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Publisher of *The Public Record Research System (PRRS)*®

Richard A. Hertling
Deputy Assistant Attorney General, Office of Legal Policy
4234 Robert F Kennedy Building, 950 Pennsylvania Ave NW
Washington DC 20530

June 27, 2005

RE: OLP Docket No. 100

Dear Mr. Hertling,

Thank you for allowing me to respond on the above mentioned Request for Comments. My interest comes not as one who performs criminal record checks, but rather as an expert on the policies and procedures associated with accessing criminal record information in the U.S. On an ongoing basis, BRB Publications monitors the 7,000+ government agencies in the U.S. regarding the collection of their criminal record databases and how the records may be accessed by non-criminal justice entities. The enclosed books, which are complimentary references that should be useful for creating your report, indicate the extent of our knowledge and expertise.

I will be brief and to the point. In their present condition, the criminal record databases and indices maintained by the FBI are inaccurate and incomplete. If the private sector employers were to use the FBI as the primary source to do criminal record checks for hiring or background checking, the employers could be in violation of the Federal laws, and State laws, and be inundated with negligent hiring lawsuits.

Consider the following facts:

1. 94% of criminal records are convictions from cases tried in the states' trial courts. The criminal case information the FBI collects from these non-federal courts is predominantly arrest-related. There is no procedure that mandates the adjudicating jurisdiction to report the disposition of crimes¹. This is an important issue to employers.
2. The EEOC regulations severely limit an employer's use of arrest records. The EEOC has strict rules for employers making employment decisions using the fact that an applicant has been arrested. In addition, many states have laws that greatly restrict employers' ability to discover or use arrest records. The use of the FBI databases as a primary source could easily place a private sector entity in violation of the EEOC or of state law.
3. The Federal Fair Credit Reporting Act (FCRA) demands that when an employer hires and uses a service (Consumer Reporting Agency – CRA) to perform the background, the most up-to-date database is used. The use of arrest-only records is also regulated. Thus, the use of the FBI databases as a primary source could likely place a private sector entity in violation of the FCRA and open to a negligent hiring lawsuit.
4. There are 5 private entities that accumulate and maintain a proprietary database of criminal records. Each of these five databases is more extensive and cumulative than the FBI databases. However, even the sole use of one of these databases by the private sector for hiring purposes could place the employer in violation of the FCRA and liable under the Negligent Hiring Doctrine. These databases are excellent supplemental tools and do add value to any criminal record search, but they are not the sole source used today by the private sector when true due diligence is required.
5. The standard procedure used by a CRA for the best level of due diligence is to perform a criminal check at the county level AND a criminal record check at the state level (when available) AND a check from one of the national supplemental databases. Anything less than this leaves the door open to possible litigation.

¹ From the U.S. Department of Justice August 2003 release of DOJ's *Survey of State Criminal History Information Systems, 2001* (www.ojp.usdoj.gov/bjs/abstract/sschis01.htm)

6. Many state occupational licensing boards are mandated to check the FBI database when tasked with issuing or re-issuing credentials. Currently, it can take up to 8 weeks for the FBI to process this request, unless the requestor is placed in a high priority bracket.

So, why is the FBI database incomplete, inconsistent, and inaccurate?

The reason is simple. There are no federal laws, consistent state laws or industry standards that determine how infractions or crimes (misdemeanors or felonies) occurring at the state, county, or local levels are collected, indexed, searched or used.

Consider these examples²:

1. Only 32 states require prosecutors to report to state repositories a decision to decline prosecution of a case.
2. Only 35 states and DC require law enforcement officials to notify the state repository when an arrested person is released without formal charging, but after fingerprints were submitted.
3. Only 42 states use computer edit and verification programs as part of data quality procedures.
4. Only 21 states report they receive final felony trial court dispositions for 70% or more arrests within the last 5 years.
5. Only 10 states report they receive 100% of final trial court dispositions.

So, how can this problem be solved? These areas must be specifically addressed by your Report:

- Type of information collected (what is a felony in one state may be a misdemeanor in another)
- Automation and control (many reporting jurisdictions are not computerized)
- Modify the processing procedure, increase the timeliness
- Receiving and reporting of dispositions
- Auditing procedures
- Use of fingerprints
- Upon finding information in the FBI data, establish required procedures to confirm the validity and lawfulness of the information for use by the employer

Until these issues are addressed, the problems solved, and the resulting record database is beta-tested successfully, the FBI is merely providing a supplemental database with limited value.

Thank you for your time.

Sincerely,

Michael Sankey
CEO, BRB Publications Inc.

² The statistics shown are taken from BRB Publication's *Public Record Research System* and from the U.S. Department of Justice August 2003 release of DOJ's *Survey of State Criminal History Information Systems, 2001* (www.ojp.usdoj.gov/bjs/abstract/sschis01.htm)