

Municipal Seminar – update regarding police record checks

Thank you to all who attended our conference last week. We enjoyed hosting you, and look forward to seeing you again next year. To those of you who could not attend, a copy of the materials will be sent to you in the next few weeks.

We wanted to give you a brief update on one of the arbitration awards that was discussed in the Privacy law segment: *City of Ottawa-and-the Ottawa Professional Firefighters Association*. This case was about a City policy that required all firefighters to provide their written consent for the City to access their police records every three years through the City's police department.

The Arbitrator found the policy unenforceable. The City of Ottawa applied for judicial review of this decision. The Ontario Superior Court of Justice recently dismissed the employer's application and upheld the Arbitrator's decision that the policy was made without authority and was of no effect. The Court also made some additional (non-binding) comments regarding the parties' agreement that the City had the right to require applicants for new employment to provide their consent for police record checks and, in individual circumstances, for reasonable cause.

The Court questioned whether the City had the authority to obtain the police record checks directly from the police department: *"I would be inclined to go even further than the arbitrator and would question, having regard to the various provisions of the Act, whether the privacy rights of Ottawa firefighters referred to in the Act can ever, regardless of the circumstances, be taken away from them by the City by unilaterally establishing a policy requiring all firefighters to provide consents periodically or "where reasonable grounds justify, it" or even by the City and the Association agreeing to include such an obligation in the collective agreement."*

For employers in B.C., the *Freedom of Information and Protection of Privacy Act* in B.C. provides employers with the right to obtain a police record directly from the police through Section 33.1. However, employers need to be alert to potential challenges not only to requirements to provide police record checks but also the process for obtaining the police record. A useful approach is described in *Vancouver (City) – and- CUPE Local 15 (Employment Checks Grievance)*, [2007] BCCA No.216 (Steeves) where the Arbitrator approved the City's process where the individual applicant or employee would obtain his/her police record check directly from the police and then subsequently submit it to the "Department Designate" of the City.

Legislative review of FIPPA

Please also note that the Office of the Information and Privacy Commissioner of B.C. is currently undertaking its third review of FIPPA. It is asking for public input until January 29, 2010. Please see the following link for further information: http://www.oipcbc.org/LegislativeReviews/LR_template.htm