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Access to Criminal History Record Information for Non-criminal Justice Purposes

In the interest of allowing states to screen people who might work in professions where they would be responsible for caring for vulnerable people or where public safety concerns are implicated, Congress has passed legislation to allow the Federal Bureau of Investigation (FBI) to facilitate the exchange of criminal history record information (CHRI) between states for authorized non-criminal justice purposes. CHRI includes descriptions of arrests or other formal criminal charges and any dispositions of the charges, such as dismissal, acquittal, conviction, sentencing, correctional supervision, release, and expungement or sealing orders. This In Focus is a primer on how CHRI is exchanged for non-criminal justice purposes.

Laws Granting Access to CHRI

Under 28 U.S.C. §534(a), the Attorney General (AG) is authorized 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, including the United States Sentencing Commission, the States, including State sentencing commissions, Indian tribes, cities, and penal and other institutions.”

A provision in the 1973 appropriations for the U.S. Department of Justice (DOJ) granted the FBI the authority to exchange CHRI with state, local, and tribal governments for licensing or employment purposes if access is granted by state law and it is approved by the AG (P.L. 92-544, codified at 34 U.S.C. §41101). P.L. 92-544 is the primary vehicle facilitating state access to CHRI.

Other federal laws allow states to access CHRI without an enabling state statute. Examples include the following:

- 34 U.S.C. §20962 authorizes criminal history records checks for individuals employed, or under consideration for employment, by a private or public school or an educational agency who would work with or around children.
 - 34 U.S.C. §40102 authorizes criminal history records checks for applicants who would provide care to the elderly or individuals with disabilities, or who are responsible for the safety and well-being of children.
 - 34 U.S.C. §41105 authorizes criminal history records checks for applicants who would provide direct care to individuals in nursing facilities or through a home health care agency.
 - 34 U.S.C. §41106 authorizes criminal history records checks for individuals seeking employment as private security officers.
- Other statutes require federal agencies to conduct background checks for certain positions:
- 34 U.S.C. §20351 requires facilities operated by or under contract with the federal government that provide child care to conduct a criminal history background check for employees and contractors.
 - 49 U.S.C. §44936 requires the Transportation Security Administration (TSA) to conduct background checks on individuals in the aviation industry who are involved in security or who have access to aircrafts.

Exchanging CHRI

Most CHRI is maintained by states in their own repositories, but the FBI facilitates the exchange of this information through its Interstate Identification Index (III, or *Triple-I*). III allows states to exchange CHRI by maintaining an index of identifying information (e.g., names, birth dates, fingerprints) of individuals with CHRI accessible through III. If a query of III indicates that an individual has a criminal history record, the requesting state will be pointed to the relevant state(s), and/or the FBI, which maintains CHRI for people convicted of federal offenses, so it can obtain the records for the individual.

III was initially established to allow CHRI to be exchanged for criminal justice purposes, but over the years there was growing interest in allowing access to III for non-criminal justice purposes. While all states currently allow CHRI to be exchanged with other states for criminal justice purposes, state laws vary regarding dissemination of CHRI for non-criminal justice purposes. Congress passed the National Crime Prevention and Privacy Compact (P.L. 105-251, compact) to establish a legal framework for interstate exchange of CHRI for non-criminal justice purposes. States that ratify the compact agree to provide all unsealed CHRI for any authorized non-criminal justice purpose.

As of October 2023, 24 states and the District of Columbia solely participate in III (III states). III states provide duplicate CHRI to the FBI so that in instances when a state has CHRI on the subject of a search but cannot release the information due to its laws, the FBI responds with the CHRI in its possession. (When states submit CHRI to the FBI, it becomes a federal record and the records are disseminated based on federal laws and regulations regarding criminal history records checks.) The FBI provides all CHRI, other than arrests without a disposition

that are more than a year old, to states conducting an authorized background check. States submit information on *criterion offenses*, which the FBI defines as all felonies and misdemeanors, except designated nonserious ones. Because reporting to the FBI is voluntary, CHRI from the FBI's records might not be as complete as a comparable state record. While states report arrests with regularity, a past analysis by DOJ found that half of records maintained by the FBI did not have final case disposition data, though more recent arrest records were more likely to be complete.

As of October 2023, 26 states participate in both III and the National Fingerprint File (NFF). States must ratify the compact in order to participate in the NFF (NFF states). NFF states do not submit duplicate CHRI records to the FBI. In NFF states, when someone is arrested the state sends the FBI fingerprints and identification information, which are used to establish a pointer to the related CHRI maintained by the state. Subsequent case disposition information or future arrests for additional crimes are maintained by the state and that information is not forwarded on to the FBI. NFF participation likely provides for the most complete CHRI because requesting states can receive the full record from the state holding it instead of receiving only what was submitted voluntarily to the FBI. While accessing CHRI directly from the holding state might provide a more complete record than a record maintained by the FBI, the most recent survey of state criminal history information systems found that 69% of arrests and 72% of felony charges in state databases have final disposition data.

When a state non-criminal justice agency is authorized by law to conduct a CHRI search, it starts by submitting an individual's fingerprints to the state repository. The repository first runs the fingerprints against its records to determine if there is an in-state match. If there is, the record also provides information indicating whether the individual has an out-of-state criminal record. In this case, III sends a notification to any NFF state with CHRI on the individual, which then provides the complete record to the requesting state. The FBI provides records it has for individuals with federal CHRI and for III states.

If a search of in-state records does not return a match, the state transmits the individual's fingerprints to the FBI for a search of III. If the FBI's search returns a match, the FBI provides the requesting state with records for federal offenses and any records it holds for III states. The FBI also notifies NFF states that hold CHRI on the individual to provide their records to the requesting state.

States repositories screen the CHRI they receive under the circumstances described above to determine which information can be disclosed under state law. The results, which are edited, if necessary, are provided to the non-criminal justice agency that initiated the search.

Federal non-criminal justice agencies that are authorized to conduct a CHRI search submit fingerprints directly to the FBI and they are processed in a manner similar to the way state requests are processed when a state does not have a record on an individual.

Barriers to Further Access to CHRI

SEARCH, a nonprofit organization that supports criminal justice information sharing, outlined several reasons why states have not adopted the compact or do not participate in the NFF.

Given that state legislatures might only meet a few months a year, it can be difficult for the state to ratify the compact if it is not a legislative priority. Adopting the compact might not be point of focus if state legislators do not understand the importance of the compact for facilitating the exchange of CHRI for non-criminal justice purposes or if legislators are concerned about which non-criminal justice agencies have access to the state's CHRI and for what purposes.

States might face costs to upgrade their criminal history repositories technology in order to respond to all requests for CHRI. Technology upgrades might be necessary in order for the state to furnish the proper information in response to the request, such as providing all CHRI in response to a III request for national security purposes.

Some states might not see the purpose of ratifying the compact because they are satisfied with the FBI furnishing the CHRI supplied by the state in instances where the state is not authorized to respond to a particular III request. States might also not see the need to ratify the compact if their state laws do not conflict with the compact (i.e., state laws authorize the state repository to respond to all III requests).

There are also some states that have ratified the compact but do not participate in the NFF. In some cases, states might face substantial costs with upgrading their fingerprint identification systems in order to be compliant with NFF standards. In other cases, states might not be able to respond to all requests for CHRI maintained by the state because the fingerprints associated with the record pre-date the creation of the state's CHRI repository (i.e., the state does not have the fingerprints on file). There might also be an issue with the quality of the fingerprints. Before fingerprints were able to be captured digitally, they were taken though an ink-and-roll process on physical fingerprint cards and the quality of the fingerprints sent to the state might have been lower than those sent to the FBI.

National Criminal History Improvement Program (NCHIP)

The Bureau of Justice Statistics (BJS) awards grants to state, territorial, and tribal governments under NCHIP to help states and localities improve the quality, timeliness, and immediate accessibility of CHRI and related information. Areas of focus under the program can vary each fiscal year, but for FY2024 two areas of focus under NCHIP are updating and automating case outcomes from courts and prosecutors in state and tribal criminal records and supporting participation in the NFF and adoption of the compact.

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