapeutic treatment and recovery. Denial of this right will be found where the state discloses records containing intensely private aspects of an individual's life. The Court referred, in particular, to records "revealing thoughts and statements which have never been shared with close friends or family and which may threaten the therapeutic patient/physician relationship crucial to the patient's psychological integrity and recovery from trauma."[68]

81. Citing *Blencoe*, the Ontario Court of Justice recently held in *R. v. Gowdy* that the s. 7 right of an accused to security of the person was infringed where, on charging him with sexual offences (invitation to touching and attempted aggravated assault), the police publicly disclosed his HIV status taken from medical documentation found in a lawful search. The trial judge observed that the police purpose in disclosing the information – to protect the public against the risk of contagion – was based on "uninformed speculation," showed "indifference" to the accused's privacy expectations and amounted to a "most serious breach" of his s. 7 right. The court also found that the disclosure was not authorized under either the *PSA* or s. 32 of *MFIPPA*. The information was "obtained or compiled as a health matter"; consequently, "disclosure … by the police was obviously not for that or any consistent purpose within the meaning of s. 32(c)." [69]

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[68] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at paras. 81-85; *R. v. Mills*, *supra* at para. 85.
[69] *R. v. Gowdy*, 2014 ONCJ 592 at paras. 26, 28, 50; *R. v. Gowdy*, 2014 ONCJ 696 at paras. 8-9.

82. Information concerning real or perceived attempts or threats of suicide is no less health-related than an individual's HIV status. Where disclosure has the great potential to cause serious psychological stress and interfere with therapeutic treatment, the security of the person is infringed.

83. The rights at s. 7 of the *Charter* are not absolute. State action which impinges on the security of the person will not result in a breach of s. 7 where shown to be in accordance with principles of fundamental justice, both substantive and procedural.

- **Fundamental justice – substantive and procedural**

84. A denial of substantive justice will be found where: (1) there is serious incursion on a s. 7 right based on a rigidly applied set of state-imposed criteria with no opportunity for the affected individuals to make a case that the deprivation is unjust in his or her particular case; or (2) where the deprivation of the s. 7 right is based on an arbitrary distinction and does not allow for exercise of discretion in light of the individual's circumstances. [70]

85. The Court's judgement in *Baker v. Canada* sets out the procedural components of fundamental justice. The requirements in a given case must be decided in the context of the statute and the rights affected, considering: (1) the nature of the decision made and the procedures followed; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; and (4) that person's legitimate expectations.[71]

86. The TPS disclosure policy fails on both measures. Disclosures via CPIC are based on the rigid characterization of persons as future threats to their own safety based on police observations in brief encounters with persons in apparent crisis without allowing for any exceptions. Given the need for police to "over-call" their decisions to take people to hospital, it is unreasonable for these judgments to be considered an accurate assessment of actual risk of suicide. The policy is arbitrary

[70] *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at paras. 72-75, 87-91; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, per McLachlin C.J.C. at paras. 148-149, per Abella J. at paras. 97-100.
[71] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras. 113-115; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 21-26.

by treating all cases the same, regardless of where on the continuum of such incidents an individual case may lie – for example, from suicidal ideation to serious injury.

87. The potential consequences of a suicide-related CPIC flag are substantial. Yet there is no process in place for individuals to know their privacy rights have been affected in this way. Even where an individual learns of a CPIC flag, there is no process to secure its removal. Unreasonable intrusions on privacy and their consequences must generally be prevented before they occur. All of this counsels that rational and objective criteria must be satisfied before suicide-related information is posted to CPIC and that a fair process be established to permit its removal.

(c) Section 15 – equal protection of the law without discrimination

88. The TPS disclosure policy unreasonably limits the right at s. 15 of the *Charter* to equal protection and benefit of the law without discrimination based on mental disability. Section 15 is concerned with protecting the dignity and freedom of a person or group of persons, so that members of the group are not "made to feel, by virtue of the impugned [ ] distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian Society equally deserving of concern, respect and consideration." This protection extends to discrimination based on stereotyping with respect to real and perceived disabilities and analogous grounds. [72]

89. The essence of stereotyping lies in making distinctions against an individual on the basis of personal characteristics attributed to that person, not based on his or her true situation, but on association with a group. A section 15 determination engages a two-step analysis. The first step is to determine whether the law or state-action draws a distinction between a class of persons and others based on a trait which is an enumerated or analogous ground. The second step is to determine whether the effect of the distinction is to impose on members of the group a burden or disadvantage

[72] *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at paras. 29, 39, 57-58;

not imposed on others or to withhold or limit access to benefits or advantages available to others.[73]

90. Discrimination based on stereotyping will not be found where the law treats the individual on the basis of his or her actual situation. In *Winko v. British Columbia*, for example, the Court found the *Criminal Code* did not breach s. 15 where it established an individualized, evidence-based process for making alternative dispositions for persons found not criminally responsible (NCR) due to mental disorder. McLachlin J. (as she then was) observed that "[t]he documented tendency to overestimate dangerousness [ ] must be acknowledged and resisted" and "the threat posed must be more than speculative in nature; it must be supported by evidence." McLachlin J. concluded that the process gave each NCR accused the disposition compatible with his or her situation.[74]

91. Similar considerations apply where the basis for flagging an individual on CPIC is a decision to take him or her to hospital due to a real or perceived mental health issue. The TPS's application of the new "cause of concern" standard continues to target the same group of persons. Its disclosure policy thus exposes members of this group to the burdens and disadvantages of CPIC flags without regard for their actual situation. The policy lacks a rational and objective basis for placing all members of this group on a CPIC watch list. Unless there is a clear factual basis underpinning individual decisions, such disclosures cannot be justified.

E. Conclusion

92. The defects in the decisions under review warrant the declarations and other orders requested below. In the Commissioner's respectful submission, the Court's orders should be framed in accordance with the Mental Health Disclosure Test. Alternatively, the Court's orders should be framed in accordance with the privacy protective principles of *MFIPPA* and the *Charter* set forth herein.

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[73] *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241 at paras. 62-66, *Egan v. Canada*, [1995] 2 SCR 513, at para. 39.
[74] *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, paras. 35, 42, 57-61, 74-77, 88-89.

PART IV – ORDER REQUESTED

93. The Commissioner respectfully requests that the Court make the following orders:

(i) an order declaring that the decisions establishing and implementing the TPS disclosure policy are invalid and unreasonable for the reasons set out herein;

(ii) an order enjoining or prohibiting the respondents from disclosing the personal information of affected individuals to CPIC other than in accordance with the Mental Health Disclosure Test or, alternatively, other than in accordance with the Court's direction;

(iii) an order in the nature of *mandamus* or a mandatory injunction compelling the respondents to remove any existing CPIC entries which do not meet the requirements of the Mental Health Disclosure Test or, alternatively, which do not meet the requirements of the Court's direction;

(iv) an order in the nature of *mandamus* or a mandatory injunction compelling the TPSB to establish a policy respecting the disclosure of the personal information in accordance with s. 31(1)(f) of the *PSA*, s. 32 of *MFIPPA* and ss. 7, 8 and 15 of the *Charter* and an order compelling the Chief to implement such policy;

(v) such further and other order as the Court may consider appropriate;

(vi) an order that there be no costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 12, 2015

Original signed by
William S. Challis

Original signed by
Stephen McCammon
Counsel for the Applicant
Information and Privacy Commissioner of Ontario

SCHEDULE "A" – AUTHORITIES

1. *Ontario (Ministry of Health & Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.)

2. *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

3. *Police Encounters with People in Crisis*, An Independent Review Conducted by The Honourable Frank Iacobucci for Chief of Police William Blair, Toronto Police Service (July 2014)

4. *Cash Converters Canada Inc. v. Oshawa (City)*, [2007] O.J. No. 2613 (C.A.)

5. Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Thomson Reuters Canada Ltd., 2014)

6. *Vic Restaurant Inc. v. Montreal (City)*, [1958] S.C.J. No. 69

7. *London Property Management Assn. v. London (City)*, 2011 ONSC 4710

8. *Municipal Parking Corp. v. Toronto (City)*, [2009] O.J. No. 5017 (S.C.J.)

9. *Regina v. Sandler*, [1971] 3 O.R. 614 (C.A.)

10. *Re Minto Construction Ltd. and Township of Gloucester* (1979), 23 O.R. (2d) 634 (Div.Ct.)

11. *Collins v. 1660524 Ontario Inc*., 2013 ONSC 4960 (Div. Ct.)

12. *Public Government for Private People: The Report of the Commission on Freedom of Information and Protection of Individual Privacy/1980*, Vol. 3 (Toronto: Queen's Printer, 1980) (*Williams Commission Report*)

13. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29

14. *Doré v. Barreau du Quebec*, 2012 SCC 12

15. *R. v. Clarke*, 2014 SCC 28

16. *R. v. Godoy*, [1999] 1 SCR 311

17. *R. v. Dietrich*, [1978] B.C.J. No. 1099 (B.C.S.C.)

18. *H.J. Heinz of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13

19. *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53

20. *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403

21. *R. v. Spencer*, 2014 SCC 43

22. *Wakeling v. United States of America*, 2014 SCC 72

23. Privacy Complaint No. MC-040012-1, *Sarnia Police Service*, [2005] O.I.P.C. 28

24. *R. v. Quesnelle*, 2014 SCC 46

25. *R. v. Mills*, [1999] 3 SCR 668

26. *R. v. McNeil*, 2009 SCC 3

27. *R. v. Dyment*, [1988] 2 SCR 417

28. *R. v. Colarusso*, [1994] 1 SCR 20

29. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307

30. *R. v. Gowdy*, 2014 ONCJ 592

31. *R. v. Gowdy*, 2014 ONCJ 696

32. *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486

33. *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30

34. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1

35. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

36. *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28

37. *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241

38. *Egan v. Canada*, [1995] 2 SCR 513

39. *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625

SCHEDULE "B" – STATUTES

1. *Police Services Act*, R.S.O. 1990, c. P.15, ss. 1, 27, 31, 35, 41

2. *Disclosure of Personal Information*, O. Reg. 265/98 under the *Police Services Act*

3. *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 1, 2(1), 28 to 33, 39 to 43, 46

4. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, 42(1), 50 to 54, 58, 59

5. *Mental Health Act*, R.S.O. 1990, c. M.7, ss. 17, 18, 33

6. *Constitution Act, 1982*, Part I – *Canadian Charter of Rights and Freedoms*, ss. 1, 7, 8, 15, Part VII – General, s. 52

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Applicant

- and -

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

Respondents

Court File No. 265/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT: Toronto

FACTUM OF THE APPLICANT INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

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Crossing the Line:
The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC

A Special Investigation Report

Information and Privacy Commissioner
Ontario, Canada

April 14, 2014