



## National Crime Prevention and Privacy Compact

Compact Council Office  
1000 Custer Hollow Road  
Clarksburg, WV 26306-0145

August 17, 2005

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

Re: OLP Docket No. 100

Dear Mr. Hertling:

I am writing to you on behalf of the Compact Council (Council) established under the National Crime Prevention and Privacy Compact Act of 1998 (Compact), 42 U.S.C. 14616. The Compact governs the use of the Interstate Identification Index (III) System to conduct national criminal history record searches for noncriminal justice purposes. The Council is vested with the authority to promulgate rules, procedures, and standards for the use of III for noncriminal justice purposes.

Attached is the Council's response to "OLP Docket No. 100, Criminal History Background Checks; Request for Comments" keyed to the structure of section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004. The attachment includes two models illustrating the proposed work flow for processing noncriminal justice fingerprint submissions and disseminating the results of the fingerprint checks. In drafting this response, the Council consulted with representatives of the FBI's Criminal Justice Information Services (CJIS) Advisory Policy Board (APB), the private security guard industry, and the Center for Medicare and Medicaid Services (CMS).

The Council is appreciative of the opportunity to provide comments to the Office of Legal Policy for improving, standardizing, and consolidating the existing statutory authorizations, programs, and procedures for the conduct of criminal history record checks for noncriminal justice purposes. If you have any questions, please feel free to contact me at (850) 410-7100 or by email at [donnauzzell@fdle.state.fl.us](mailto:donnauzzell@fdle.state.fl.us). You may also contact Mr. David Sim, Council Vice Chairman, at (785) 296-8265 or by email at [dsim@kbi.state.ks.us](mailto:dsim@kbi.state.ks.us).

Sincerely,

Donna M. Uzzell  
Compact Council Chairman

**COMMENTS OF THE NATIONAL CRIME PREVENTION AND PRIVACY COMPACT COUNCIL (COUNCIL) TO THE DEPARTMENT OF JUSTICE OFFICE OF LEGAL POLICY REGARDING SECTION 6403(d) OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004 (ACT)**

For purposes of the Council's input on these recommendations, the following terms are defined:

**Criminal history record check** means a fingerprint-based noncriminal justice background check of criminal history record information maintained in the FBI's CJIS Division Integrated Automated Fingerprint Identification System (IAFIS) and state criminal history record repositories. It does not include name checks of National Crime Information Center (NCIC) files or information obtained from other sources.

**Criminal history record check types** include those allowed pursuant to state statutes approved by the Attorney General under Public Law (Pub. L.) 92-544, other federal statutes, and Executive Orders for noncriminal justice purposes.

**(d) RECOMMENDATIONS.—The Attorney General shall make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes. In making these recommendations to Congress, the Attorney General shall consider—**

**(1) the effectiveness and efficiency of utilizing commercially available databases as a supplement to IAFIS criminal history information checks;**

### **Response**

The Council believes there is data to support the effectiveness of utilizing state and federal criminal history databases via a fingerprint submission for a background check. This belief is based on the fact that fingerprint submissions to IAFIS greatly reduces the potential for false positives and false negatives for identification (see the *Interstate Identification Index Name Check Efficacy: Report of the National Task Force to the U.S. Attorney General, July 1999*) and provide the gateway for a check of all 50 states.

Although the Council is not aware of any study to support or evaluate the effectiveness and efficiency of utilizing commercially available databases as a supplement to IAFIS criminal history information checks, the Council presumes there could be value in checking commercially available databases. However, employer checks of commercially available databases should be voluntary and not required. Further, the employer should not be forced to supplement the check only because there is no other mechanism to provide the employer access to nationwide criminal history data. (See comments for #9.) In regards to searching commercially available databases, the Council requests the following comments be considered:

- The understanding that the search of commercial databases is not supported by fingerprints for purposes of assuring the information is accurately matched and that no identification is missed.
- The understanding that commercial databases do not have complete national coverage because, for a variety of reasons, many states do not make criminal history record information (CHRI) available to commercial database compilers. The lack of complete and current data may result in inaccurate information being provided to the requestor.

**(2) any security concerns created by the existence of these commercially available databases concerning their ability to provide sensitive information that is not readily available about law enforcement or intelligence officials, including their identity, residence, and financial status;**

### **Response**

If a commercial database company enters into a contract to send and or receive CHRI on behalf of an Authorized Recipient<sup>1</sup>, then the company will be subject to the security requirements provided

---

<sup>1</sup> An Authorized Recipient means (1) a nongovernmental entity authorized by Federal statute or Federal executive order to receive CHRI for noncriminal justice purposes, or (2) a government agency authorized by Federal statute, Federal executive order, or State statute which has been approved by the United States Attorney General to receive

in the Council's Outsourcing Rule and Security and Management Control Outsourcing Standard, which summarily ensures that Contractors are held to the same level of security as Authorized Recipients.

**(3) the effectiveness of utilizing State databases;**

**Response**

The Council strongly supports the use of state databases for criminal history record checks as the most complete and accurate source of criminal data. Any proposed models should endeavor to include access to all state repository databases to take advantage of greater public safety and homeland security benefits.

In recognition of the importance of the state repositories, the Council further encourages states to become more proactive in facilitating such checks. The Council believes the restrictions in current federal legislation (e.g., Pub. L. 92-544) have at times discouraged states from fully participating in the process to support background checks for certain industries. The Council believes that the models (see pages 11 & 12) proposed in this document will encourage more expansive participation by states.

**(4) any feasibility studies by the Department of Justice of the resources and structure of the Federal Bureau of Investigation to establish a system to provide criminal history information;**

**Response**

The Council supported the National Fingerprint-based Applicant Check Study (N-FACS). The N-FACS study was conducted by the FBI's CJIS Division. The N-FACS mission was to conduct a study and produce a final report exploring the feasibility of fielding a national, rapid, and positive fingerprint-based identification background check system for authorized noncriminal justice purposes. The collection of flat-fingerprint images to be searched against the Integrated Automated Fingerprint Identification System (IAFIS) became the foundation for the N-FACS. As a result of the N-FACS study and an examination of the various findings of the study, the Council formally accepted ten-flat fingerprints as another method for determining positive identification for exchanging CHRI for noncriminal justice purposes. The use of ten-flat fingerprints provides a faster and more efficient alternative for the capture of fingerprints for noncriminal justice purposes.

Experience in providing CHRI to a qualified entity (as defined in the National Child Protection Act of 1993) has been positive. Beginning June 2003, the Council and its Standards Committee received monthly updates on the status of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) study. The FBI CJIS Division is conducting the PROTECT Act study on the feasibility of performing fingerprint-based criminal background checks on employees and volunteers who provide care to children, the elderly, or the disabled. The objective of the PROTECT Act's State Pilot Program is to evaluate the cost and

---

CHRI for noncriminal justice purposes.

effectiveness of various models for performing state and national criminal history background checks on prospective volunteers. Florida agreed to participate in the State Pilot Program as a result of discussions at Council and Standards Committee meetings. The Council felt that the three models did not represent all of the options that are available to volunteer organizations, in particular, the option to disseminate criminal history records down to the qualified entity to make fitness determinations.

The Council was briefed on the Medicare Prescription Drug Improvement & Modernization Act of 2003 Pilot Program and supports the program that will not only evaluate dissemination of CHRI to the employer but potentially evaluate credentialing models, and identify barriers and best practices.

**(5) privacy rights and other employee protections, including—**

**(A) employee consent;**

**Response**

The Council supports the policy set forth in Title 28, CFR, Section 50.12 that current and prospective employees must acknowledge the performance of a criminal history background check. A statement should be completed and signed by the employee informing the employee that a criminal history background check will be performed and that his/her signature on the form constitutes an acknowledgement and consent that such a check may be conducted and, if applicable, the fingerprints will be retained by the state and/or federal repositories.

**(B) access to the records used if employment was denied;**

**Response**

The agency making the fitness determination should, upon request of the individual who is the subject of the CHRI, provide a copy of the CHRI (based on positive identification) to the individual.

The employee should also be provided useful information regarding the mechanisms to correct an erroneous record.

**(C) the disposition of the fingerprint submissions after the records are searched;**

**Response**

The utility of retaining applicant fingerprint submissions for “rap back<sup>2</sup>,” latent comparisons, and disaster victim identification purposes as allowed by state and federal law outweighs any benefit of destroying the fingerprints after processing. Retention of the fingerprints provides a more efficient

---

<sup>2</sup> A new service currently provided by some criminal history repositories to authorized users who desire immediate notification when an enrolled employee has a subsequent arrest.

background check by providing a mechanism to avoid costs associated with subsequent background checks which would include the costs of capturing new fingerprints. The Council supports the current plan to retain the applicant fingerprint submissions in IAFIS with the state's concurrence.

**(D) an appeal mechanism; and**

**Response**

The Council supports an appeal mechanism.

**(E) penalties for misuse of the information;**

**Response**

The Council recommends that Congress provide states and the FBI with financial and technical support to establish audit and training programs.

Current penalties are not adequate or consistent. Substantial criminal and civil penalties for the misuse of CHRI should be attached to any legislation arising from this initiative. Violators should be vigorously prosecuted.

**(6) the scope and means of processing background checks for private employers utilizing data maintained by the Federal Bureau of Investigation that the Attorney General should be allowed to authorize in cases where the authority for such checks is not available at the State level;**

**Response**

The Council conceptually agrees that all private and public employers should be authorized to request and receive the results of state and federal fingerprint based checks. Some states currently have the staff, system capacity, and desire to conduct such checks. Congress should enact legislation delegating to the United States Attorney General (AG) the authority to perform such checks in those states that "opt in" to this broad authorization. Those states that "opt in" would utilize existing infrastructure to process the fingerprint submissions--that is, the employers would submit the fingerprints to the state repository; the state repository would conduct a state fingerprint check and, if necessary to obtain the complete record, forward the fingerprints to the FBI for a national fingerprint check; the FBI would return the results of the check to the state repository for transmittal to the employer. This broad (all-employer) authorization would not apply in those states that "opt-out" of this process. National background checks only would not be permitted under this broad authorization.

For those states that "opt-out" of the above "all-employer" authorization, there is a need to create "generic" entitlements for national record checks in lieu of existing state or federal statutes. Therefore, the federal legislation should also delegate to the AG the authority to establish a national fingerprint background check for industries where checks are not otherwise authorized by

state or federal statutes. The Council recommends that the AG authorize “generic” entitlements for the following specifically defined categories:

Public Safety

Security personnel

Protection of Critical Infrastructure and Key Assets

Positions of trust working with vulnerable populations

Persons who have access to CHRI under outsourcing rule

Or others specifically authorized by the AG (could include insurance industry, etc.)

(Note: The AG should evaluate the categories to determine if additional categories should be included or if system capacity issues precluding expansion should be addressed)

The federal legislation authorizing the “generic” entitlements should require the AG to obtain confirmation from non-participating (opting-out) states prior to the AG authorizing the requesting entity to submit fingerprints for a national check (the “generic” entitlement). States would “opt-in” or “opt-out” of participating in the noncriminal justice national fingerprint background check program(s) authorized by the AG. States could “opt-in” for one or more of the specifically defined categories. If a state “opts-out,” then the authorized agencies in that state may choose to use the national model (see page 11) when it becomes available. Under this model where a state “opts-out,” the Council recognizes that the FBI may need to develop rules that assist them in the management of the channeling of these additional prints.

Nothing should prohibit the states from continuing to do checks for specific categories of employment or licensing pursuant to the current Pub. L. 92-544 process.

**(7) any restrictions that should be placed on the ability of an employer to charge an employee or prospective employee for the cost associated with the background check;**

**Response**

This is a private industry issue.

**(8) which requirements should apply to the handling of incomplete records;**

**Response**

The state repository should make a reasonable effort to obtain missing disposition information. However, missing information should not be a deterrent to dissemination of the record to the employer unless such dissemination is contrary to state law.

**(9) the circumstances under which the criminal history information should be disseminated to the employer;**

**Response**

The Council supports dissemination of the CHRI to public and private employers for employment

suitability determinations when (1) the CHRI is obtained based upon positive fingerprint identification, and (2) the applicant signs a form that acknowledges that the State and/or the FBI may disseminate a copy of the applicant's CHRI to the employer. Such dissemination should be authorized by amending Pub. L. 92-544.

Currently, criminal history information is disseminated to the employer only as the result of specific authorizing federal legislation (industry-by-industry). For example, Pub. L. 105-277 permits receipt of the CHRI by a private nursing facility or home health care agency for a "first hand" suitability determination by the employing entity. Federally chartered or insured banks also receive the results of criminal history record checks. However, private child care facilities and a host of other private employers do not.

If the purpose of the criminal history record check is governed by a state regulatory agency, nothing should preclude the State repository from disseminating a copy of the record to the regulatory agency and also to the employer. Nor shall nothing preclude the employer from establishing more stringent suitability screening criteria than the regulatory agency.

**(10) the type of restrictions that should be prescribed for the handling of criminal history information by an employer:**

**Response**

The Council supports dissemination of CHRI to the employer if proper controls are in place. If CHRI is permitted to be provided to an employer, the employer would essentially become an "authorized recipient" as defined in the Council's Security and Management Control Outsourcing Standard (Outsourcing Standard) and would be subject to the same level of security, audit, privacy requirements, and sanctions that exist for current authorized recipients of CHRI.

**(11) the range of Federal and State fees that might apply to such background check requests;**

**Response**

State fees vary depending on the services (name search, technical search, retention, and "rap back" practices) that are provided by the state. Therefore, the Council supports the position that states must be allowed to establish their own fee structure for performing noncriminal justice background checks; however, the Council encourages states and the FBI to explore ways to reduce the costs of performing criminal history background checks. Fees allow for the recovery of the state's costs for performing the record check, including all direct and indirect costs. However, the Council recognizes that the fee structures are often set legislatively at the state level.

If federal legislation is enacted delegating to the AG the authority to authorize a national fingerprint background check in industries where checks are not specifically authorized by state or federal statutes, a fee structure will need to be developed for such national fingerprint background checks to include fee sharing among the states.



**(12) any requirements that should be imposed concerning the time for responding to such background check requests;**

**Response**

Electronic fingerprint capture and submission would reduce the processing time for background check requests. The Council urges the AG and Congress to establish a date by which each state repository must submit criminal and civil fingerprints to the FBI electronically and to continue financial and technical support to obtain that goal.

**(13) any infrastructure that may need to be developed to support the processing of such checks, including—**

**(A) the means by which information is collected and submitted in support of the checks; and**  
**Response**

Electronic fingerprint capture, via live scan machines, and automated processing must be developed and supported. Congress needs to provide funding to support automation. States and federal agencies should be encouraged to improve the efficiency of the infrastructure by using existing technology such as the Internet, ten-flat civil submissions and participation with commercial entities for matters of similar interest.

**(B) the system capacity needed to process such checks at the Federal and State level;**

**Response**

The Council's model (see page 11), which allows for states to "opt-in" or "opt-out," recognizes system capacity issues to some extent by limiting access via a national model to only certain "generic" categories. System and through-put capacity and process limitations must be considered in the implementation of the recommendations and sufficient "ramp-up" timeframes will need to be developed. Financial incentives to the states and appropriations to the FBI would facilitate participation in the proposed model.

**(14) the role that States should play; and**

**Response**

The Council strongly supports the concept that states provide essential value to noncriminal justice background checks and must always be provided a central role in the identification and dissemination of CHRI. Traditionally, Congress has recognized the importance of performing a state criminal history record check prior to a national check. Article V of the Compact requires that each request for a criminal history record check utilizing the national indices made under any approved state statute shall be submitted through the state's criminal history record repository.

Recognizing the increased demands for noncriminal justice background checks, some states are not able to perform all phases of the criminal history background check process. Accordingly, the

models proposed by the Council permit states to “opt-in” or “opt-out” of any stage of the criminal history background check process.

Congress proactively set a standard for improving criminal history record checks for noncriminal justice purposes by passage of the Compact. Twenty-five states have adopted the Compact. The Council encourages full participation in the Compact by all 50 states, territories or possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico so that the National Fingerprint File (NFF) model of providing the most complete records to the requestor can be realized. The Council further encourages Congress to provide incentives to states to ratify the Compact and become NFF participants.

**(15) any other factors that the Attorney General determines to be relevant to the subject of the report.**

### **Response**

#### **Multi-State Licenses**

There is a finite list of industries (e.g. liquor distributors, horse racing/paramutual wagering) in which some individuals are licensed/certified in multiple states. Individuals currently must receive a state check as well as a national check in every state in which they are applying for a license/certification. The Council has drafted a model (see page 12) that would allow for multiple state checks, but only one national check.

To allow for state checks but only one national check, the proposed model would establish a channeling agency to submit fingerprints directly to the FBI for a national check. At the same time, the channeling agency would request a state check of all states in which the individual is applying to be licensed/certified as authorized under state law. The channeling agency would collate the results from the “national” and “state” fingerprint checks. The channeling agency would forward the results of the checks to the state regulatory agency of each state in which the individual applied. Each state regulatory agency would apply its own suitability criteria to make the fitness determination, provide notification of its determination to the individual applicant, and provide notification of its determination and the results of the criminal record checks to the individual’s employer.

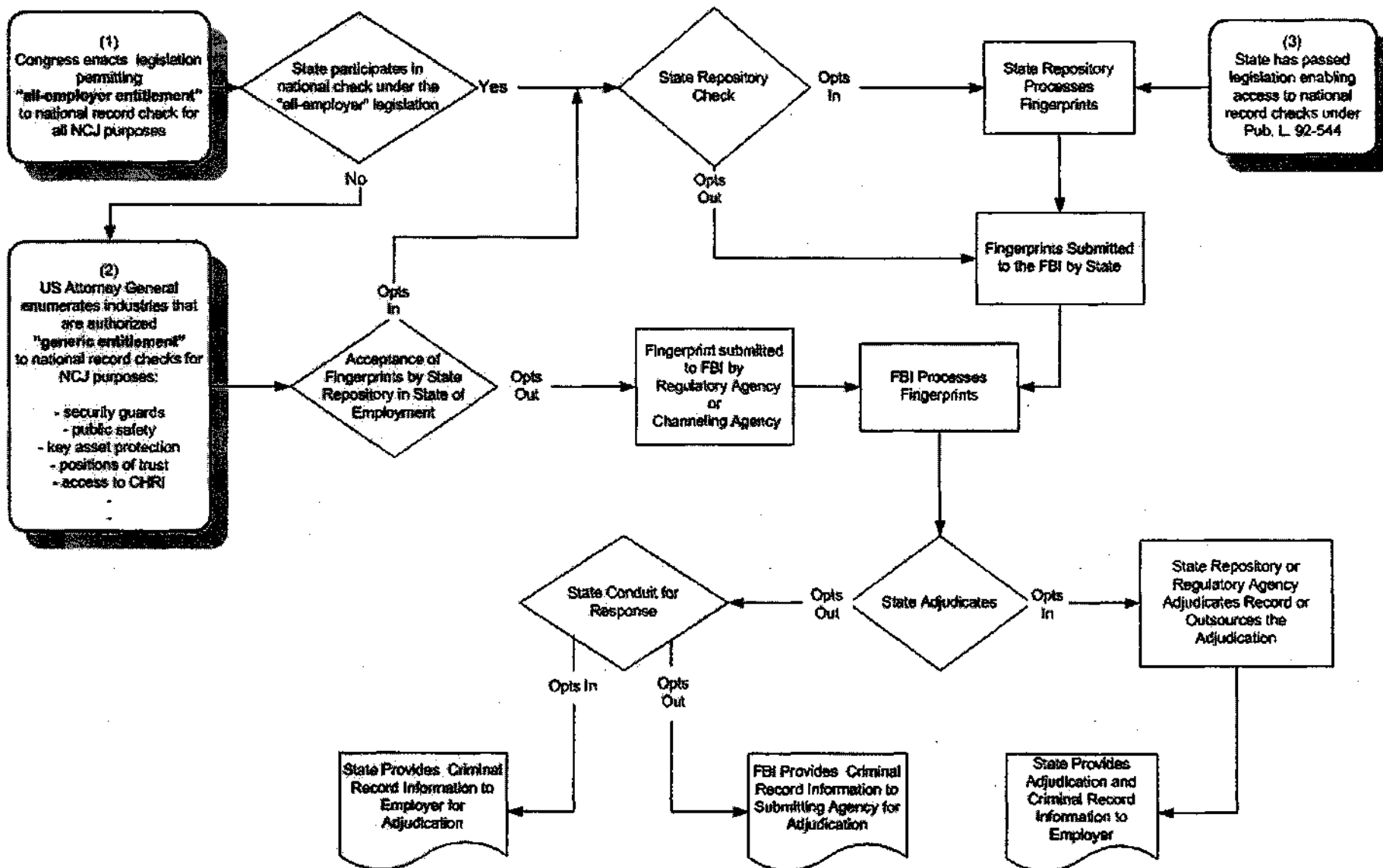
#### **Need to Remove Restrictions Regarding Record Sharing**

Under the “generic” entitlement model suggested by the Compact Council, the current restriction on record sharing for “related” purposes for which the record was requested needs to be removed. The records could be shared under the umbrella of the “generic” entitlements provided that the employee consents to the record being shared with another authorized recipient, the information shared can only be that which the authorized recipient would otherwise be entitled to receive, and the employer sharing the record maintains a log of the dissemination for at least one year. The employer (authorized recipient) receiving the record understands that the information may not be current and is not necessarily verified by a biometric.

## **ID Verification**

For fingerprint checks to truly be effective, the collection of the fingerprints must be accompanied by methods to authenticate and verify a person's identity. The Council is drafting "best practices" notices/standards for personal identification verification and the chain of custody for fingerprints.

## Proposed Workflow for State and National Criminal History Checks (All-Employer, Generic and Pub. L. 92-544 Entitlements)



## Proposed Workflow for State and National Criminal History Using Channeling Agency (Single National Check with Multiple State Checks)

