

# NASCO

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## FAX

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Date: August 5, 2005  
(Refaxed to corrected number on August 8)

Re: OLP Docket No. 100 Criminal History Background Checks

<i>Urgent</i>	<i>For Review</i>	<i>Please Comment</i>	<i>Please Reply</i>
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Comments:

Mr. Hertling:

Per our telephone conversation this afternoon, thank you for accepting the enclosed response to the Request for Comments on Criminal History Background Checks. Our transmission on Friday inadvertently was sent to the wrong number.

Best regards,

Gail Simonton



August 5, 2005

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

Re: OLP Docket No. 100 Criminal History Background Checks

Dear Mr. Hertling:

These comments are submitted by the National Association of Security Companies (NASCO) and ASIS International in response to the notice entitled "Criminal History Background Checks; Request for Comments," published in the *Federal Register* on June 6, 2005 (70 Fed. Reg. 32,849). The *Federal Register* notice requests public input on the issues that the Department of Justice must address in the Report to Congress mandated by Section 6403 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638, 3758-60 (2004).

Summary. The private security industry recently obtained statutory authority in Section 6402 of Public Law 108-458 to access Criminal History Record Information ("CHRI") under certain specific conditions. Our industry is regulated at the state level in most states and would be seriously adversely affected if forced to conform to the significantly different models under which other industries are provided access to CHRI. In addition, consolidation of the current regimes could require significant additional legislative and regulatory effort, and could offend the Federalism concerns of many States. We therefore recommend against advising Congress that the existing statutory authorizations for industry access to CHRI be "standardized" or "consolidated" unless these state level concerns are addressed.

ASIS International, with more than 33,000 members, is the preeminent international organization for professionals responsible for security, including managers and directors of security. In addition, corporate executives and other management personnel, as well as consultants, architects, attorneys, and federal, state, and local law enforcement, are becoming involved with ASIS to better understand the constant changes in security issues and solutions.

The National Association of Security Companies (NASCO) was founded in 1972 as the Committee of National Security Companies (CONSCO). Today, NASCO is at the forefront of efforts to set meaningful standards for the private security industry. NASCO also monitors proposed state and federal legislation and regulations that might affect the quality and/or effectiveness of private security services.

## **I. Existing Statutory Programs Should Not Be Standardized or Consolidated.**

Although a number of issues are listed in the *Federal Register* notice, the most important matter is the requirement for the Department of Justice to “make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorizations, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes.” As an industry, we have serious concerns about any proposal to standardize or consolidate the procedures for conducting criminal history record checks for non-criminal justice purposes in situations where the information is being obtained for use in an industry (such as ours) regulated by the states, unless the consolidation or standardization follows the framework of the Private Security Officers Employment Authorization Act of 2004 (“PSOEAA”).<sup>1</sup>

Efficiency and Federalism. We believe there is no clear policy basis for consolidation of the current statutory authorities for access to CHRI. Consolidation would require the expenditure of significant legislative and regulatory resources to resolve conflicting access regimes, as we describe in detail below. As such, the efficiency of this undertaking is questionable. In addition, any consolidation proposal must take into account the current role of a state government role in CHRI access, or else the federalism principles of many interested parties could be offended.

Recent Federal Legislation. In recent years, private security officers have become an important adjunct to law enforcement in the public safety and homeland security arenas. Today, private security officers protect individuals, property, and proprietary information, and provide protection to such diverse operations as banks, hospitals, research and development centers, manufacturing facilities, defense and aerospace contractors, high technology businesses, nuclear power plants, chemical companies, oil and gas refineries, airports, communication facilities and operations, office complexes, schools, residential properties, apartment complexes, gated communities, and others. Congress has recognized that the increased use of private security officers frees up sworn law enforcement personnel to provide additional public safety and homeland security. The industry believes, and Congress confirmed, that the American public deserves the employment of qualified, well-trained private security personnel who have been thoroughly screened. See “Findings,” § 6402(b), Pub. L. 108-458.

State Regulation. The licensing of private security officers is currently regulated at the state level in approximately 40 states. The regulatory requirements vary from state to state. We believe that U.S. homeland security is enhanced by an effective and responsible private security industry. We also believe that these qualities depend to a large extent upon the ability of employers to thoroughly screen their employees. We believe that for those industries, such as ours, that are regulated by a majority of states, the best method of screening involves checks not only of FBI records, but of the state CHRI database for the state in which the person is to be employed and in which the employee may be subject to regulation. The relevant state database generally contains the more complete record and

<sup>1</sup> Pub. L. 108-458, § 6402, 118 Stat. 3638, 3755-3758 which was enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004.

often includes more recent information than is found in the FBI database. By disregarding or circumventing the state's records, important details may not be uncovered and an unsuitable person could be employed based on the FBI check. (Ironically, this person might not qualify for a state license based on information discovered in the home state CHRI database.) This inconsistent result raises serious policy and public safety concerns, as an employer would not know which CHRI result is more accurate.

We also have concerns about any consolidated procedures that would bypass the state agencies on administrative convenience grounds. Unless sufficient administrative and technological coordination were imposed on otherwise separate agencies and systems in diverse stages of technological advancement, employers seeking to screen their private security officer applicants could be compelled to undergo one FBI check for federal law purposes and a second state check to insure that up-to-date, accurate information from state databases is obtained. This is needless duplication. In our view, the present structure, as contemplated by the PSOEAA would be preferable to any alternatives requiring an employer to undergo additional administrative procedures to obtain confirmation of the suitability of individuals for employment.

## II. Other Issues.

With regard to the other issues raised in the *Federal Register* notice, we would like to make the following observations:

- Any fees charged should be reasonable and should be based on a desire to facilitate provision of the necessary information; due consideration should be given to any fee levels that are so high that they discourage potential users from obtaining such information;
- The turnaround time for providing information should be relatively quick, as the CHRI check is merely one step in the employment process and the sooner that the desired information is made available, the quicker a determination can be made whether to employ an applicant;
- Privacy concerns may be alleviated by following a process similar to that set forth in the PSOEAA, which provides criminal penalties for improper use of the requested information and provides that in those states having licensing requirements, the state receives the information and lets the employer know only whether or not the individual meets the state's requirements. The employer is not directly provided the details of the CHRI. In participating states that do not have standards for qualification to be a private security officer, the State shall notify an authorized employer as to the fact of whether an employee has been convicted of a felony, an offense involving dishonesty or a false statement if the conviction occurred during the previous 10 years, or an offense involving the use or attempted use of physical force against the person of another if the conviction occurred during the previous 10 years; or charged with a criminal felony for which there has been no resolution during the preceding 365 days;

- An individual who believes decisions were made on incorrect or incomplete information should be able to have access to the information and file an appeal of any adverse decision. Conversely, companies charged with protecting critical infrastructure should be permitted some discretion in suspending or transferring a private security employee with a problematic CHRI result, until the CHRI issue is resolved, in order to protect the homeland security.

We very much appreciate this opportunity to provide input to the Department of Justice on this report to Congress.

Sincerely,

NASCO



Gail M. Simonton  
Executive Director & General Counsel

ASIS International



Jack Lichtenstein  
Director, Government Affairs & Public Policy