

A CAUTIOUS WAY FORWARD:

Fairness Principles for Public Service Providers Regarding the Use of COVID-19 Vaccine Certification



As an independent officer of the Legislature, the Ombudsperson investigates complaints of unfair or unreasonable treatment by provincial and local public authorities and provides general oversight of the administrative fairness of government processes under the *Ombudsperson Act*. The Ombudsperson conducts three types of investigations: investigations into individual complaints; investigations that are commenced on the Ombudsperson's own initiative; and investigations referred to the Ombudsperson by the Legislative Assembly or one of its Committees.

The Ombudsperson has a broad mandate to investigate complaints involving provincial ministries; provincial boards and commissions; Crown corporations; local governments; health authorities; colleges and universities; schools and school boards; and self-regulating professions and occupations. A full list of authorities can be found in the *Ombudsperson Act*. The Office of the Ombudsperson responds to approximately 8,000 enquiries and complaints annually.

Under the *Public Interest Disclosure Act* the Ombudsperson investigates allegations of wrongdoing from public employees in or relating to a public body covered by the Act as well as allegations of reprisal.

Our Consultation and Training Team offers educational webinars, workshops and individual consultation with public organizations to support fairness and continuous improvement across the public sector.

For more information about the B.C. Office of the Ombudsperson and for copies of published reports, visit www.bcombudsperson.ca.



OMBUDSPERSON
BRITISH COLUMBIA

May 2021

The Honourable Raj Chouhan
Speaker of the Legislative Assembly
Parliament Buildings
Victoria BC V8V 1X4

Dear Mr. Speaker,

It is my pleasure to present the Ombudsperson's Special Report No. 47, *A Cautious Way Forward: Fairness Principles for Public Service Providers Regarding the Use of COVID-19 Vaccine Certification*.

The report is presented pursuant to section 31(3) of the *Ombudsperson Act*.

Yours sincerely,

Jay Chalke
Ombudsperson
Province of British Columbia

FROM THE OMBUDSPERSON

Life saving COVID-19 vaccinations continue to be administered globally and while significant challenges presented by the pandemic continue, optimism for a return to normalcy is cautiously taking hold in Canada. With that optimism, questions are emerging about if, how, and when proof of vaccination may be required as we resume our pre-pandemic lives. Those questions are raising privacy and human rights concerns. And for the Canadian Council of Parliamentary Ombudsmen (CCPO), a network of provincial and territorial parliamentary Ombudsmen across Canada, the potential use of vaccination certification by public bodies is raising fairness concerns.

Vaccination certification schemes are being contemplated and, in some cases, implemented in many jurisdictions around the globe with “vaccine passports” now being developed most notably for international travel.

However, what if the idea of vaccine passports is extended to apply to people when they’re receiving domestic *public* services in British Columbia – visiting a public library for example, going to a local recreation centre, attending a municipal public meeting, visiting a provincial government office? Governments and their public bodies have relationships with the public that differ from the private sector. Often governments deliver services that are, by their nature, monopolies. This means governments have to serve everyone. The public can’t select a competitor to receive a driver’s licence, to obtain compensation for a workplace injury or to report to a probation officer to name just a few examples. Accordingly, governments are under a special obligation to ensure that services are reasonably accessible to everyone. This is why it is imperative for caution to be exercised before distinctions in public services are made based on COVID-19 vaccination status.



Given this context, CCPO has released a guidance document on this issue. *Fairness Principles for Public Service Providers Regarding the Use of COVID-19 Vaccine Certification* sets out our collective perspective on vaccine certification in the delivery of public services. While vaccination certification is not currently being used in relation to public service delivery, this guidance document serves to emphasize that should these schemes be more widely implemented, fairness must be a central feature in their design and implementation. The principles do not go so far as to suggest an absolute prohibition on public bodies utilizing vaccine certification; but they do suggest a cautious approach be taken and that the risks of unfair outcomes be considered. If a certification scheme is to be adopted, the guidelines set out a number of steps to mitigate the risks of unfairness.

The principles set out in the CCPO document are ones we apply in our work all of the time but are particularly important when programs are new, untested and in this case unprecedented. They include important pillars of democracy such as the necessity for any vaccination certification scheme to be transparent, to be rooted in sound policy or robust legislation, to be equitable and accessible, to have built-in review and appeal mechanisms, to be clearly communicated to the public and to be subject to external oversight, to name a few.

The CCPO document benefitted from input from Ombuds colleagues worldwide and it discusses the importance of these and additional fairness principles in detail. In developing this guidance, Ombuds in Canada’s provinces and territories have an express goal of providing proactive advice rooted in decades

of administrative expertise that may serve to prevent unfairness from occurring if vaccination certification schemes are ultimately applied to public services.

This document is the latest in our office's efforts to provide proactive best practice guides to public bodies that have the purpose of reducing the risk of unfairness arising in the first place. And while the advice applies to all public bodies, we have been advised that such guidance is particularly helpful to smaller public bodies who may have fewer operational policy resources.

Thank you to provincial and territorial Ombuds across Canada and to our Public Authority Consultation and Training Team for its work in developing this document. And thank you to British Columbia's public bodies who I know will carefully consider the guidance provided as they seek to deliver their services fairly during this unprecedented time.

A handwritten signature in blue ink, appearing to read 'Jay Chalke', with a stylized, cursive script.

Jay Chalke
Ombudsperson
Province of British Columbia

Fairness Principles for Public Service Providers Regarding the Use of COVID-19 Vaccine Certification

MAY 2021



Canadian Council of
Parliamentary Ombudsman

Conseil canadien des
ombudsmans parlementaires

These guidelines are intended for:

- ✓ Provincial/territorial governments
- ✓ Other public bodies under the jurisdiction of the Ombudsman

These guidelines are not intended for:

- × Federal government
- × Indigenous governments
- × International travel procedures
- × Private sector

These guidelines are directed to public organizations and are not intended to replace public health guidance.





Governments around the world are considering, or are currently in the process of implementing, vaccine passports or certificates¹ to allow individuals to prove vaccination against COVID-19 and gain access to certain services. Should municipal or provincial/territorial governments in Canada decide to implement vaccine certificates or passports to allow access to public services, the following principles are offered to help guide public sector organizations to proactively ensure fairness in their application. As a basic premise, and in keeping with the principles of administrative fairness, there should be no oppressive or unreasonable barriers to accessing services offered by provincial/territorial and municipal governments based on a person's vaccination status; government and other public services must be accessible to all.

These administrative fairness principles have been developed by the Canadian Council of Parliamentary Ombudsman (CCPO). The CCPO is comprised of provincial and territorial Ombudsmen, whose mandate is to ensure people are treated fairly in the delivery of public services. By following these fairness principles, those who deliver public services are more likely to achieve fair administration in the use of vaccine certification should it be introduced in Canada.

¹ Vaccine passport is the common term used to describe the process for proving vaccination status and confirming immunity against communicable diseases such as COVID-19. Other names for such certification may be used in different jurisdictions, such as vaccination certificate, immunity passport, or digital proof of vaccination.

1. If vaccine certificates or passports are implemented in Canadian provinces and territories, governments must provide clear direction on their application and use to all entities providing services to the public, either via legislation or publicly available policy.

Decisions to restrict an individual's access² to services based on vaccination status must be made fairly and consistently by public service providers. As such, if an individual's vaccination status is considered relevant to the receipt of public services, it is critical that government provide clear guidance to decision makers through legislation or policy in order to prevent arbitrary, unlawful, unjust, or unreasonable decisions from being made. The criteria for obtaining such vaccine certification must be clearly established in such legislation or policy, communicated to the public, evidence-based, and subject to review or appeal. Provincial or territorial governments may create this legal or policy framework for the use of vaccine certificates or passports, but, in the interests of policy consistency, any such policy should apply to the broader public sector.

2. Government policy regarding the use of vaccination certificates or passports must be evidence-informed and subject to regular review.

Because the scientific and medical evidence for each COVID-19 vaccine continues to evolve, and the duration of protective immunity and vaccine efficacy remains uncertain at this time, public organizations must make decisions regarding the ongoing requirement for vaccination status based on current advice from appropriate public health officials and the associated scientific data. There should be a continuous assessment of whether there continues to be risk of transmission by those who have been vaccinated – and if so, an explanation of the rationale for continued use of such vaccine certificates or passports. Until further information is available and public health restrictions are lifted or loosened, public organizations should consider whether they can continue to provide adequate services using the same methods employed throughout the pandemic (such as through telephone and online delivery) with no disruption in service delivery.

² The term "access" used throughout this document refers specifically to *in-person* access to public services delivered by municipal, provincial and territorial governments in Canada. Remote access to these services should not be affected in any way by a person's COVID-19 vaccination status.

3. Determining access to public services based on vaccination status cannot be contrary to the pre-existing laws of the relevant jurisdiction.

The unprecedented global pandemic cannot allow the lessening of legal frameworks in place that serve to protect individuals, such as privacy and human rights law. These laws must be considered when deciding whether to require proof of vaccination for access to a public service, and adequate consultation with relevant stakeholders and regulators should be conducted in each jurisdiction.

4. If introduced, vaccine certification must be made available in a way that is equitable and accessible to everyone.

While digital technology such as smart phones may be able to provide some individuals with immediate access to their personal health information (including their immunization records), this information must be made accessible in multiple ways. This means ensuring that there are alternative methods, such as paper records, for individuals to prove they have been fully vaccinated against COVID-19 and pose a reduced risk

to public health. In addition, if tests for COVID-19 will be required to gain in-person access to a public service, these tests must be free, easily accessible and available to all those who may require them in the pursuit of receiving such service.

5. Requirements to disclose vaccination status in order to access public services must be proportionate to the type of service being provided, the associated risk to individuals and the risk posed to public health.

The decision to require vaccination status prior to receiving a public service must be proportionate to the nature of the service being provided and the risk of transmission of the COVID-19 virus. Similarly, where restrictions on an individual's liberty have been imposed based on their vaccination status (such as self-isolation requirements for inmates upon admission to a correctional centre), these must also be proportionate to the level of risk involved and reviewed regularly to determine whether or not they continue to be necessary, as they could be viewed as arbitrary and unfair.

6. Accommodations must be made for those who have not received the vaccine.

There are many individuals who may not be able to receive the COVID-19 vaccine (including as a result of the phased roll-out) and there are also those who will choose not to receive the vaccine. In these circumstances, public services should not be restricted on the basis of vaccination status. Instead, reasonable accommodations must be made for those individuals to receive services, and alternative methods of service delivery should be available to them.

7. Public organizations should provide clear guidance to their staff to assist them in making and communicating decisions to limit access to services based on vaccination status.

Decisions about limiting access to public services can be complex and challenging for front-line staff, particularly in the rapidly changing situation of the pandemic. Organizations should provide proper guidance to their staff to help them exercise discretion fairly and allow for some flexibility and accommodations to be made to

standard policy. This guidance should ideally include information about the factors to consider when making accommodations, any limits to their discretion in determining such exceptions to the rule, and contact information for a resource within the organization where front-line staff can obtain further assistance or advice.

8. Decisions about restricting access to a service based on a person's vaccination status must be done in a transparent, procedurally fair manner and be clearly communicated to the affected person in an accessible way.

Individuals who are denied service or have limited access based on their vaccination status must have the ability to communicate with a representative of the service provider to discuss the matter and communicate their concerns. To facilitate this, adequate notice about the requirement to disclose vaccination status to access the service must be provided to the individual in advance. This notice should contain:

- clear reasons for the requirement to disclose vaccination status;
- the criteria used to make the decision that led to the requirement;

- the consequences for declining to provide information about vaccination status;
- information about how to access the service without disclosing vaccination status; and
- the name or title of a contact person at the organization who can answer questions and address any concerns about the requirement.

In addition, general policy regarding any requirements to prove vaccination status in order to access a service should be made publicly available on the organization's website.

9. When decisions are made to deny or limit public services to those who may not be able to prove vaccination status, they must be informed of their right to appeal and be provided with information about the appeal process available.

Decisions to limit or restrict services can have a significant negative impact on individuals. As such, procedural fairness also requires that those who suffer such an impact be informed of their right to appeal to the service provider for an exception to the proof of vaccination requirement based on their individual circumstances. Any decision made on appeal must provide

clear and meaningful reasons to the affected individual.

10. If vaccine certificates or passports are implemented, government must ensure that independent oversight is in place.

Independent oversight of government is an essential aspect of Canada's democratic system. Particularly in times of significant and constant change, and when governments are taking such extraordinary steps to protect the health of individuals, oversight of government decisions is needed to ensure that government is accountable to the public it serves. Furthermore, should vaccine certification be introduced in Canada, municipal, provincial and territorial governments would benefit from proactive engagement with oversight bodies such as the Ombudsman. The members of the CCPO welcome the opportunity to consult with government to proactively identify fairness issues that may arise should vaccine certification be introduced in Canadian provincial/territorial jurisdictions. Governments may also reference, and find useful, the Fairness by Design self-assessment guide created by the CCPO for public organizations to proactively evaluate the fairness of their programs and policies.



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