

Re: Criminal History Background Checks; Request for Comments (70 FR 32849, 6.6.05)

Comments from the U.S. Nuclear Regulatory Commission (NRC), Office of Nuclear Security and Incident Response. Contact: Brad Baxter, 301-415-6742, bxb@nrc.gov.

Title VI, Subtitle D, of the Energy Policy Act of 2005 (EnPA05), signed into law on August 8 of this year, incorporates the NRC's security proposals, in particular an extended requirement to fingerprint, a requirement first imposed nearly 20 years ago by Section 149 of the Atomic Energy Act of 1954 (because of this recent enactment, we are responding late to your request for comments). The extended requirement covers a wider class of individuals; in particular, it would cover individuals who are permitted unescorted access to radioactive material or other property that is subject to NRC regulation and that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks. This is a major milestone for the NRC to protect public health and safety and to make sure individuals who are involved in licensed activities are accountable for their past actions and identities are verified.

However, with passing of the Intelligence Reform and Terrorism Prevention Act of 2004, the NRC Office of Nuclear Security and Incident Response wants to make recommendations for improving programs and procedures for conducting criminal history record checks for non-criminal justice purposes such as licensing and employment purposes at our nuclear facilities.

Background: Until amendment by EnPA05, Section 149 of the Atomic Energy Act of 1954 (AEA) authorized the Commission to require only licensees of utilization facilities licensed under sections 103 or 104b of the AEA to obtain fingerprints of certain individuals. Those individuals who were fingerprinted were individuals who were permitted unescorted access to the facility or who are permitted access to safeguards information (SGI) under section 147 of the AEA. The Commission's current implementing regulations are in 10 C.F.R. §§ 73.21 and 73.57 for nuclear power reactors. Passage of EnPA05 has enlarged the classes of NRC-regulated entities and activities whose employees are subject to the requirements of section 149 of the AEA. The amended section 149 would require the Commission to mandate fingerprinting, for criminal history record checks, by (1) any person that is licensed or certified to engage in an activity subject to NRC regulation, (2) any person that has filed an application for a license or certificate to engage in such an activity, and (3) any person that has provided written notification to the Commission of an intent to file an application for licensing, certification, permitting, or approval of a product or activity subject to NRC regulation. These persons must fingerprint anyone who is permitted unescorted access to a utilization facility (such as a nuclear power plant), or radioactive material or other property subject to regulation by the NRC that the Commission determines to be of "such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks;" or is permitted access to safeguards information under section 147. See Section 652 of EnPA05.

Pursuant to section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004, DOJ is to consider fifteen factors in making recommendations. NRC/NSIR's recommendations are related to the following factors: (4), (5), (6), (9), (12), and (15) and aim to establish a program holistically by eliminating the uncertainty of an individual's true identity by providing high assurance that the individuals granted

access are trustworthy and reliable, and do not constitute an unreasonable risk to public health and safety including a potential to commit radiological sabotage.

Factor (4): Any feasibility studies by DOJ of the resources and structure of the FBI to establish a system to provide criminal history information. (Related factors: (6),(9),(12), and (15).) The nuclear power plant industry receives criminal history information under 10 CFR 73.57, which implements section 149 of the AEA. The plants receive this information because, under NRC regulations, they are responsible for making access decisions. However, identity verification would be enhanced if the nuclear power plants could have direct access to essential databases such as the National Crime Information Center (NCIC). Alternatively, the information they have should encompass what is currently utilized in the Homeland Security Presidential Directive No. 11 (HSPD-11) to establish a comprehensive terrorist-related screening procedure. Ideally data points of interest would include: Criminal History for Felony, Misdemeanor Crimes of Domestic Violence, Other (Multiple Driving Under the Influences, Non-NCIC Warrants, Flash Notices, etc), Drug Abuse, Domestic Violence Restraining Orders, Fugitive from Justice, Illegal/Unlawful Aliens, Dishonorable Discharges, Denied Persons File, Mental Defectives. This information would be useful for officer protection and protection of public health and safety. If providing this information directly to the plants is not feasible then possibly the use of a channeling agency such as the NRC could expedite the process. NRC should be privy to that same information and be granted direct access to all other relevant criminal history databases, relevant databases that would help determine the status of any alien under the immigration laws of the United States, and relevant international databases through Interpol-U.S. National Bureau, or other appropriate means.

Licensee access to NCIC information would enhance background checks at nuclear power reactors and other sensitive nuclear facilities. However, we have been told that legislation may prohibit the use by the civilian work force. To promote "high assurance" regarding access authorization to the nation's nuclear facilities, access to this information would help increase public confidence, improve effectiveness and efficiency of background checks, and provide "high assurance" that individuals granted unescorted access are trustworthy and reliable and do not constitute an unreasonable risk to public health and safety.

Factor (5): Privacy rights and other employee protection. This principle is currently in place with the power reactor community by virtue of NRC requirements codified in 10 CFR 73.56 and 57 and industry guidelines reviewed and approved by the NRC. All individuals who seek to be employed or who will have unescorted access to the protected area of the facility must fill out and complete a Pre-History Questionnaire (PHQ) before access is authorized. Furthermore, each PHQ contains a consent form which describes the protection of their personal information and how that information may be transferred, electronically or otherwise, to other licensees and contractor/vendors or agents of each. Programmatically, the industry maintains an infrastructure capable of maintaining protection of secured and Privacy Act information.