

August 4, 2005  
1151 Steeplechase Drive  
Morgantown, WV 26508

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

Re: Comments on OLP Docket No. 100

Dear Mr. Hertling:

I am pleased to have the opportunity to provide comments on Section 6403 of the Intelligence Reform and Terrorism Prevention Act of 2004. I believe I have a unique perspective to add to this subject as I retired from the FBI on August 31, 2004, as the Assistant Director in charge of the Criminal Justice Information Services Division, and since that time have established an independent consulting practice, part of which is devoted to assisting clients in the broad area of "background checks." My comments on the fifteen factors to be considered by the Department of Justice in making recommendations to Congress follow:

1. Currently, criminal history record information (CHRI) maintained by the FBI in the Integrated Automated Fingerprint Identification System (IAFIS) and by state criminal history repositories (repositories) in Automated Fingerprint Identification Systems (AFIS) are the primary records searched during criminal history information checks. This information, while not perfect in terms of accuracy and completeness, is subject to strict quality control standards for timeliness, accuracy, and completeness. These factors are in fact audited to ensure compliance with established standards. While under the appropriate circumstances there is value to be gained from supplementing IAFIS CHRI checks with commercial database information, one must be careful in the use of such information. Commercial database information is not subjected to the same quality controls and audits to which FBI and state CHRI is subjected. Once information enters commercial databases, it is extremely difficult to ensure its accuracy; for instance, if the underlying fact situation changes (e.g. an arrest is dismissed or a conviction is expunged). However, in the hands of trained analysts, such commercially available information can serve as a valuable adjunct to a CHRI check. The fact that an individual resided at a certain address for a given length of time can be valuable supplemental information if placed in the correct context by a trained analyst. Thus, the fusion of commercial database information with CHRI, when placed in the proper context, can be a valuable supplement to the CHRI maintained by the FBI and state repositories. Such

information is readily available from a number of vendors and often costs less than CHRI checks. Nothing precludes an employer from supplementing CHRI with commercial database information, but to rely exclusively upon arrest and conviction information contained in commercial databases is extremely risky as it is neither accurate nor complete.

2. As a former national level law enforcement executive, I always presumed that anyone could find out any information they desired on me through commercial databases and public records searches. The proliferation and widespread availability of such searches today does in fact represent a threat to law enforcement and intelligence agency operatives, particularly those acting in a covert manner. While law enforcement and intelligence agencies go to great lengths to develop and place “legends” for their undercover operatives, it is extremely difficult to develop such an identity which will withstand the level of scrutiny which is available through today’s commercial databases. Besides the threat to covert operatives, in today’s age of information warfare, technology savvy adversaries, such as terrorists and international criminals, can easily identify non-covert law enforcement/intelligence officials, search them through commercial databases, and obtain very valuable intelligence on them which could be used against them or their families. Such use could be more than a nuisance if their credit history were to be tampered with, their identity stolen, or their residence and family status discovered.

3. Research has shown that CHRI maintained at the state level is more complete for criminal activity committed within a particular state than such information maintained by the FBI. However, given today’s extremely mobile society, a one state check is likely not to return an offender’s entire CHR, especially that originating from states other than the state making the check. Thus, the use of state CHRI databases is extremely effective and possibly efficient for information within a particular state. It is neither effective for information held by other states nor efficient if one must search the databases of fifty states. This is the value of an FBI check; a look at the criminal activity of an individual across all fifty states with one check. The FBI check adds value by providing multi-state information as well as federal arrest/conviction information and terrorism-related information. Currently, several states are unable to efficiently process background checks as they are experiencing backlogs and/or do not have the in-state infrastructure to efficiently collect and transport check information. The FBI, on the other hand, runs an extremely efficient operation which regularly handles electronic records requests in a matter of hours.

4. I would suggest that a study be conducted on the feasibility of divesting the Criminal Justice Information Services (CJIS) Division from the FBI and establishing it as a quasi-independent agency solely dedicated to performing as the nation’s single biometrics repository, handling all biometrics and all types of checks. This common services model is similar to the situation found in the United Kingdom with the Police Information Technology Organisation and in Australia with CrimTrac. CJIS has little in common with the rest of the FBI, and is, frankly, not understood by the FBI’s leadership. Such independence could allow CJIS to take a more entrepreneurial approach to many problems, including the problem of civil background checks. One possibility would be to

establish a national background check clearinghouse at such an independent organization which would have the responsibility for effectively and efficiently providing noncriminal justice background checks.

5. Background checks for current or prospective employers should only be performed with the individual's informed consent. The employee should have access to any records from which an adverse employment decision is made in order to provide an opportunity for the employee to correct any erroneous information. Ideally, fingerprint submissions will be retained by the state repositories and/or the FBI in order to establish a "rap back" process which will ultimately result in fewer background checks being repetitively conducted. Current avenues available are adequate means to correct inaccurate records. The federal government should not become involved in appealing adverse decisions unless it is also the entity making the decision. Penalties for the misuse of CHRI and its means of dissemination (e.g. NCIC) should be strengthened. This information is extremely personal and should be protected.

6. For many different reasons, some of which are enumerated in #3 above, certain organizations have determined that an "FBI only" check is adequate for their purposes. In instances in which there is an interstate nexus but in which not all states are in agreement for the need for a background check, the Attorney General or his designee should be allowed to authorize "FBI only" checks based upon a proper showing of such need by the affected organization. The FBI should work cooperatively with the affected organization to funnel applicants to FBI-authorized "channeling agents" who would be responsible for collecting the fingerprints and forwarding them to the FBI. Depending on the needs of the affected organization either it or the designated authorized channeling agent could make a fitness determination.

7. Employers should be allowed, but not required, to recoup the cost of background checks from their employees or applicants. This should be a cost recoupment only; the employer should not be allowed to profit from the background check.

8. Incomplete CHRI is always going to be a problem at both the state and FBI levels. Decisions should be based upon available, verifiable information. An applicant should be given a reasonable opportunity to supplement incomplete CHRI with official records which provide "the rest of the story" (e.g. missing disposition information) when such missing information results in a negative decision. However, it should not be the responsibility of either the state repository or the FBI to track down missing information. The state repository and FBI can accept applicant-furnished supplemental information provided it is provided in an accepted means (e.g., certified copy of disposition from court).

9. With appropriate statutory and/or regulatory safeguards (see #5 above and #10 below), CHRI should be disseminated to the employer so they can make the appropriate hiring decision with all available information.

10. I would suggest that the National Crime Prevention and Privacy Compact Council (Council) study the issue of restrictions on the handling of CHRI by employers and issue appropriate regulations which balance the need for applicant privacy with an employer's need for access to CHRI. Some items which should be considered by the Council in this area include use of user agreements with employers, provisions for providing the applicant with a copy of his CHR, secondary dissemination of the CHRI by the employer, fixed life cycle for the CHRI, and penalties for misuse of CHRI.

11. Appropriate fees are one of the most important factors in the acceptance of fingerprint-based CHRI checks. Currently, there is a wide divergence in fees charged for providing this service. My recommendation would be that all public entities involved in the process be allowed to charge a reasonable fee which recoups their expenses incurred in providing the service as well as providing for an "evergreen" fund to keep their expensive technology current. Private entities involved in the process should be allowed to recoup their expenses plus a reasonable, negotiated profit. Unfortunately, unless Congress wants to appropriate funding to cover the costs of CHRI background checks, fees will be a necessity.

12. One of the detriments to fingerprint-based CHRI checks is that they are often not handled in a timely manner, particularly at the state level. The FBI has set a goal of handling electronically received background checks within 24 hours. In reality, it is handling such checks within a few hours. However, name-based checks of commercial databases can be completed within seconds, but without the confidence of positive identity afforded by fingerprints. In reality, 24 hours is likely a reasonable period of time to respond to a fingerprint-based CHRI check. Goals should be established for the length of time it takes to electronically transmit fingerprints from the point of capture to the collection point (e.g. state repository or FBI), process the prints at the state repository, electronically forward the print search request to the FBI, process the print at the FBI, and electronically transmit the print search results to the authorized recipient. I would suggest that three days to accomplish this process is reasonable and achievable (see #13 below), and if achieved at a reasonable cost would obviate much of the demand for name-based background checks.

13. A three day processing cycle (see #12 above) is generally not reasonable in today's environment due to the lack of an adequate supporting infrastructure. In today's hierarchical system in which most civil fingerprints are captured at local police departments, sent to the state repository, and then forwarded to the FBI, the failure to perform is within the boundaries of the states which have not invested in the necessary technology and staff (note that there are a limited number of states which have made the investment needed for total end-to-end electronic connectivity within the state and to which this statement does not apply). To succeed, it will be necessary to implement an infrastructure to collect civil fingerprints at either government locations or through an approved channeling agency. Ideally, an applicant should be able to have their fingerprints collected at a livescan site within their county of residence or work. This dictates some type of ubiquitous location, such as a sheriff's office, post office, etc.,

which is equipped with a livescan device and electronically connected to the next location in the process, either the state repository or the FBI.

Many state repositories are operating with AFIS which are outmoded, at their operating throughput capacity, and understaffed. The FBI currently has excess IAFIS capacity, which includes fingerprint examiners. The FBI has just started its next generation IAFIS planning effort, which should incorporate many IAFIS enhancements to accommodate additional civil fingerprint check requirements, such as “rap back” and enhanced civil file searching. Thus, the FBI is in good shape from a capacity standpoint while many states immediately need additional AFIS capacity, including corresponding staff, to meet today’s, much less tomorrow’s, demand for civil background checks.

Given the foregoing assessment of the states’ infrastructure, it may be time to look at a public-private partnership model, further consolidation of state AFIS, or more direct access to the FBI for civil checks. In a public-private partnership, a government entity would contract with a private sector entity to provide all or part of the infrastructure to successfully meet the needs of the civil background check customer. This might be limited outsourcing, such as the establishment of fingerprint capture locations, or more radical outsourcing, such as the privatization of the state repository. Alternatively, the Western Identification Network (WIN) model is one which might need to be adopted by more states. In this model, states would abandon their outdated AFIS in exchange for participation in a regional or “service bureau” type AFIS arrangement with several other states in which collectively they operate one AFIS with sufficient throughput capacity to handle all their projected needs. This model could be accomplished through a governmental entity or through outsourcing the operation of the consolidated AFIS and funding it through a “subscription” basis. Alternatively, direct access to the FBI IAFIS for civil checks becomes a more attractive option where states are unable to timely meet the demands for civil checks. As described in #3 and #6 above, for many organizations, an FBI only check is “good enough” (especially as the FBI is now accepting all arrests forwarded to it by the states not just “criterion offenses”), more timely, and more economical. Unless states are able to meet the demands of their civil check customers, pressure will continue to grow to allow more FBI only checks.

14. There are three roles which states can play in a national civil fingerprint-based background system: direct participation, indirect participation, and no role. In direct participation, the state can implement and operate an in-state infrastructure which meets the timeliness needs of its civil background check customers, conduct a state repository check, and forward the check to the FBI. In the indirect participation model, the state outsources some aspects of the infrastructure and/or state repository function while still acting as a conduit for checks from that state to the FBI. Finally, a state could play no role by opting out of civil background checks and allowing the federal government to implement a fingerprint collection infrastructure within the state which directly transmits the checks to the FBI with no state check. Ideally, states would choose to directly participate in the civil background check process; however, it is realistic to expect that, given the option, several states would choose to indirectly participate or play no role.

15. Two other factors are worth noting. First, any use of private sector channeling agents must be done in such a way as to ensure a reasonable return on the somewhat

significant initial startup investment required to enter this business. In other words, having 50 approved channeling agents is likely too many because the market would be divided into pieces so small as to be unprofitable. On the other hand, having, for example, five nationwide channeling agents would allow for the private sector to profitably invest in that new business.

Secondly, all efforts should be made to allow for the searching of civil background fingerprints during unsolved latent fingerprint searches. This is an important law enforcement technique which can only become more valuable as the number of stored and searchable civil fingerprints grows.

Again, I appreciate the opportunity to provide comments on this most important topic. If I can be of any further assistance, please do not hesitate to contact me via email at [mdkirkpatconsult@aol.com](mailto:mdkirkpatconsult@aol.com) or by telephone at (304) 594-9004.

Sincerely,

Michael D. Kirkpatrick