



# Department of Justice

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STATEMENT

OF

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BEFORE THE  
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY  
COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

"EMPLOYER ACCESS TO CRIMINAL BACKGROUND CHECKS:  
THE NEED FOR EFFICIENCY AND ACCURACY"

PRESENTED ON

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## **Statement for the Record**

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**Before the**

**United States House of Representatives  
Committee on the Judiciary  
Subcommittee on Crime, Terrorism, and Homeland Security**

**Hearing on Employer Access to Criminal Background Checks:  
The Need for Efficiency and Accuracy**

**April 26, 2007**

Chairman Scott, Ranking Member Forbes, 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 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 the *Intelligence Reform and Terrorism Prevention Act of 2004*. 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. There appeared to be frustration, both within Congress and among private users of criminal history information, with the existing approach of enacting separate state or federal statutes authorizing access to FBI data for only particular employers or 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.

In preparing the report's recommendations, the Department was required to consult with the state criminal record repositories, the National Crime Prevention and Privacy Compact Council, and representatives from the private sector and labor organizations. In addition to these entities, we sought broad input from a variety of stakeholders with an interest in this issue, and received a great deal of information and diverse points of view that were extremely useful in preparing the report.

The Attorney General's Report recognized that improving criminal history background checks involves several different, and sometimes competing, interests. They include:

- employers' interest in being aware of the criminal history of a job applicant in order to assess whether they can bear the risk of hiring the individual;

- the need to find efficient ways to deliver to users reliable and accurate criminal history information;
- protecting the privacy rights of individuals subject to a criminal background check;
- ensuring that users of the information follow state and federal equal employment opportunity laws and do not to unfairly exclude persons with criminal records from employment opportunities when they are otherwise qualified for a position; and
- the broad social interest in facilitating the reentry and continued employment of ex-offenders.

The Report attempted to account for this range of interests 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 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.

Noting the importance of record completeness for this use as well as the myriad of other uses made of the FBI criminal history record system, the report also calls for a "renewed federal effort to improve the accuracy, completeness, and integration of the national criminal history records system." The report notes that in recent years the National Criminal History Improvement Program (NCHIP) has been funded at smaller and smaller fractions of the amount requested in the President's Budget. At the same time, the purposes for which the money is to be used have increased, such as participation by the states in the National Sex Offender Registry and the creation of files on sharing information, including civil protection orders on domestic violence. The report also recommends that "federal funds should be targeted at reaching national standards established by the Attorney General relating to prompt disposition reporting and record completeness, including declinations to prosecute and expungement and sealing orders, so that there is uniformity in improvements by repositories nationwide."

Several key points underlie the Report's recommendations:

- Conducting criminal history background checks is a reasonable step that employers and volunteer organizations take to protect their customers, their employees, their assets, and the public. Employers want to make informed hiring decisions. While not all criminal records are relevant to a person's qualifications for a job, some records clearly are relevant to a placement decision, and there is no way of knowing whether a relevant record exists unless an employer screens applicants for criminal history.
- As a result, private employers can and do ask applicants about their criminal history. In some states, how that question is asked is subject to restrictions, but in all states some form of criminal background screening is permitted for employment purposes. When they ask the criminal background question, employers seek out information on whether an applicant's response is truthful and complete.
- Employers who do not have access to FBI criminal history information go to other sources of this public record information, including courthouse searches, available state criminal record repository information, and commercial data providers and background screening companies. According to a recent SEARCH survey cited in the report, 25 of 34 states responding to the survey now make both

name-only and fingerprint searches of their state criminal history record information available to any member of the public.

- Private sector criminal history checks will continue regardless of whether FBI information is made available for that purpose. Making FBI criminal history information available for private sector background screening will not necessarily lead to more criminal history checks than already occur. FBI fingerprint checks are more expensive and less convenient than name checks. The private sector is in the best position to identify the unregulated jobs that require this level of criminal history screening.
- 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.
- The current access scheme has created a patchwork of statutes, including over 1,200 state statutes 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.
- Since all employers are able to access criminal history information through other sources, such as the courts, state repositories, and commercial vendors, it would be reasonable to provide all employers access to FBI records for criminal background checks without the need for separate statutory enactments, if two important 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 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 private employment or volunteer placement.
- 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. I hope today's hearing helps to shed further light on a fairly complex set of issues.

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