

Richard A. Hertling
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Office of Legal Policy
4234 Robert F. Kennedy Building
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Washington, DC 20530

August 5, 2005

Ref: OLP Docket No. 100

Dear Mr. Hertling:

As director of the central repository for criminal history information in Michigan I offer the following information pursuant to your request for comments in preparing the report to Congress required in Section 6403 of the Intelligence Reform and Terrorism Prevention Act.

As background, my office performs approximately 120,000 fingerprint based checks each year. The cost is \$30 for the Michigan check and an additional \$24 for the federal check if it is required. Michigan has recently secured the services of a private vendor to take livescan fingerprints at locations throughout the state. This vendor will charge an additional \$16 for this service. Due to system capacity issues Michigan only allows fingerprint based checks if Michigan law requires them or federal law allows them. These laws vary in what can be disseminated; sometimes only information containing a conviction can be disseminated, other times an arrest can be disseminated without a conviction. Again, only criminal history information is provided except in the case of private security guard legislation which requires that the system also query the warrant file.

In addition, each year approximately 900,000 name checks are conducted through an automated Internet system called ICHAT (Internet Criminal History Access Tool). The cost for these name checks is \$10, except for government and charitable non-profit agencies which receive this service for free. Since Michigan does not have a dissemination law, it follows the federal guidelines established in Title 28, Part 20, and provides information only if there is a conviction. Only criminal history information is provided with this name check; the system does not query warrant, sex offender, or other files.

As administrator of these background checks I agree standardizing and streamlining the background check system is important. I believe the public is not well served by the current system. I suggest the system could be improved in the following ways:

- First, it is important to distinguish between a *background* check and a *criminal history* check. Although we call them background checks and most employers are assuming they are getting background checks, what most are getting, in reality, is

a criminal history check. This is a very narrow piece of information on arrests/convictions. While a true *background* check encompasses more than a law enforcement agency can provide (credit history, etc.), law enforcement does have much more data available to them than it typically gives out. A typical employer expects the full range of information from the law enforcement agency when a check is requested. A guideline for what should be included in a “criminal justice” check should be developed. At a minimum, this should include:

- Sex offender registry information
- Protective orders for domestic violence, etc.
- Warrants
- Eliminate federal law 92-544 limiting federal checks to those purposes and state statutes requiring such a check. We all agree fingerprint based checks are the most reliable, yet we do not allow this to be done.
- Eliminate the requirement limiting the response to government agencies. This is an undue burden on government; employers are best able to judge the suitability of their candidate for a position. Standardized dissemination rules and a standardized format for providing the response would assist employers in interpreting the information.
- Find a way to query all states for all fingerprint based searches. A search of only the Michigan database, or only the Michigan and federal database, is not a complete search.
- Revise Title 28, Part 20, to clarify dissemination law and make it standard. A nationwide employer does not understand why it can have arrest information without a conviction in one state but not in another, why it must sign a waiver in one state and not in another, etc.

Following are remarks on each of the fifteen factors for which comments are requested:

1. Effectiveness of utilizing commercial databases. These should not be used as the primary check for the following reasons:
 - They are based on name without verification of fingerprints.
 - The criminal records they obtain are not refreshed and therefore the information may be old and could have been expunged, etc.
 - The employee has limited ability to get the record corrected since these private vendors are not the originating source of the record.
2. Security concerns about providing information on officials. No comment.
3. Effectiveness of state databases. State databases should be used as the primary source because:
 - Most states keep non-felony incidents and the FBI only recently decided to keep these.
 - The FBI does not have many dispositions on file (even though it may show the arrest) and it does not have an efficient way to accept those dispositions electronically to improve their system. For example: 98% of Michigan’s dispositions are now being reported electronically to the CHR from the courts but

- a method for accepting this electronic information at the same time at the FBI is not in place.
- All state databases should be queried; a query of a single state database gives employers a false sense of security. We must recognize we live in a mobile society.
4. Any feasibility studies by DOJ. No comment.
 5. Privacy rights. The rights of individual applicants can be protected in the following ways:
 - With government facing a shortage of resources the maintenance of consent forms is unrealistic. Rather, by providing fingerprints it must be understood by the employees that they are giving their implied consent.
 - The employer must verify the information contained in the record with the employee prior to making a decision on employment. The employee must be allowed to see the contents of the record check and take action to correct and settle any outstanding issues (get a court document showing the case was dismissed, etc.)
 - A file of applicant fingerprint submissions should be kept. Future queries on the AFIS system can be matched against these for:
 - Latent searches from crime scenes.
 - Many employers are requesting a “rap back” system whereby employers are notified when an arrest fingerprint search hits against their employees’ fingerprints on file. Given our mobile society, these prints ought to be able to be searched against a national file.
 - Most states and the FBI have a mechanism whereby the applicant has the right to submit their own fingerprints, free of charge, for a record challenge in the event that they believe their identity was stolen. This should be incorporated in the requirement whereby the employer must allow the applicant to take action to correct the record.
 - A nationwide policy needs to be established on dissemination. This would eliminate many of the privacy issues if everyone knows what information is public. In addition, a rule should be established that this information is only to be used for the purpose for which it was requested. The applicant should be able to take legal action if this is not the case.
 6. Processing checks when the states lack authority. The FBI was designed to be a pointer system, providing an index of an arrest but letting the states retain the information on that and subsequent arrests of that same individual. Utilizing this system, provide a mechanism, such as the HazMat driver background checks, whereby a state has the option of opting in or out of a process whereby a fingerprint-based nationwide search is done.
 7. Restrictions on employers charging the employee for the check. This should be left up to the employer, but the employer should not be allowed to charge a fee above and beyond what is already being charged for the actual performance of the search.

8. Requirements applicable to handling incomplete records. Missing court disposition information is a problem nationwide. Suggestions:
 - NCHIP funds must continue to be made available. These funds have been critical in assisting courts set up electronic reporting systems.
 - In Michigan the incomplete records will not be a problem on current records due to the automation efforts nearly completed. However, missing dispositions from previous years continues to be a set back. A system such as is done for NICS checks should be set up, but additional funding would be required for the states and courts since both lack the resources to find missing dispositions. This is evidenced in Michigan whereby about 50% of the NICS check missing dispositions cannot be provided within the mandatory three days.
 - The FBI needs to create a mechanism to accept real-time electronic disposition reporting.
9. Circumstances when criminal the history should be given to employer. All cases. Eliminate the requirements for state clearinghouses.
10. Handing of criminal record by employer. See #5 above.
11. Federal and state fees. It would be helpful to the employer / employee if fees were consistent nationwide although this is probably not realistic. The amounts states charge varies widely. It must be recognized that most states have instituted fees as a way to offset the costs of running the repository. In Michigan, \$4 million is collected each year in background check fees. These fees have been stretched to the point where they are now supporting not only the Criminal History Record and AFIS systems but portions of the uniform crime reporting, sex offender registry, and gun registration programs.
12. Time requirements for performing background checks. Guidelines would be helpful to assist states in making the argument for more resources for our programs. No solid requirements should be made as there are too many factors outside the control of the repositories. With the advent of live scan, this should not be a problem unless it is required that missing information be found.
13. Infrastructure needed:
 - Most agree the use of fingerprints is the best way to secure accurate checks. Livescan provides an efficient way to perform these checks. A system such as that used for HazMat drivers could be offered whereby states could chose to use this national system or their own live scan capture systems. Once this system is available, electronic data submissions could be required.
 - Most state AFIS systems are not set up to accept a large volume of applicant prints since they were designed for criminal submissions. Many AFIS systems need to be upgraded.
14. Role states should play.

- Provide information contained within their records systems.
- Provide overall and primary criminal history background check administration.

15. Other. No comment.

Thank you for providing the opportunity to comment. If you have questions please feel free to call me at 517-322-5511.

Sincerely,

DIANE L. SHERMAN
Criminal Justice Information Center