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Richard A. Hertling
Deputy Assistant Attorney General
Office of Legal Policy
4234 Robert F. Kennedy Building
950 Pennsylvania Avenue, NW
Washington, DC 20630

Re: OLP Document No. 100

Dear Mr. Hertling:

Thank you for this opportunity to provide the comments of SEARCH, the National Consortium for Justice Information and Statistics, on Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004, which requires the Attorney General to report to the Congress on a number of matters related to national criminal history record checks for noncriminal justice purposes, and to make recommendations for improving, standardizing and consolidating the existing statutory authorizations for such checks.

SEARCH is a nonprofit membership organization created by and for the States and is dedicated to improving the criminal justice system and the quality of justice through better information management, effective application of information and identification technology, and responsible law and policy. SEARCH is governed by a Membership Group comprised of one gubernatorial appointee from each of the 50 States, the District of Columbia, Puerto Rico and the Virgin Islands. Members are primarily State-level justice officials responsible for operational decisions and policymaking concerning the management of criminal justice information, particularly criminal history information.

We believe the concepts and strategies described below would contribute significantly to an improved system for conducting national criminal history record checks for noncriminal justice purposes.

Ideally, any undertaking to improve the national criminal history record check system should build upon the existing infrastructure governed by the National Crime Prevention and Privacy Compact. The Compact, which has been ratified by the Federal Government and 23 States, governs the use of the Interstate Identification Index (III) System for conducting national criminal history record searches for noncriminal justice purposes, such as background screening for employment, licensing and volunteering. (Twelve additional States have signed a Memorandum of Understanding to formally share criminal history information for such purposes under the terms of the Compact.) The States and the Federal Government have invested a great deal of expense and effort over a period of more than 25 years to implement the III system, which provided access to more than 54 million criminal history records as of June 2005.

Much of the growth of the III system can be credited to the National Criminal History Improvement Program (NCHIP), an umbrella program that implements provisions of the Crime Identification Technology Act of 1998, the Brady Handgun Violence Prevention Act, the National Child Protection Act of 1993 and several others. Since the inception of NCHIP in 1995, the national number of criminal history records increased 35 percent. Over the same period, the number of records available for sharing between the States and the FBI under III climbed nearly 97 percent. Since year-end 1993, the number of States participating in III has grown from 26 to 47. As of the year 2000, 94 percent of the criminal history record information in the FBI database was contributed by State and local law

enforcement, courts and other local justice entities, typically through a State-level criminal record repository. We believe it would be counterproductive for the Congress to abandon efforts such as NCHIP and the Privacy Compact, which have contributed significantly to the assembly of an effective system for processing noncriminal justice record searches, and to substitute a different approach to conducting these types of background checks.

During such checks as conducted pursuant to the Compact, a request for a national search for a noncriminal justice purpose authorized by a State statute is submitted to the State's criminal history record repository and begins with a fingerprint-based search of the repository's criminal history record database. Typically, an FBI search may follow if the State repository fails to identify the applicant as having a State record. In other instances, the applicant fingerprints are submitted to the FBI independent of whether an identification and record have surfaced at the State level. In these instances, both the State level and national level information is forwarded to the adjudicating entity. Either of these approaches provides a more comprehensive search than a search conducted by the FBI alone, since State databases are more complete than the centralized database of State offenders maintained by the FBI. We recommend that this approach be retained. In addition to providing the most reliable search, the fees charged by State repositories for such searches provide funds that the States rely upon to support their criminal history record systems, which are the foundation not only for employment and licensing decisions but also for an array of critical criminal justice decisions such as charging, bond setting, sentencing and others.

We would be opposed to the development of any system that results in State repositories being bypassed, which would fail to take advantage of State-maintained records that have been shown to be more complete than those maintained by the FBI. State-maintained databases contain arrests that may not be included in the FBI's files, and are more apt to include dispositions of arrest charges. This is the primary reason why the FBI and State officials agreed 25 years ago to begin the phased implementation of the III system, which is designed ultimately to make State repository records available for all national search purposes instead of FBI records.

FBI-held offender records continue to be the primary database used for national noncriminal justice search purposes. Many of the records provided as a result of such searches lack disposition information. In some instances, such as requests through the National Instant Criminal Record Background Check System (NICS), the burden of providing this missing disposition information falls primarily upon the State repositories, which do not receive compensation for this activity other than from their own legislatures.

To the extent that the national system that may be authorized by the Congress permits additional noncriminal justice entities to bypass the State repositories and apply directly to the FBI or to some other national-level organization, the problem of missing dispositions will worsen and the burden on State repositories will increase. The loss of funds that repositories receive for conducting noncriminal justice background checks would seriously impede their ability to collect, search and forward criminal records to the FBI, resulting in the steady erosion of the quality of criminal records maintained by the FBI. Meanwhile, the FBI's workload would increase significantly. Sizing for the FBI's Integrated Automated Fingerprint Identification System was based, in part, on the well-recognized fact that two-thirds of arrested individuals have previous criminal histories; identification of these individuals at the State level would spare the FBI from having to conduct a repetitive search.

For these reasons, we urge the Department of Justice to recommend that appropriate Federal funding be provided to compensate State repositories if they are expected to contribute services to a national check system that deprives the States of existing fees.

We have previously provided the Department of Justice with the results of a survey we conducted of State repositories which indicated that the greatest obstacle to increased State participation in programs to provide national searches for noncriminal justice purposes is the fact that current Federal law does not permit the repositories to make criminal history records, or parts of them, available to private noncriminal justice entities, such as volunteer agencies covered by the National Child

Protection Act or non-governmental entities authorized under State statutes enacted pursuant to Public Law 92-544. Instead, the States must designate State agencies to make fitness determinations and forward them to the applicant noncriminal justice agencies.

We urge the Department of Justice to include in its recommendations to the Congress a recommendation that the States and the FBI be authorized, as an option, to make criminal history records disseminated by the FBI or accessed by a State from the FBI available to nongovernmental agencies, such as private employers and agencies that deal with children, the elderly and disabled persons. We believe these agencies are able to make their own fitness determinations concerning their applicants as an alternative to State agencies that may not be familiar with all of the circumstances concerning applicants' duties and the environments in which they will be employed or may volunteer. This recommendation is not intended to abrogate governmental determinations relating to regulatory responsibilities associated with licensing or certification for various positions.

We recognize that some private noncriminal justice agencies may need training or instructions to help them interpret and understand criminal history records. We recommend that such agencies be required to enter into user agreements that contain such requirements as training, security and perhaps making the criminal history records reviewed during applicant processing available to the applicants themselves to help ensure that they are accurate and complete. Applicants should be given the opportunity to correct erroneous information and to appeal adverse decisions. We believe that this approach recognizes and is consistent with privacy protections and consumer rights. Such agreements should also require compliance audits and provide penalties for noncompliance.

Further, we believe that the criminal history record databases maintained by the FBI and the State repositories should continue to be the basis for national criminal history searches for noncriminal justice purposes. While some applicant agencies may wish to obtain criminal record searches from the commercial databases compiled by private vendors, we believe that those databases should not be a part of a national system authorized by the Congress, since they are not based on positive identification -- fingerprint-based identification. In his testimony to Congress in May 2000, former Assistant FBI Director David Loesch shared the results of an analysis conducted by the Bureau of the 6.9 million records submitted for employment and licensing purposes in Fiscal Year 1997. According to Loesch, 8.7 percent or just over 600,000 of the prints produced "hits." Loesch further noted that 11.7 percent of the "hits" or 70,200 civil fingerprint cards reflected different names than those listed in the applicants' criminal history records. These individuals would have been missed entirely by name-only background checks. This and other studies have repeatedly substantiated that background checks based on names rather than positive identification consistently miss a substantial number of criminal records while erroneously associating applicants with criminal record information that does not relate to them.

Criminal information databases maintained by private vendors are also not as complete as the official records maintained by State and Federal criminal record managers. Official records are populated with information from all segments of the criminal justice process, from arrest, trial, adjudication and correctional activity. Information in private databases is often collected from only one or two of the justice process components, such as courts or corrections. Further, access to records that are sealed or expunged from official databases is often provided in commercial databases, interfering with public policy efforts to give former offenders an opportunity to rebuild their lives.

Finally, we would advise the Department of Justice to utilize the findings of the National Task Force on the Criminal Record Backgrounding of America, co-sponsored by the Bureau of Justice Statistics and SEARCH. The task force is attempting to bring clarity to processes through which criminal histories are reviewed to determine suitability for certain jobs, licenses and other opportunities. Task force members represent a wide range of participants in the criminal record check process, from Federal and State justice agencies, public and private providers of background check services and subject matter experts to end-users from the public and private sectors and from volunteer organizations. Their collective wisdom would greatly inform the Department's discussions about what should be recommended to Congress.

We are confident that the concepts, processes and procedures described above would contribute significantly to a noncriminal justice background check system that provides the public with maximum safety benefits while ensuring the viability of all justice entities that contribute criminal record data. Once again, we appreciate the opportunity to provide these comments, and we urge you to contact us if we can provide additional information concerning this vitally important matter.

Sincerely,

RONALD P. HAWLEY
Executive Director
SEARCH