



Department of Justice

STATEMENT OF

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BEFORE THE

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS**

CONCERNING

**“H.R. 2703, PRIVATE SECURITY OFFICER EMPLOYMENT
AUTHORIZATION ACT OF 2007”**

PRESENTED

February 26, 2008

Chairman Andrews, Ranking Member Kline, and Members of the Subcommittee:
My name is Frank Campbell and I serve as Senior Counsel in the Office of Legal Policy in the United States Department of Justice. I appreciate the opportunity to address you on the issues relating to the implementation of the Private Security Officer Employment Authorization Act (PSOEAA). The law was enacted as section 6402 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) and provided authority for states to perform fingerprint-based checks of state and national criminal history records to screen prospective and current private security officers.

Existing Authorities for Access to FBI Criminal History Background Checks

Under current law, access to Federal Bureau of Investigation (FBI) maintained criminal history information is governed by a patchwork of state and federal statutes. The main vehicle for gaining access for non-criminal justice purposes has been state statutes that take advantage of the provisions of Public Law (Pub. L.) 92-544 (enacted in 1972), which allow sharing of FBI-maintained criminal history records in certain licensing and employment decisions, subject to the approval of the Attorney General. These checks are processed through state identification bureaus and, in order to provide more complete information, include a check of state records. These statutes generally require background checks in certain areas that the state has sought to regulate, such as persons employed as civil servants, day care, school, or nursing home workers, taxi drivers, private security guards, or members of regulated professions. The results of these checks are supplied to public agencies that apply their own suitability criteria or those established under state law. There currently are approximately 1,200 state statutes

that are approved by the Attorney General under Pub. L. 92-544. The National Child Protection Act/Volunteers for Children Act (NCPA/VCA) allows state governmental agencies, without requiring a state statute, to conduct background checks and suitability reviews of employees or volunteers of entities providing services to children, elderly, and disabled persons. In addition, as noted below, the PSOEAA allows states to do FBI background checks on private security officers without passing a state statute under Pub. L. 92-544.

Other access has been authorized by federal statutes allowing particular industries or organizations to go directly to the FBI for an employment, licensing, or volunteer check, without first going through a state repository and also checking state records. These laws, some of which were passed after the terrorist attacks on September 11, 2001, seek to promote public safety and national security by either authorizing access to a check by certain industries or affirmatively regulating an industry or activity by requiring background checks and risk assessments by government agencies. They include authority for discretionary access by the banking, nursing home, securities, and nuclear energy industries, as well as required security screenings by federal agencies of airport workers, HAZMAT truck drivers and other transportation workers, persons seeking access to nuclear facilities and port facilities, and aliens visiting the United States.

Pub. L. 92-544 State Statutes Relating to the Private Security Industry

According to the FBI, currently 41 states, plus the District of Columbia and Puerto Rico, have passed 92-544 statutes authorizing FBI criminal history checks in

connection with licensing or employment of individuals as private security guards, watchman, or private investigators or detectives or for permits to carry or possess a firearm in connection with such activities. Some of the statutes only cover background checks or licensing for armed security guards. Many of the statutes permit, but do not mandate, such checks.

The Provisions of the PSOEEA

The PSOEEA was passed as a means of encouraging and prompting states without private security officer licensing systems to set up a program that would allow private security companies to obtain FBI background checks on prospective and current private security officers. The PSOEEA allowed authorized employers of private security officers to submit fingerprints to a state identification bureau for a state and national criminal history check. State identification bureaus serve as the criminal justice information record repositories in each state. Upon receiving a background check request under the PSOEEA, a state identification bureau is authorized to submit the fingerprints to the Attorney General for a check of the FBI's national criminal history record information databases, with the results of the FBI check to be returned to the state identification bureau.

Upon receipt of the results of the FBI check, a state that has not opted out of the background check system authorized by the Act is required to provide a qualified employer notice as to (1) whether the applicant fails existing state standards (such as licensing requirements) relating to criminal history background for qualification to be a

private security officer, or (2) if the state has no such standards, whether the applicant has been (a) convicted of a felony, (b) convicted within the last 10 years of an offense involving dishonesty or false statement or an offense involving the use or attempted use of physical force against another person, or (c) charged with a felony with no resolution within the preceding 365 days.

The checks under the Act are permissive, not mandatory, for private security companies. An employer may forego requesting a check or may provide interim employment while a check is pending. The Act does not compel an adverse or favorable employment determination based upon the results of the check. The Act specifies that states may decline to participate in the background check system authorized by enacting a law or issuing an order by the Governor (consistent with state law) providing that the state is declining to participate. States that have not opted-out under this subsection are considered to be participating in the background check system established under the Act.

To date, only one state, Wyoming, has notified the FBI that it has opted out of the PSOEAA background check system. While the PSOEAA provides that states are considered to be participating in the Act's background check system if they have not opted out through state legislation or an executive order, the Act provides no enforcement mechanism to compel participation by states that have neither opted out nor taken steps to make these checks available to the private security industry. Nor did the law provide carrot-and-stick incentives for state participation, such as federal funding or federal grant penalties. The Department, however, expects in the near future to send an additional

communication to the states on their obligations to participate in the background check system established under the PSOEEA if they have not opted-out under the Act. We will also make the states aware of the option under the Compact Council's outsourcing rule¹ to use contractors or channeling agents to implement the suitability review requirements under the Act. The PSOEEA, however, does not provide the Department with authority beyond such exhortation to obtain the cooperation of the states in performing these background checks.

The Attorney General's Report on Criminal History Background Checks

As you know, in June 2006, the Department of Justice sent to Congress *The Attorney General's Report on Criminal History Background Checks*. The report responded to a provision in IRPA, section 6403, which was a companion to the PSOEEA. We understood the reporting requirement to be based on congressional interest in developing a more uniform and rational system for accessing and using FBI criminal history records for employment suitability and risk assessment purposes. The current access scheme has created a patchwork of statutes, including over 1,200 state statutes

¹ The National Crime Prevention and Privacy Compact Council, whose members are appointed by the Attorney General from state and federal agencies, promulgates rules and procedures governing the exchange and use of criminal history records in the FBI-maintained Interstate Identification Index for non-criminal justice purposes. The Department's regulations under the PSOEEA encouraged States to consider using channeling agents to transmit fingerprints to the FBI and the results of the criminal history checks to the States. Channeling agents are generally private entities that contract with authorized recipients of criminal history information to perform routine non-criminal justice administrative functions relating to the processing of criminal history information. The Compact Council issued an outsourcing rule and standard in December 2005 governing the non-criminal justice use of FBI criminal history information. The outsourcing standard specifies that among the functions that can be outsourced to a contractor or channeler are making fitness determinations or recommendations, obtaining missing dispositions, and disseminating the information as authorized by federal law or a Pub. L. 92-544 state statute. See The National Crime Prevention and Privacy Compact Council, Notice, Security and Management Control Outsourcing Standard, 70 Fed. Reg. 74373, 74375 (Dec. 15, 2005).

under Public Law 92-544. This patchwork allows access to FBI criminal history information inconsistently across states, inconsistently across industries, and even inconsistently within industries. The resulting inconsistent access authority often affects critical infrastructure industries – for example, while the banking and nursing home industries have access authority, the chemical industry does not. This approach frequently leaves those without access authority with what they consider less than adequate information for efficient and accurate criminal history checks.

The Report attempted to account for the range of interests involved in criminal history background check in recommending ways to provide broader private sector access to FBI criminal history information. We agree that there is a need to revisit the authorities under which checks of this information can be made for non-criminal justice purposes. Many employers can and do seek criminal history information from other public and commercial sources, but frequently find those sources to be inefficient, incomplete, or inaccurate. FBI criminal records would add significant value to such checks by providing a nationwide database of records based on the positive identification of fingerprints. The framework for broader access authority suggested in the Report seeks to avoid the need to enact separate statutes that create inconsistent levels and rules for access to these records. The basic question we considered is: How can this be done in a way that allows the responsible use of this information to protect public safety while at the same time protecting privacy and minimizing the negative impact criminal screening may have on reasonable efforts to help ex-offenders reenter and stay employed in the work force?

We answered that question by recommending that access be authorized for all employers, but that the access be made subject to a number of rules and conditions. We emphasized that private sector access to FBI criminal records must be prioritized by the Attorney General to enable the scaling of the system to meet the demand in a way that does not interfere with the use of the system for criminal justice and national security purposes. To avoid government agencies having to make suitability decisions for private employment, the report recommends authorizing dissemination of the records to the employer or a consumer reporting agency acting on the employer's behalf. The access would be under rules protecting the privacy interests of individuals in ensuring that the information is accurate, secure, and used only for authorized purposes. The rules also would require record screening to account for federal and state laws that limit access to criminal records for private employment purposes. In addition, the rules would require an employer's acknowledgment of legal obligations under federal and state equal employment opportunity laws. Consideration also should be given to providing employers guidance on suitability criteria to be used in criminal records screening. When possible, the access should be through states that agree to participate and that meet minimum standards for processing these checks, including a response time of no more than three business days. The Attorney General would establish a means of doing the checks in states that do not opt into the program.

The report's recommendations are forward-looking. Given the competing law enforcement and national security demands on the FBI's system and resources, all-employer access under the proposed rules would likely take many years to implement.

However, the report recommends that the Attorney General should be authorized to provide access to priority employers as FBI system capacity and other necessary resources allow.

Several key points underlie the Report's recommendations:

- FBI criminal history information, while not complete, is one of the best sources available – it covers all 50 states and, even when missing final disposition information, it can provide leads to complete and up-to-date information. FBI statistics show an annual hit rate for its civil fingerprint submissions of 11.62 percent.
- To enhance data quality, state repositories should be checked whenever possible, so that the states' more complete disposition records can be part of the response to authorized users. According to the Bureau of Justice Statistics, approximately 70 to 80 percent of state-held arrest records have final dispositions, as compared to the approximately 45 to 50 percent of FBI-maintained arrest records with final dispositions.
- Use of FBI criminal history information can enhance privacy through positive identification. Fingerprint checks reduce the risk of the false positives and false negatives produced by name checks. With FBI fingerprint checks, it is less likely

that another person's record would be wrongly associated with an applicant. It is also less likely that an applicant's criminal record will be missed.

- It would be reasonable to provide a means for access to FBI records for criminal background checks for private security officers when such checks are not available through a state, if two conditions are met: first, that private employers satisfy requirements for privacy protection and fair use of the information, and second, that the FBI have the necessary resources and infrastructure to service the increased demand for civil fingerprint checks without compromising, delaying, or otherwise impeding important criminal justice and national security uses of the information system.
- If expanded access is allowed, the FBI and state repositories should be authorized to disseminate the records directly to employers. The general limitation on disseminating FBI criminal history information only to governmental agencies that do the suitability determinations has meant that many types of authorized checks (such as those under the PSOEEA) do not get done. State repositories and government agencies do not have the resources, nor, in most cases, do they see it as part of their mission, to perform suitability reviews for unregulated private employment.
- The role of the state and federal record repositories should be limited to that of record providers, leaving the suitability determinations to the users or their agents.

The access process must avoid federal and state agencies acting as clearinghouses that make employment or volunteer suitability determinations for unregulated private employers or entities. Repositories should be allowed to continue to focus on their mission, with the support of user fees, of maintaining and updating criminal justice information and efficiently delivering that information to authorized users.

- Under certain conditions, the existing private sector infrastructure for background screening, including consumer reporting agencies subject to the Fair Credit Reporting Act (FCRA), should be allowed to access these records on behalf of enrolled employers. Consumer reporting agencies also could assist in finding final dispositions of arrest records since the FCRA requires them to ensure that the information they report is complete and up to date. Consumer reporting agencies allowed such access, however, should meet minimum standards for data security and training in applicable consumer reporting laws.
- Detailed privacy and fair information practice requirements should be imposed as part of expanded access authority, including protections similar to those in the FCRA. These requirements include user enrollment, use limitations, Privacy Act compliant consent and notice, rights of review and challenge, a newly streamlined and automated appeal process, limits on redissemination, information security procedures, compliance audits, and statutory rules on the use, retention, and destruction of fingerprint submissions. The Report also recommends giving an

individual the option to review his or her record before applying for a job and before it is provided to a private employer. The latter recommendation is something that goes beyond current FCRA requirements and helps to address the fact that many FBI-maintained arrest records are missing final dispositions.

- Most FBI civil fingerprint submissions typically are collected by law enforcement agencies, such as police departments and jail facilities. These locations are not the appropriate venues for fingerprint submissions for private sector criminal history screening. Fingerprints for these checks should be collected through an unobtrusive electronic means, such as flat prints, in non-law enforcement settings.
- When providing FBI criminal history information to private employers, we should not undermine the reentry policies that state and federal consumer reporting laws seek to promote by limiting the dissemination of certain kinds of criminal record information by consumer reporting agencies. Expanded private sector access to FBI criminal history information should therefore include record screening in accordance with consumer reporting laws. This screening should be done to respect the limits those laws place on the dissemination of certain criminal histories for use in employment decisions. Congress and the state legislatures may change those restrictions from time to time, depending on the balance they wish to strike between promoting privacy and reentry and allowing the free flow of public record information to users making risk assessments to promote public safety. Our recommendations in this area include suggestions to consider changes

in the FCRA to provide some greater uniformity and predictability in access to criminal history information among the states.

- Finally, suitability criteria can play an important role in the screening process by helping guide a determination by an employer of the relevance of criminal history to the duties or responsibilities of a position. For that reason, the report recommends that Congress consider whether guidance should be provided to employers on appropriate time limits that should be observed when specifying disqualifying offenses and on allowing an individual an opportunity to seek a waiver from the disqualification. Federal and state equal employment opportunity laws and regulations bear on the use of criminal records in deciding an individual's job suitability. Therefore, as required by the FCRA, private employers allowed expanded access to FBI criminal history information should certify that information under this expanded access authority will not be used in violation of those laws.

The Report concludes that if the information is handled properly, allowing dissemination of FBI criminal history records to private employers can not only provide more accurate and reliable information for use in suitability screening, but also enhance individual protections for privacy and fair use of the information.

Thank you for the opportunity to appear before this Subcommittee today. I would be happy to answer your questions.