Vision: *Excellence in police leadership: working together for safer communities.*

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December 11, 2015

The Honourable Yasir Naqvi
Minister of Community Safety and Correctional Services
25 Grosvenor Street
18th Floor
Toronto ON M7A1Y6

Dear Minister,

I am pleased to provide you with a copy of our submission on Proposed Regulations to the Police Services Act: "Collection of Identifying Information in Certain Circumstances – Prohibition and Duties" and Proposed Amendments to the Schedule to O.Reg. 268/10 (Code of Conduct). Please note that this submission was passed unanimously by the Ontario Association of Chief of Police's Board of Directors on December 8, 2015.

We look forward to continuing to work with you and your government on community safety and well-being for all citizens of our Province. Please contact Joe Couto, OACP Director of Government Relations and Communications, should you have any questions regarding this submission.

Sincerely,

Jeff McGuire
Chief of Police, Niagara Regional Police Service

Cc. Mr. Matt Torigian Deputy Minister – Public Safety, Ministry of Community Safety and Correctional Services
Mr. Steve Beckett, Deputy Minister, Policing Services Division
OACP Board of Directors
Joe Couto, OACP Director of Government Relations and Communications

ONTARIO ASSOCIATION OF CHIEFS OF POLICE

Submission on Proposed Regulations to The *Police Services Act:* *"Collection of Identifying Information in Certain Circumstances – Prohibition and Duties"* And Proposed Amendments to the Schedule to O.Reg. 268/10 (*Code of Conduct*)

December 11, 2015

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I. GENERAL COMMENTS/REVIEW

(a) Purpose – Met…and Missed

The Minister of Community Safety and Correctional Services (MCSCS) has stated that the purpose of the new regulations is to:

1. Prohibit the random and arbitrary collection of identifying information by police, and

2. Establish clear new rules for voluntary police-public interactions where identifying information is collected to ensure that interactions are consistent, conducted without bias or discrimination, and done in a manner that promotes public confidence and keeps our communities safe.

Ontario's police leaders agree that the goal of eliminating random and arbitrary stops that do not have a clear policing purpose, and which are done solely for the purpose of collecting identifying information, is good and appropriate. Throughout MCSCS's consultation process, the OACP has consistently agreed with the need for a clear statement prohibiting such stops. Our association has been consistent with its previous feedback and submissions provided to the Ministry on this matter. However, after prohibiting these practices, the draft Regulation goes on to propose an overly bureaucratic regime for regulating legitimate interactions with the public – including trying to regulate the attempt to collect in the face of a person exercising their legal rights.

(b) Bureaucratic Scheme – Rights and Reasons

The Regulation attempts to establish a process wherein if the interaction between a police officer and an individual is not random or arbitrary and fits within the poorly defined parameters of a legitimate stop (see below for our specific comments and concerns regarding the gaps in the Regulation), the officer is required to inform the individual as to the reason(s) for the interaction and that the individual is not required to participate. The officer would then be required to provide a document to the individual from whom they **attempt to collect** identifying information which, at a minimum, must include:

- The officer's name and identification number (i.e. badge number)
- The date, time, location and reason for the collection
- Information about how the individual can contact the Independent Police Review Director (e.g., to file a complaint), and
- How to access the information collected.

While the OACP understands that the purpose of these requirements is to promote transparency and respect for an individual's civil rights, imposing a duty on the officer who has collected personal information to immediately advise the individual that he/she can complain about the interaction to the OIPRD (even if the person does not express any complaint at the time of the stop to the officer) and how they can later access their personal information under Freedom of Information legislation (which

will, more likely than not, be redacted to remove any information that would reveal investigative techniques, information relating to an ongoing investigation, intelligence data, or the names of any third parties) may, in fact, undermine any goodwill or rapport that the officer has established with the individual. In short, it's overkill.

Furthermore, in setting up a system of providing a stopped individual with a receipt to memorialize the encounter, the Regulation seems to create a "carding" regime that did not exist before in many jurisdictions.

(c) Records Regime – Recording, Accessing, Retention, and Audit

The Regulation goes on to create a regime for the audit and retention of personal information collected during a permitted interaction. The sections of the regulation that deal with the audit function are complicated (for example, the records relating to every interaction with the public that does not fit within the exceptions to the application of the regulation will need to be reviewed within 30 days by a supervisor to ensure compliance with all of the requirements of the regulation). It will result in significant changes to how a whole slew of Record Management System (RMS) data will be generated, reviewed, and retained. There will certainly be budget implications that the Minister could not have foreseen when the Regulation was drafted (see below).

The Regulation also creates new records analysis provisions. It requires Chiefs to establish certain categories for identifying individuals by sex, age, race, and the neighbourhoods where the collection of information was attempted (as noted below, the Regulation should be limited to instances of actual collection). Officers engaged in legitimate interactions captured by the provision of the regulation would then have to guess at (the word used in the regulation is "perceive") and record specific identifying information about the individual so as to fit the individual within those established categories.

The end goal of collecting this information is to compare the information gathered regarding these individuals with the data found in the *National Household Survey* conducted by Statistics Canada (the last one was conducted in 2010) so as to determine if the collection of information conducted by officers was attempted disproportionately in relation to certain groups of individuals within the community. If there are, in fact, anomalies identified from the data, it would then be the duty of the Chief of Police to report and explain them to his or her Board, the Ministry of Community Safety and Correctional Services, and the public. Again, while we see the need transparency, there are inherent issues in the records analysis and reporting process that every Chief of Police will need to navigate through.

Information collected forms part of a Police Record. Police Records are operational records and are under the authority of the Chief of Police pursuant to the *Municipal Act*, s. 255(6). Police Services Boards properly do not have domain over operational records as a result. Both the *Police Services Act* and the Provincial Adequacy Standards require police services to have policies for managing their records.

(d) Training

The OACP supports training for all police officers regarding racial profiling. The *Police Services Act* requires that,

> 1. Police Services shall be provided throughout Ontario in accordance with the following principles:
>
> > (5) The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario Society.

The frequency and who is responsible for the development and delivery of such training is something that should be reconsidered (see below). In addition, training requirements should or could form part of the Adequacy Standards (versus inclusion within a Regulation) such that there is more flexibility and input from stakeholders – as is the usual practice in the development of such Adequacy Standards.

(e) Polices and Procedure

The inclusion of sections 11 and 12 seems contrary to past practice as it relates to the role of Adequacy Standards. More importantly, those provisions have the Boards entering into areas they are prohibited from entering into (i.e., operational records retention) and seem almost redundant given the very prescriptive nature of the Regulation – there is little to no room for policy development.

(f) Amendment to Code of Conduct

The second regulation, which amends the Code of Conduct to add offences if an officer either conducts an arbitrary/random stop or does not comply with the requirements and minutia of the regulation, seems redundant. The first offence would clearly fall within the definition of discreditable conduct, as an arbitrary stop would contravene the primary regulation (as well as the Charter and the common law), and the second offence really amounts to either neglect of duty or a performance issue that could be dealt with outside of the scope of Part V of the PSA.

II. Unintended Negative Consequences

(a) Exemption-based Model to Reasons = Endangering Lives and Undermining Investigations

If a person is not given the reason(s) why the information is being collected, the person will know that it is because one or more of the reasons enumerated in the Regulation (as potentially added to – see below).

This is of extreme concern to the policing community and should be equally of concern to prosecutors (provincial or federal) and the Province. Silence on reasons indirectly could compromise a police investigation of a particular offence and thus its prosecution.

The indirect revealing of the identity of a confidential informant – in fact, even the possibility of there being a confidential informant – may put lives at stake. A drug dealer or organized crime member will read into the silence (and/or attempt to challenge the officers to glean further information) and potentially get them thinking that there may be a confidential informant in their midst that resulted in the officer asking the questions he or she did (which may narrow the suspicion). Even if there is no confidential informant, paranoia and uncertainty could put the stopped individual's associates in jeopardy.

Similarly, if silence is based on the potential "compromise" of the safety of an individual, then he or she is at risk should their safety be indirectly compromised by this regime.

(b) Cost Implications and Lack of Funding Initiatives

Who will pay? It is a simple question without an apparent answer.

The Regulation will cost require a substantial commitment of financial resources to Police Services Boards: from the simple cost of creating receipts to the potentially exorbitant costs of administering the system of collection, recording, and audit from an IT perspective and an increase in required personnel. The Ontario Provincial Police and many municipal Police Services have different RMS systems and have stored and integrated street check data differently. Therefore, the costs per Service will be different depending upon existing set ups.

It is essential to note that the costs involved will be substantial, including but not limited to:

(a) moving the data

(b) setting up different fields (e.g., racialized groups, neighbourhoods or areas where collections attempted, age groups, attempts vs actual collection, tracking of access to the information, etc.)

(c) sectored databases with limitations on access

(d) associated external costs such as software providers amending RMS systems and maintenance costs, and

(e) internal costs such as data inputters, IT programmers, auditors, hardware (e.g., printers for receipts, servers and hard drives), etc.

These costs, as written in the Regulation, will be borne by Police Services Boards/the OPP.
There will likely be other direct or indirect costs that will arise from this Regulation. There is a real potential that there will be increased public complaints under the PSA and applications brought under the OHRC. Add to that the cost of responding to the increased Access to Information requests and privacy complaints (especially if the reasons with exemptions model is maintained) and associated IPC appeals.

There is a significant cost risk to Boards regarding the defence of potential law suits and *Ontario Human Rights* matters that will be based on the perceived contravention of the Regulation, policy/procedure and/or inadequate training. Some have argued that such is a cost of doing business in the policing environment – however, the overall confusion created by the Regulation, as drafted, will no doubt find its way into monetary-based litigation. Conversely, there is a concern as it relates to circumstances where legal action is commenced suggesting the police (and its Board) were negligent, inadequate or ineffective in our duty to prevent crime and protect our community and its citizens.
If a confidential informant's identity is compromised through the reasons with exemptions model, as proposed, the costs to ensure their protection (including Witness Protection) and/or civil damages will be immense. Again, who will bear those costs? Who will bear the moral burden should someone be injured or killed?

Finally, the costs of training as set out on a 36-month cycle – especially when added to all the existing, mandated training and training that is required from a risk management perspective – will be costly as well. It not only requires police to incur the cost of training their trainers and/or hiring additional trainers, but more training inevitably leads to significant costs in officer overtime and/or the need to hire more police officers to police while other officers are off on training.

(c) Interprovincial and National Intelligence Undermined – Inconsistencies, Gaps, and Hampering Public Safety and National Security Investigations

Crime and criminals know no boundaries. There are borderless organizations – organized crime and street-level gangs – that may reap the benefit from inconsistent police practices and/or gaps in intelligence information as it relates to interprovincial or national intelligence initiatives and information gathering.

Ontario will have a law enforcement/public safety border around it as it relates to criminal intelligence and the detection of illegal activities.

As has been explained on multiple occasions, street checks can be an important public safety tool. A street check can be used to connect an individual(s) to a gang or organized crime or to provide intelligence to track their activities and/or associations. In addition, street checks can be key to intelligence gathering as it relates to international criminal activities.
The Regulation, as drafted, raises substantial and important concerns. The Province of Ontario will be the only Province with this regime. The limits imposed (practically and explicitly) in the Regulation, along with the time-limited access of historical records (five years subject to exemptions), could result in the hampering public safety and national security investigations. It will also limit the ability to anticipate emerging threats. These types of investigations and information sharing are often based on years, sometimes decades of activities and observations.

Most importantly, the Province of Ontario's police agencies will be perceived as a "weak player" and/or "leaky" agencies by other intelligence agencies, nationally and internationally – in particular, due to the requirement for reasons and limits on record-keeping. These legitimate concerns, combined with potential gaps in intelligence information and intelligence gathering abilities may result in a reluctance or inability for other law enforcement/intelligence gathering agencies to share information with us and/or result in a loss of confidence at the intelligence level.

The Ministry (along with other stakeholders) have been provided specific examples of where and when street check information has resulted in the solving of or adverting serious crime. We concede that we need to better track such information to those results and better record keeping provisions and reporting will assist.

However, any regulation of these important policing and national security practices must strike a balance in their breadth and consequences. The proposed Regulation needs to be amended (see below) in order to approach that balance.

III. Solutions – Required Amendments

The following should be read with the more specific comments and recommendations made under **IV.**

SPECIFIC COMMENTS – Section-by-Section below.

(a) Rights…without Reason

(1) <u>RIGHTS</u>

The OACP understands the rationale for the inclusion of this provision. However, the Province has already been provided a cautionary note as it relates to the potential confusion this may create. The requirement to inform the person that they are "not required to remain in the presence of the officer" may be practically problematic. This very essential policing tool (if done correctly – including non-randomly and bias neutral/free) may be undermined because the draft Regulation may confuse a person that is approached – for example when exemptions apply and/or on the continuum from investigative detention to arrest rights.

(i) Amendment

Section 5 should be amended to require all police officers engaging in a street check, **if asked or if the person is under the age of 16 or reasonably believed to be under a condition of mental impairment or developmental disability,** to advise the individual that they do not have to remain or answer any questions.

(ii) Commentary and Explanation:

This amendment is an appropriate balance between the provision of rights (and those underlying concerns) of those that may be vulnerable to perceived psychological detention and ensuring that this police interaction is not mired in complaints, on the street conflicts and its utility is not completely undermined.

(2) <u>REASONS</u>

While it is appreciated that the draft Regulation attempts to carve out exemptions to the provision of reasons in recognition of the serious negative implications that could occur, they are practically and simply <u>not workable</u>.

We do support the requirement that reasons be recorded and included when the information collected is inputted or archived into the database.

(i) Amendment

Delete the requirement that the police must inform the individual why the information is being collected (paragraph 5(1)(b)) and delete the corresponding exemptions to that requirement in section 5(2).

Delete paragraph 7(2).

(ii) Commentary and Explanation:

The Regulation, as drafted, gives the public an expectation that they will be given reasons at the start of an interaction (i.e., when "a police officer attempts to collect…").

However, if the officer does not provide him or her reasons, the individual is <u>indirectly</u> being informed that the reason is one or more of the exemptions – and yet the Province recognizes that those reasons must be protected. This is both illogical and potentially dangerous/life threatening as it relates to confidential informant privilege or the safety of an individual, and deleterious to the investigation of a particular offence.

The scheme, as written, is also unworkable because the reasons for collecting the information may change as the interaction progresses.

Finally, this expectation of being provided rights on the street would likely arise and have to be dealt with by officers in all other interactions with individuals. This is because the individual will not always know the non-"street check" reason for the interaction and demand a reason assuming they have a regulatory right to know. This further complicates matters and undermines the proposed scheme and will likely lead to either disengagement by officers or confrontations on the street where an officer is being asked to assess and apply the exempt reasons on the spot.

(3) <u>REASONS/EXEMPTIONS: ALTERNATIVE AMENDMENTS</u>

(i) Amendment

In the alternative and if, unfortunately, the exemption scheme is maintained, the exemptions in subsection 5(2) must be amended and expanded to include:

(i) Amend "would likely allow a confidential informant to be identified" to "may result in a confidential informant to be identified, directly or indirectly" – the Regulation should not have a standard that is less than that which a Court would apply.

(ii) Amend "might compromise the safety of an individual" to "may compromise…" – again, when the safety of an individual is at stake, the threshold should be clear and consistent with other areas of the law.

(iii) Add an exemption: "(d) may compromise the collection of criminal intelligence information relating to potential national security threats, organized crime or gang activities".

(iv) Add an exemption: "(e) would result in the revealing of information in contravention of the *Youth Criminal Justice Act*".

(v) Add an exemption: "(f) would result in the revealing of information of another person's personal information in contravention of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* or for which disclosure could be denied under the applicable Act".

(vi) Add an exemption: "(g) would be in contravention of another Act or Regulation of the Legislature or Parliament or order of a Court".

(ii) Commentary and Explanation:

The exemption scheme is does not capture all the exemptions that should apply. The changes suggested in (i) and (ii) are set out as part of the recommendation and should be self-evident. The addition of (iii) is crucial and is more substantively explained under "**(II) Unintended Negative Consequences**, (a) Interprovincial and National Intelligence Undermined – Inconsistencies, Gaps and Hampering Public Safety and National Security Investigations" (above). As well, it does not make drafting sense to not include compromising the collection of intelligence information as an exemption when is one of the enumerated reasons in subclause 4(2)1.(ii) as it relates to permitted, non-arbitrary collection.

With respect to the additional exemptions (iv) to (vi), a police officer would be contravening other explicit laws that are paramount to the Regulation. In addition and as it relates to FIPPA or MFIPPA exemptions that could be used to deny a request, it seems contrary to the legislative intent for those Acts and illogical not to have those same exemptions apply to an exchange on the street versus one made to the appropriate agency and dealt with individuals trained in privacy. Nevertheless, we still maintain that the serious (sometimes dire) implications of the proposed Regulation, should the above reasons be revealed directly or indirectly by the proposed regulatory scheme, underscores the need for a complete deletion of the requirement to give reasons based on an exemption model.

(b) Receipts

(i) Amendment

Amend section 6 of the Regulation to provide that an officer is required, **upon request**, to provide an individual with the following information:

(i) The officer's name and officer identification number and the date, time and location of the collection; and

(ii) A telephone number and link of the Ministry of Community Safety and Correctional Services that provides information on street check rights, the means to request access;

(ii) Commentary and Explanation:

It is unreasonable (and costly) to expect officers, while on the street doing their law enforcement duties, to carry around pamphlets or information sheets. Therefore, a system that allows them to hand out a business card that has on its back space provided to fill in the information set out in (i) and has pre-printed links to the Ministry's recorded information line and website is infinitely more practical and workable. The individual would, through that "information hub", be provided with the necessary contact information/links to the OIRPD, IPC, OHRC and the local Service's Access to Information office. By having the individual referred to the Ministry's information hub, there will be a consistency of information provided across the Province and the Ministry also may choose to (or perhaps should be required to under the Regulation?) track and audit data Province-wide (which is one of the underlying goals of the Regulation).

All of this should be managed by the Province <u>at its costs – including the development of a standard "form"</u>.

(c) <u>Records Regime</u>

(i) Amendment

Delete provisions that restrict access to the data.

Delete paragraphs 11(1) 6 and 7 and subsection 11(2) that purports to give Boards the authority to make a Policy regarding the retention of (and therefore, destruction of) records collected under the Regulation.

(ii) Commentary and Explanation:

As long as information is lawfully collected for a law enforcement purpose, it can and should be stored for this use. If there is to be a restriction on the use of these records, it should be defined as an access restriction rather than a requirement for destruction. Access to the information must be permitted for the purposes of defending a lawsuit or other complaint as well as for the purpose of inculpating or exculpating a party with respect to a criminal offence.

In addition, gangs and organized crime members may cycle in and out of criminal activities (sometimes due to the rise and fall of the power of the organization or members serving time in prison). Therefore, historical intelligence data may become key again even after the passage of several years.

Pursuant to section 255(6) of *Municipal Act, 2001*, Police Services Boards do not have authority over records relating to any law enforcement activity with respect to a person or body. That is why this Ministry has an Adequacy Standard that requires a Chief to have a records retention procedure. Therefore, paragraphs 11(1) 6 and 7 of the Regulation are inconsistent with the *Municipal Act, 2001*.

There is a real concern with the destruction any of records that could or have formed the basis of a prosecution (spoliation). This is something a Board (or the Ministry) should not prescriptively deal with or at all.
It should also be clear that none of the information captured in a street check will ever be used or disclosed in a Police Record Check.

(d) <u>Training</u>

As noted above, the OACP supports training. Training on this very complicated Regulation should be consistent across the Province.

If the Regulation is going to deal with training requirements, this training should begin for recruits at the Ontario Police College (OPC) to ensure high quality and consistent training across the Province. This training should then be updated regularly for all officers in a standardized format.
In short, the Province should develop, in consultation with the OPC, standardized training for all police officers in order to ensure consistency and clear expectations. This would be in keeping with Minister Naqvi's statement to the legislature on October 29th, 2015. As such in that regard, the Regulation should be simplified.

(i) Amendment

Regulation 36/02 of the Act, "Courses of Training for Members of Police Services", should be amended to include the content of section 10(2) but assigned to the Ontario Police College as part of recruit training.

Section 10 (1) and (2) should be amended to provide:

> 10 (1) A chief of police shall ensure that every police officer on his or her police force who attempts to collect identifying information about an individual from the individual has successfully completed the training provided by the Ontario Police College within the previous 36 months.
>
> (2) The training referred to in subsection (1) shall be consistent with that required by Regulation 36/02 of this Act and may be provided in person or through on-line learning modules.

(ii) Commentary and Explanation:

See above and submission regarding cost implications (this would somewhat reduce those costs).

e) <u>Other – Board/Ministry Policies and Their Role</u>

(i) Amendment

Delete paragraphs 11(1) 1, 2, 4, 6 and 8 (or the entire subsection if the other amendments/deletion mentioned herein are made).

Delete subsection 11(2) and (3).

(ii) Commentary and Explanation:

The provisions that deal with Board Policies and Chief Procedures (sections 11 and 12) should first and arguably be dealt with by way of Adequacy Standards, not in a Regulation.
Secondly and as the Regulation is currently drafted (and subject to the deletion of the provision as it relates to retention of records - above), there is little to no room for expansion on the paragraphs set out in subsection 11(1). Everything is already prescribed with sufficient specificity in the Regulation.

IV. SPECIFIC COMMENTS ON DRAFT REGULATION – Section-by-Section

Please see comments immediately under the provisions and in red

Collection of Identifying Information in Certain Circumstances-
Prohibition and Duties
PART I
APPLICATION AND INTERPRETATION

Application — attempts to collect

1. (1) This Regulation applies with respect to an attempt by a police officer to collect identifying information about an individual from the individual, if that attempt is done in the course of,

- "Attempts to collect" should be deleted and replaced with "collects identifying information". Practically, attempts to collect will require a second database and does not serve the overreaching intent of regulating Street Checks – especially, if rights are mandated as drafted. The attempt will be recorded solely based on officer perceptions and undermines the goal of allowing an individual to exercise their right to "walk away" and/or not provide any information to the police in these encounters. It also will leave those persons stopped with the real perception that notwithstanding their exercise of their rights, they are being recorded and entered into a police database. Furthermore, it is an interaction that is impossible to consistently govern and/or provide reliable, empirical data.

(a) conducting a general investigation into offences that might be committed in the future if there are no specifics regarding those offences;

- This provision is vague and overly broad. We read this to mean that officers must by default comply with the Regulation if engaged in general crime prevention activities.

(b) gathering information, for criminal intelligence purposes, about individuals known or reasonably suspected to be engaged in illegal activities;

- This will include intelligence activities which the Courts have already established that police are entitled to conduct. This provision restricts the manner in which officers would gather information about the possible associates of known or suspected criminals. This activity should be moved to the list of exempt activities set out in subsection 1(2).

(c) implementing programs to raise awareness of the presence of police in the community; or

- This does not seem broad enough to capture community outreach initiatives such as community safety officers, at risk children programs, school resource officers, etc. It should be expanded or clarified.

(d) inquiring into suspicious activities for the purpose of detecting illegal activities.

- Suspicious activities should trigger police interaction as a function of our common law duty and statutory duty to engage in crime prevention. This activity should be moved to the list of exempt activities set out in subsection 1(2).

(2) This Regulation does not apply with respect to an attempt by a police officer to collect identifying information from an individual if,

(a) the individual is legally required to provide the information to a police officer;

(b) the individual is under arrest or is being detained;

(c) the officer is engaged in a covert operation;

- "Covert operation" ought to be a defined term.
- Remove "an attempt by a police officer" and replace with "interactions with a police officer".

(d) the officer is investigating a particular offence;

- Does "investigating a particular offence" mean investigating an offence in general or an incident(s) of a particular offence? This is an important distinction in relation to the interpretation/application of the rest of the Regulation and confusion that it may cause as it relates to lawful investigative detention which case law has developed to mean "an" offence.

(e) the officer is executing a warrant, acting pursuant to a court order or performing related duties;

(f) the attempted collection is made in an informal or casual interaction and the officer has no intention, at the time of the attempted collection, of recording the information; or

- Amend "the attempted collection" to "the actual or attempted collection" (both times).

(g) the individual from whom the officer attempts to collect information is employed in the administration of justice or is carrying out duties or providing services that are otherwise relevant to the carrying out of the officer's duties.

- See above additions and amendments if this is not deleted, as recommended.

Application — information collected

2. (1) This Regulation applies with respect to identifying information collected on or after July 1, 2016 as a result of an attempt to collect to which this Regulation applies.

- Remove "an attempt to collect" and replace with "interactions with a police officer".

(2) This Regulation applies with respect to identifying information that was collected before July 1, 2016 only as provided under paragraph 7 of subsection 11 (1) and under subsection 12 (1) in relation to that paragraph.

- The requirement to comply with the Regulation for information collected before July 1, 2016 will create an issue for retention and access to "suspicious person" reports that are currently being submitted. There may or may not be a significant administrative burden to identify and restrict those records, but police services may lose valuable investigative information for this period of time. If the Province continues down this avenue, there should be clear direction and/or criteria as to the permitted retention of this data rather than leaving it to the Police Service Boards to create policy.

Interpretation — attempt to collect identifying information

3. (1) For the purposes of this Regulation, an attempt to collect identifying information about an individual from the individual is an attempt to collect identifying information by asking the individual, in a face to face encounter, to identify himself or herself or to provide information for the purpose of identifying the individual and includes such an attempt whether or not identifying information is collected.

(2) For greater certainty, photographing or recording an individual is not an attempt to collect identifying information from the individual for the purposes of this Regulation.

- Delete subsection (1) and amended subsection (2) so that "not an attempt to collect identifying information from the individual" is replaced with "not an interaction with a police officer".

PART II
PROHIBITION — CERTAIN COLLECTIONS OF INFORMATION

Limitations on collection of certain information

4. (1) A police officer shall not attempt to collect identifying information about an individual from the individual if,

(a) any part of the reason for the attempted collection is that the officer perceives the individual to be within a particular racialized group unless,

(i) the officer is seeking a particular individual in the course of doing anything set out in subparagraph 1 i or ii of subsection (2), and

- This provision is highly restrictive and unreasonable. If the justification for the stop is intelligence gathering or inquiring into suspicious activity, how can you limit an inquiry to only those circumstances where an officer is seeking a particular individual?

(ii) being within the racialized group forms part of a credible description of the particular individual or is evident from a visual representation of the particular individual; or

- We think we understand the intent, but as written, the question, what is "a credible description" will arise.

(b) the attempted collection is done in an arbitrary way.

- Agreed.

(2) For the purpose of clause (1) (b), an attempted collection by a police officer from an individual is done in an arbitrary way unless the officer has a reason that the officer can articulate that complies with all of the following:

1. The reason includes details about the individual that cause the officer to believe that identifying the individual may be relevant to,

    i. gathering information, for criminal intelligence purposes, about individuals known or reasonably suspected to be engaged in illegal activities; or

    ii. inquiring into suspicious activities for the purpose of detecting illegal activities.

2. The reason does not include either of the following:

    i. that the individual has declined to answer a question from the officer which the individual is not legally required to answer, or

    ii. that the individual has attempted or is attempting to discontinue interaction with the officer in circumstances in which the individual has the legal right to do so.

3. The reason is not only that the individual is present in a high crime neighbourhood.

- This provision is vague and somewhat counter-intuitive. What is a "high crime neighbourhood"? How this term is defined or interpreted will differ from jurisdiction to jurisdiction and from time to time. The gathering of information for criminal intelligence purposes about individuals known or reasonably suspected to be engaged in illegal activities will often occur in high crime areas. Does this mean that if an officer sees a suspicious person in a high crime area, he/she must articulate grounds that are more fulsome than if a suspicious individual is seen a low crime area?

PART III
DUTIES RELATING TO COLLECTIONS OF INFORMATION
OFFICER DUTIES WHEN ATTEMPTING TO COLLECT INFORMATION

Duties to inform when attempting to collect information

5. (1) A police officer who attempts to collect identifying information about an individual from the individual shall, as required under the procedures developed under section 12,

(a) inform the individual that he or she is not required to remain in the presence of the officer; and

(b) inform the individual why the information is being collected.

- See above submissions regarding necessary amendments.

(2) A police officer is not required to inform the individual under a clause of subsection (1) if the officer has a reason, which he or she can articulate and that includes details relating to the particular circumstances, to believe that informing the individual under that clause,

(a) would likely compromise a police investigation of a particular offence;

- The "investigation of a particular offence" by the officer exempts the interaction from the Regulation under subsection 1(2). So... why is this provision included under the duty to inform?

(b) would likely allow a confidential informant to be identified; or

(c) might compromise the safety of an individual.

- Regarding these subsections, see our comments under subsection 1(2) and comments under III. Solutions – Required Amendments (above).

Document for individual

6. A police officer who attempts to collect identifying information about an individual from the individual shall, unless it would be unreasonable in the circumstances to do so, give the individual a document that contains at least the following information:

- Delete “attempts to collect” and replace with “collects” (same for the rest of this section)

1. The officer’s name and officer identification number and the date, time and location of the attempted collection.

2. Information about how to contact the Independent Police Review Director.

    - We disagree with the requirement to provide information on how to contact the OIPRD. This type of interaction is far less intrusive that issuing a PON or a Form 9. Reference to a public complaint process on the “receipt” to the interaction will encourage vexatious and frivolous complaints against the officer and/or his or her Service. The OIPRD will certainly have to engage more staff to screen complaints. At what cost?

3. An explanation that the individual can request access to information about himself or herself that is in the custody or under the control of a police force, under the *Municipal Freedom of Information and Protection of Privacy Act* in the case of a municipal police force, or under the *Freedom of Information and Protection of Privacy Act* in the case of the Ontario Provincial Police, and information about how to contact persons to whom such a request may be given.

    - Given the vetting of information under MFIPPA/ FIPPA to comply with the exemptions and prohibitions governing access under the legislation, is there any benefit to this provision? If the personal information of the requestor is the only information released, will this provision become moot in its intended effect?

Police officer must record reason and other information

7. A police officer who attempts to collect identifying information about an individual from the individual shall record the following:

1. The officer’s reason required under section 4, including the details referred to in paragraph 1 of subsection 4 (2).

2. Whether the individual was informed as required under subsection 5 (1) and, if informing the individual under clause 5 (1) (b) was not required under subsection 5 (2), the reasons why that was not required.

3. Whether the individual was given a document referred to in section 6.

4. Such other information as the chief of police requires the officer to record.

   - If an individual refuses to provide information to an officer, how is this interaction recorded? As noted above, delete "attempts to collect" and replace with "collects"

INCLUSION OF COLLECTED INFORMATION IN POLICE DATABASES

Collected information in police databases

8. (1) This section applies with respect to the inclusion, in databases under the control of a police force, of identifying information about an individual collected by a police officer from the individual.

- The scope of this provision should be clarified. We assume this references only the identifying information collected in accordance with the Regulation and not all identifying information collected by the police service under different circumstances.

(2) The chief of police shall ensure that the requirements under this section are complied with.

(3) Access to identifying information shall be restricted in accordance with subsection (7) unless the information may be included, under this section, without limiting the access of members of the police force

(4) Identifying information may be included in a database without limiting the access of members of the police force if,

(a) a person designated by the chief of police has reviewed the information, as well as the officer's reason required under section 4 (including the details referred to in paragraph 1 of subsection 4 (2)), and has determined that the officer appears to have had a reason that met the requirements of section 4; or

(b) the database indicates that a review and determination described in clause (a) has not been done for the information.

(5) The following apply with respect to the review and determination described in clause (4) (a):

1. The review and determination shall be done within 30 days after the information was first entered into a database under the control of the police force and the indication required under clause (4) (b) shall be retained until that review and determination has been done.

2. If it is determined that the officer does not appear to have had a reason that met the requirements of section 4, the identifying information shall be retained, subject to the procedures developed under section 12 in relation to paragraph 6 of subsection 11 (1), in a database under the control of the police force but access to such retained information shall be restricted in accordance with subsection (7).

(6) Access to identifying information shall be restricted in accordance with subsection (7) after the fifth anniversary of the date on which the information was first entered into a database under the control of the police force.

(7) The following apply with respect to identifying information to which access must be restricted:

1. No person may access the information without the permission of the chief of police.
2. A chief of police may permit members of his or her police force to access the information only if the chief of police is satisfied that access is needed,

    i. for the purpose of an active police investigation,

    ii. in connection with legal proceedings or anticipated legal proceedings,

    iii. in order to prepare a report relating to the provision of police services, which will not identify the individuals from whom the information was collected,

    iv. for the purpose of complying with a legal requirement, or

    v. for the purpose of evaluating a police officer's performance.

    - Subsection (7) v. should also include "…or investigating misconduct or unsatisfactory work performance under Part V of the Act."

RESTRICTIONS ON PERFORMANCE TARGETS

Performance targets not to be used in evaluating work performance

9. A chief of police shall ensure that no performance target based on any of the following factors is used to evaluate the work performance of a police officer on his or her force:

1. The number of times, within a particular period, that the officer collects or attempts to collect identifying information about individuals from the individuals.
2. The number of individuals from whom the officer collects or attempts to collect identifying information within a particular period.

- We agree that the number of contacts made under the terms of this Regulation should not be used for the purposes of evaluating performance.

PART IV
OTHER MATTERS

TRAINING

Chiefs of police must ensure training

10. (1) A chief of police shall ensure that every police officer on his or her police force who attempts to collect identifying information about an individual from the individual has successfully completed the training described in subsection (2) within the previous 36 months.

(2) The training referred to in subsection (1) is training that includes, at a minimum, training on the following topics:

1. The right of an individual not to provide information to a police officer, the limitations on this right and how to ensure that this right is respected.
2. The right of an individual to discontinue an interaction with a police officer, the limitations on this right and how to avoid unlawfully psychologically detaining an individual.
3. Bias awareness, discrimination and racism and how to avoid bias, discrimination and racism when providing police services.
4. The rights that individuals have to access information about themselves that is in the custody, or under the control, of a police force.
5. The initiation of interactions with members of the public.

POLICIES AND PROCEDURES

Boards and Minister must develop policies

11. (1) A board shall develop policies regarding the following matters:

1. Attempts by police officers to collect identifying information about individuals from the individuals.
2. The informing of individuals, by police officers, as required under subsection 5 (1).
3. The document to be given to individuals under section 6.

4. The entry of identifying information about individuals collected by police officers from the individuals into databases under the control of a police force.
5. The training referred to in section 10.
6. The retention of, access to, and disclosure of identifying information collected on or after July 1, 2016, including the retention of identifying information collected contrary to this Regulation.
7. The retention of, access to, and disclosure of identifying information collected before July 1, 2016 with respect to which this Regulation would have applied had the collection taken place on July 1, 2016.

(2) The policy developed under paragraph 6 of subsection (1) shall provide that identifying information collected contrary to this Regulation shall not be retained longer than is reasonably necessary,

(a) to comply with the reporting requirements under section 13; or

(b) in connection with legal proceedings or anticipated legal proceedings, including to comply with disclosure obligations in relation to the prosecution of offences.

(3) The duties imposed by subsections (1) and (2) on boards in relation to municipal police forces apply to the Minister of Community Safety and Correctional Services in relation to the Ontario Provincial Police.

(4) The policies developed under this section shall be consistent with this Regulation.

Chiefs of police must develop procedures

12. (1) A chief of police shall develop procedures regarding the matters set out in subsection 11 (1).

(2) The procedures developed under subsection (1) shall be consistent with this Regulation and the relevant policies developed under section 11.

REPORTS, REVIEWS AND COMPLIANCE

Annual report

13. (1) This section applies to,

(a) an annual report provided by a municipal chief of police to a board under section 31 of Ontario Regulation 3/99 (Adequacy and Effectiveness of Police Services) made under the Act; and

(b) the annual report provided by the Commissioner under subsection 17 (4) of the Act.

(2) A chief of police shall ensure that his or her annual report includes the following information in relation to attempted collections of identifying information:

1. The number of attempted collections.

2. The number of individuals from whom collections were attempted.

    - Are not 1. and 2. the same thing? Delete both.

3. The number of times subsection 5 (2) was relied upon by a police officer to not inform an individual as would otherwise be required under subsection 5 (1).

4. The number of attempted collections from individuals who are perceived, by a police officer, to be within the following groups based on the sex of the individual:

    i. male individuals, and

    ii. female individuals.

    - Delete "attempted collections" and replace with "collections".

    - The use of the term "perceived" in this section is fraught with potential pitfalls, especially if the criteria to determine age, race or sex are not standardized across the province.

5. For each age group established by the chief of police for the purpose of this paragraph, the number of attempted collections from individuals who are perceived, by a police officer, to be within that age group.

    - Delete "attempted collections" and replace with "collections".

6. For each racialized group established by the chief of police for the purpose of this paragraph, the number of attempted collections from individuals who are perceived, by a police officer, to be within that racialized group.

    - Delete "attempted collections" and replace with "collections".

7. A statement, based on an analysis of the information provided under this subsection, as to whether the collections were attempted disproportionately from individuals within a group based on the sex of the individual, a particular age or racialized group, or a combination of groups and if so, any additional information that the chief of police considers relevant to explain the disproportionate attempted collections.

- Delete “attempted collections” and replace with “collections”.

8. The neighbourhoods or areas where collections were attempted and the number of attempted collections in each neighbourhood or area.

    - What is a “neighbourhood or areas”? There should be consistent criteria to define a “neighbourhood or areas” that can be applied across the province.

    - Delete “attempted collections” and replace with “collections”.

9. The number of determinations, as described in clause 8 (4) (a), that a police officer did not appear to have had a reason that met the requirements of section 4.

10. The number of times members of the police force were permitted under subsection 8 (7) to access identifying information to which access must be restricted.

(3) A Chief of Police shall establish age groups for the purpose of paragraph 5 of subsection (2).

(4) A chief of police shall establish racialized groups for the purpose of paragraph 6 of subsection (2) and shall do so in a way that allows the information required by subsection (2) relating to the racialized groups to be comparable to the data referred to in the following paragraphs, as released by the Government of Canada on the basis of its most recent National Household Survey preceding the period covered by the chief of police’s annual report:

- There are obvious issues that arise with respect to accuracy and reliability when data against which results are measured is not current, and changes occur in the make-up of a community between Surveys. **In addition, are we racializing a process that should not be and in most cases, was not?**

1. For each derived visible minority group set out in the National Household Survey, the number of individuals who identified themselves as being within that group.
    - This seems to imply that the police will be asking individuals to identify themselves as being within a visible minority group. Is this the intent given that (2) 6 speaks to officer perceptions of being in a racialized group? If so, will there be protection against complaints for asking the question and/or will it lead to a perception that the stop WAS related to their status within the group?

2. The number of individuals who claimed Aboriginal identity.

(5) This section does not require the inclusion of information about anything that occurred before July 1, 2016.

Chiefs of police must review practices and report

14. (1) If an annual report referred to in section 13 reveals that identifying information was attempted to be collected disproportionately from individuals perceived to be within a group, the chief of police shall review the practices of his or her police force and shall prepare a report setting out the results of the review and his or her proposals, if any, to address the disproportionate attempted collection of information.

- How is "proportion" or "disproportion" to be determined in relation to data collected regarding individuals who are stopped to be identified in accordance with the Regulation but do not live within the jurisdiction?
- Delete "attempted to be collected" and replace with "collected" and delete "disproportionate attempted collection" with disproportionate collection".

(2) A municipal chief of police shall provide his or her report to the relevant board, and the Commissioner shall provide his or her report to the Minister of Community Safety and Correctional Services.

(3) When a board receives a report from a municipal chief of police under subsection (2), and when the Minister of Community Safety and Correctional Services receives a report from the Commissioner under subsection (2), the board or the Minister, as the case may be,

(a) shall publish the report on the Internet in a manner that makes it available to the public free of charge; and

(b) may make the report available to the public free of charge in any other manner that the board or the Minister, as the case may be, considers appropriate.

Chiefs of police must make records available

15. (1) For the purpose of carrying out a duty, or exercising a power, under clause 3 (2) (b), (d), (e) or (h) of the Act, the Minister of Community Safety and Correctional Services may request a chief of police to make available to an employee in the ministry, within the period specified in the request, any record that is relevant to that duty or power and is in the possession or under the control of the chief of police's police force.

(2) A chief of police shall comply with a request made under subsection (1).

Review of Part III

16. The Minister of Community Safety and Correctional Services shall ensure that a review of Part III is conducted and that a report on the findings of the review is published no later than July 1, 2021.

- Should this provision specifically provide for stakeholder consultation in a timely manner and with the benefit of all the data collected across the Province?

V. SPECIFIC COMMENTS on Proposed Amendments to the Schedule to O.Reg. 268/10 (*Code of Conduct*) – Section-by-Section

1. (1) Clause 2 (1) (g) of the Schedule to Ontario Regulation 268/10 is amended by striking out "or" at the end of subclause (i) and by adding the following subclause:

    (i.1) without good and sufficient cause makes an unlawful or unnecessary physical or psychological detention,

    (2) Clause 2 (1) (g) of the Schedule to the Regulation is amended by adding "or" at the end of subclause (ii) and by adding the following subclause:

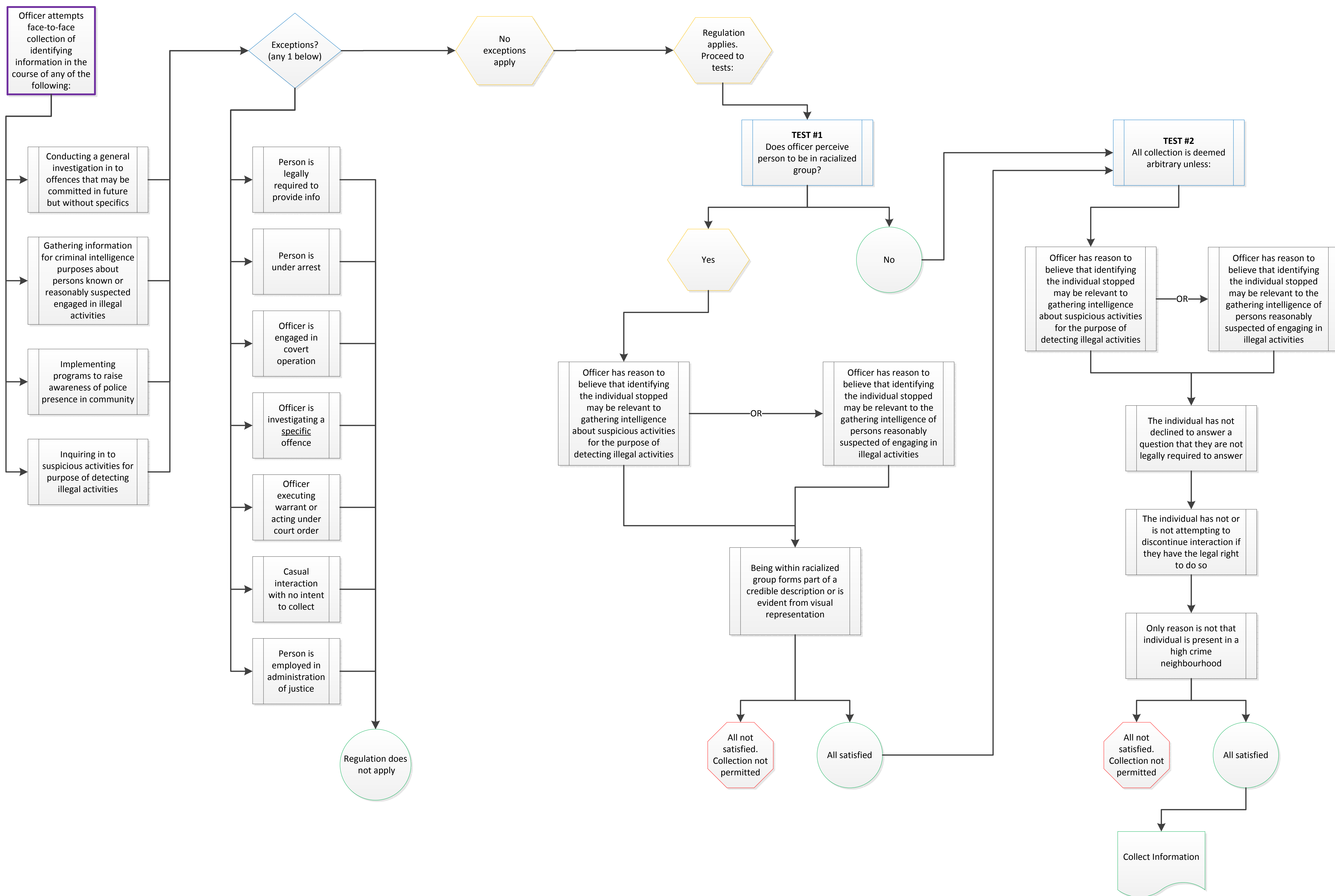
    (iii) collects or attempts to collect identifying information about an individual from the individual in the circumstances to which Ontario Regulation **[insert O. Reg. number]** (Collection of Identifying Information in Certain Circumstances – Prohibition and Duties) made under the Act applies, other than as permitted by that regulation;

    - As set out at the outset, the new *Code of Conduct* offences seem redundant.
    - The first offence would clearly fall within the definition of discreditable conduct, as an arbitrary stop would contravene the primary regulation (as well as potentially the Charter and the common law) – as well, it is overly broad in that it includes detentions beyond Street Checks and "without good and sufficient cause" is ambiguous and invites unintended complaints
    - The second offence really amounts to either neglect of duty or a performance issue that could be dealt with outside of the scope of Part V of the PSA – regardless, attempts should be removed.

Police officers who act in a manner inconsistent with the *Ontario Human Rights Code,* Service values, or expected professional behaviour, would clearly be seen as breaching the Code of Conduct as currently drafted; specifically, neglect of duty or discreditable conduct. Further, police services have a number of procedures governing expected behaviour of officers as it relates to many operational matters, including conducting street interview and bias neutral/free policing.

An officer's failure to adhere to Service procedures would also be a breach of the Code of Conduct, in that; it would be an act of insubordination**.** Accordingly, the addition of offences to the Code of Conduct specific to police-public interaction is unnecessary. **More importantly, it brings all potential community interaction and legitimate street check interactions AND investigative detentions under a presumptive misconduct lens and expectations.**

As a result, it is recommended that the amendment to the Code of Conduct be abandoned.



Proposed Requirements
Street Check Regulations

November 2015