

**THE BILL BLACKWOOD
LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TEXAS**

**Non-Criminal Justice Access to Criminal History
Record Information**

**A Policy Research Project
Submitted in Partial Fulfillment of the
Requirements for the Professional Designation
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Conclusion

The purpose of this research paper has been to evaluate the use of criminal history record information and to educate legislators in order to create a balanced dissemination policy for the state of Texas. Lack of federal legislation establishing a uniform policy on dissemination of criminal history record information to the non-criminal justice community left states free to establish their own privacy and confidentiality laws and policies to attempt to find a balance between the rights of the criminal record subject and the public's right to know. With today's technological advances, more law enforcement agencies are beginning to create their own web sites in order to provide criminal history record information, along with other public information, to those who request it.

In conclusion, as law enforcement executives, we need to continue to listen to the needs of the public, be prepared to handle the public's demand and be well versed in the law to know what records the public can legally access. In fiscal year 1998, the Texas Department of Public Safety processed 1,676,177 criminal history record checks for non-criminal justice agencies. That was an increase of 105,311, or 6.7 percent from the previous year. The Texas legislature continues to pass legislation requiring the DPS to provide access to the non-criminal justice community. It is our responsibility to educate our representatives and senators and make them aware of the multiple levels of access currently available in order to assist them in creating a responsible, user friendly non-criminal justice information system.

Abstract

The purpose of this research paper is to resolve the problem of confusing legislation and a cluttered Texas Government Code regarding non-criminal justice access to criminal history record information. Currently, legislation exists for each agency with statutory authority to access criminal history record information. The paper explores whether it would benefit the Department of Public Safety to create a document that outlines the history of legislation passed concerning non-criminal justice access to criminal history record information and suggests the categorization of types of access. This document should be presented to representatives of both the Senate and the House of Representatives prior to each legislative session to educate and encourage responsible legislation and a balanced policy for the state of Texas.

The main findings were that society has progressively become less protective of the criminal's right to privacy and has demanded the right to know a person's criminal history in order to protect themselves and their community.

It is recommended that a criminal history record information document be created, presented to legislators, and updated after each session. Doing these things will make the Texas Government Code less confusing, create a balanced criminal history record information dissemination policy for the state of Texas and improve the relationship between the Department of Public Safety and the Texas Legislature.

RESERVE

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RESERVE

Introduction

When we think of law enforcement today, we usually focus our attention on the thousands of officers working the streets. In order for those officers to effectively handle situations and ensure their personal safety as well as the safety of the community, access to criminal history record information (CHRI) is essential. The Texas Department of Public Safety (DPS) serves as the Control Terminal Agency (CTA) for the state of Texas. As CTA, the DPS is responsible for maintaining the computerized criminal history file (CCH) that includes all reported arrest, prosecution, disposition, and custody/supervision data for individuals handled by local law enforcement officials. The Texas Government Code, Section 411.082(2), defines criminal history record information as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." The Texas CCH file is based on fingerprints.

A criminal justice agency is defined as a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order and that allocates a substantial portion (51% or more) of its annual budget to the administration of criminal justice; or a non-governmental railroad or campus police department that has obtained an originating agency identifier (ORI) from the Federal Bureau of Investigation (FBI) (Texas Government Code 22). Criminal history record information, in Texas, is provided to the law enforcement community via the Texas Law Enforcement Telecommunications System (TLETS), a network designed strictly for law enforcement use. This paper

addresses the increase in new legislation authorizing non-criminal justice and private entities access to criminal history record information previously considered confidential and restricted to "law enforcement purposes" only.

The purpose of the research project is to address the evolution of criminal history record information access by the non-criminal justice and private communities, and to determine the most equitable means of making this information available. The intended audience will consist of law enforcement agency administrators, legislators, criminal justice policy makers, and representatives of the non-criminal justice and private communities interested in accessing criminal history record information. There are very few published resources on this subject, so the research relies on legislation granting non-criminal justice agencies access to criminal history record information, journals, books, criminal justice publications and case studies. The intended outcome of this research project is to achieve a sense of balance between the obligation of the Texas Department of Public Safety to protect the public from persons who pose a threat to society and to maintain the privacy of the subject of the criminal records.

Historical, Legal and Theoretical Context

Public access to criminal history record information has been an issue since its creation. In the 1960's, when the FBI began collecting criminal history record information at the national level, it was strongly felt that the information collected was to be used only by law enforcement personnel while performing their job-related duties. Both federal and state statutes govern the collection, maintenance, and dissemination of criminal history

record information. The statutory authority of the FBI to maintain criminal history records is found in Section 534 of Title 28 of the United States Code. Specifically, subsections (a)(1) and (a)(4) authorize the Attorney General to "acquire, collect, classify and preserve identification, criminal identification, crime and other records" and to "exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions" (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 36). Statistics show that from the mid-1960s through the mid-1970s, most experts felt that dissemination trends were moving in the direction of increased confidentiality and the imposition of restrictions upon the release of criminal history records for non-criminal justice purposes (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 40). In today's society, the trend is more toward allowing the non-criminal justice community access to criminal history record information in order to better protect themselves.

In the early 1970s, police discretion was under attack. There was public concern about privacy, automation, and governmental and private information systems. The basis of concern revolved around computerization, misuse, quality of data, and dissemination of non-conviction data. There was a general belief that irrespective of past crimes, people should be given a second chance to rehabilitate themselves through work and reintegration into the community and that the community was obligated to accept such persons (Laudon 114-115). Contrary to that belief, others felt that the community had the right to protect itself from individuals likely to commit a crime, that people should be

held accountable for their past behavior, and that organizations must be held responsible for the character of their employees (Laudon 115). In an attempt to address this issue, Congress considered several legislative proposals that would have imposed a uniform national information management scheme for state and local handling of criminal history record information (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 36). It was at this time they began to see a need to develop exceptions for governmental entities with national security missions and licensing boards. There also was a need for some private employers to screen applicants for security sensitive positions, such as those involving public safety, supervision of children or custody of valuable property. This was most likely the first time non-criminal justice access to criminal history record information was made an issue. Not only were several public and private non-criminal justice agencies making persuasive arguments for access to criminal history record information at the national level, they were making the same argument at the state level. Congressional efforts to enact federal legislation setting national dissemination standards for state criminal history record systems failed. The 1975 Law Enforcement Assistance Administration (LEAA) regulations did not attempt to create a uniform policy on non-criminal justice access. Instead, they left the matter up to the legislatures and governors of individual states. Section 20.21(b)(2) of the regulations provided that non-criminal justice access and use is permitted in instances "authorized by statute, ordinance, executive order, or court rule, decision or order as construed by appropriate state or local officials or agencies" (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 7-8). As a result of this regulation, each legislative session results in new statutory authority for non-criminal justice agencies and

groups to obtain criminal record checks for such purposes as public and private employment, occupational licensing, and the issuance of various permits, certifications and clearances (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 8). This becomes a problem because existing laws and policies on non-criminal justice access consist of a patchwork of statutory and regulatory provisions. The "patchwork" is a result of independent lobbying efforts by particular groups rather than from a comprehensive review of the issues and development of a consistent, balanced, statewide policy (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 8).

Review of Literature or Practice

A 1984 study of state policies and practices regarding use of criminal history record information for non-criminal justice purposes was impossible to classify because each state's policies were so different (SEARCH Group, Inc. A Study to Identify Criminal Justice Law, Policy and Management Practices Needed to Accommodate Access to and Use of III for Noncriminal Justice Purposes). There were a few states that had no statutory provisions setting statewide policies on non-criminal justice access. These states used the Department of Justice (DOJ) regulations to control access and use. In other states, statutes did nothing more than delegate a designated official the authority to issue rules and regulations on non-criminal justice dissemination. Most state's statutory provisions do not specifically identify particular non-criminal justice agencies or organizations that may obtain criminal history records. They instead define classes or types of agencies or organizations that may obtain certain types of records for specified

purposes (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 8).

In Texas alone, there are currently 51 agencies statutorily authorized to access criminal history record information. Florida, for example, is an "open record" state where anyone can obtain access to criminal history records for any purpose (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 8). The Florida Government Code, Sections 943.053 (3) and (4) state, "Criminal history information, including information relating to minors, compiled by the Criminal Justice Information Program from intrastate sources shall be available...to governmental agencies not qualified as criminal justice agencies on an approximate-cost basis. After providing the program with all known identifying information, persons in the private sector may be provided criminal history information upon tender of fees as established and in the manner prescribed by rule of the Department of Law Enforcement. Criminal justice information provided by the Department of Law Enforcement shall be used only for the purposes stated in the request." Florida appears to be the most liberal state in granting criminal history record access to the non-criminal justice community.

The state of Texas has been granting non-criminal justice agencies access to criminal history record information for several years. Some non-criminal justice entities want to use criminal history information for employment screening, applicant screening, professional licensing/certification, administrative enforcement of certain acts, employment of persons in "security-sensitive" positions, public/commercial transportation, volunteers, and screening of any persons who may have the opportunity to

interact with children, disabled persons, or the elderly. The DPS may disseminate CHRI to: non-criminal justice agencies only for the purpose specified in the statute or order; the person who is the subject of the CHRI; a person working on a research or statistical project that is funded by state funds or meets the requirements of Part 22, Title 28, Code of Federal Regulations, and is approved by the DPS; and an individual or agency that has a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice. This initiated a concern about the quality of the records provided. Those within the law enforcement arena were familiar with the logistics of criminal history record information and if they had any questions, they could contact the appropriate agency for clarification. The non-criminal justice community did not have that neither luxury nor the background to know when to question the information contained in a criminal record. Even if they did, they were not authorized to get any other information other than what was provided to them by the DPS. Congress and the Department of Justice established only minimum requirements for the management of criminal history record systems, leaving it up to the individual states to create specific laws and policies to attempt to ensure complete and accurate records. Prior to 1990, the majority of criminal records in the state of Texas were incomplete. Law enforcement agencies and courts failed to submit case processing data to the DPS, resulting in inaccurate and incomplete criminal records. Chapter 60 of the Texas Government Code was created to require law enforcement agencies, prosecutors, and courts to submit information resulting from an arrest to the Department in order to increase the quality of records in the central repository at the DPS. Criminal history records are created after the DPS receives a fingerprint card and demographic identifiers

contributed by the arresting agency. This is the initial creation of the record. Prosecutors, court clerks and correctional agencies are also required to submit information relating to the disposition of their portion of the form. Law enforcement and criminal justice agencies can access CHRI via the Texas Law Enforcement Telecommunications System (TLETS). Non-criminal justice agencies, authorized by federal statute or executive order or by state statute, may also access CHRI, but through another medium. Non-criminal justice and private entities can request criminal history record information that is processed only on the basis of the person's name, unless submitted electronically or by magnetic media, in which the cost is \$1.00 per inquiry. Inquiries can also be made on the basis of fingerprint comparison searches, where the fee is \$15.00 per inquiry. In 1997, the 75th Texas Legislature passed House Bill 1176 granting the general public access to any information defined as public including criminal history record information maintained by the Department. This covers court records of public judicial proceedings that relate to convictions for criminal offenses or grants of deferred adjudication to individuals charged with felony offenses. This law also requires the DPS to design and implement a system to respond to electronic inquiries. As a result of the law, the DPS created a website that can be accessed via the Internet at <http://records.txdps.state.tx.us>. For \$3.60 per inquiry, anyone with access to the Internet can inquire on their neighbor, daycare providers, and even their child's boyfriend or girlfriend. The only information needed is the name, sex, race and date of birth of the individual. Fees charged by individual states for processing non-criminal justice record searches range from \$1.00 to \$44.00.

Discussion of Relevant Issues

Most professional law enforcement record keepers support extending the use of criminal history records to employment and other records as a means of controlling the criminal population, tracing criminals' whereabouts, preventing 'crime prone' individuals from assuming positions of trust, and limiting the exposure of the public to such persons (Laudon 115). The Freedom of Information Act provides for public to access government records that apply to criminal justice. Many laws require that certain agencies or organizations be able to show specific legal authority under statutory provisions to obtain criminal records. Alternatively, it may be required that the need for the record be approved by a designated board, council, or official (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 9). Employers are under increasing pressure to seek out and use criminal record information (both arrest and conviction data) because courts are increasingly finding employers liable for the conduct of their employees. Additionally, employers may be held liable for failing to inquire of their employees' criminal backgrounds when such inquiries were possible and feasible (Laudon 130). According to Laudon, there are four factors related to the level and growth of non-criminal use of CCH records:

Social – increase in crime

Organizational – desire of agencies to exchange information (applicant screening) and in economically advanced areas, positions may involve financial trust

Technological – computerized criminal history record system (states with CCH more likely to have more requests for information)

Legal/Regulatory – the more restrictive the statutes regulating criminal history record use, less use and vice-versa (Laudon 122-125).

Considering these factors, criminal history record information access is no longer restricted to law enforcement or criminal justice officials. Criminal history record information is becoming increasingly more available outside the criminal justice arena.

A majority of states now permit access to some criminal history records by at least some type of non-criminal justice agencies and private entities (SEARCH Group, Inc. Compendium of State Privacy and Security Legislation 7).

Along with the privilege of obtaining criminal history record information comes the responsibility of proper use. There are penalties associated with misuse of criminal history record information. According to the Texas Government Code, Section 411.085, "penalties for unauthorized use or disclosure of CHRI will be administered if a person knowingly or intentionally obtains CHRI in an unauthorized manner; uses the information for an unauthorized purpose or discloses the information to a person who is not entitled to the information". An offense under this subsection is a Class B misdemeanor. If it is found that the person obtains, uses, or discloses CHRI for remuneration or the promise of remuneration or employs another person to obtain, use, or disclose CHRI for remuneration or the promise of remuneration, it is a 2nd Degree felony. Fortunately, the information provided to the non-criminal justice community is considered "public record" and can be disseminated without any consequences.

I believe the most important issues regarding dissemination of criminal history record information are: (1) the education of legislators and policy makers who grant authority to non-criminal justice entities; (2) the education of those who are authorized access and; (3) categorization of the types of access.

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