

# MEMORANDUM

**From:** Robert Tenneson, Chair  
Steven L. Chanenson, Reporter  
Jordan M. Hyatt, Associate Reporter

**To:** Members, Advisors, and Observers Drafting Committee for the Criminal Records Accuracy Act

**Re:** Drafting Meeting (October 23-24, 2015)

**Date:** October 6, 2015

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This memo provides an overview of the issues and materials for the October 2015 meeting of the Committee. We will gather together on Friday and Saturday, October 23 and 24, in Fall Church, VA.

The current draft is exceedingly preliminary. We expect to use this meeting, as well as the next meeting, to further develop and refine the ideas presented in this first draft. Our primary goals in October will be to consider major policy issues and to further refine the required framework to address those challenges through the act.

Included with this memo are the following documents:

- (1) The current draft of the act with some discussion notes;
- (2) A list of relevant statutes from the majority of states (“Appendix A”);
- (3) A summary of key statutory language from the majority of states (“Appendix B”);
- (4) The Sentencing Reform and Corrections Act of 2015 (“SRCA”), where section 213 directly addresses accuracy of criminal records (“Appendix C”);
- (5) A summary of the federal identify theft identity database and parallel efforts from California, efforts similar to a new proposal contained within the current draft (“Appendix D”).
- (6) Information about fingerprint collection problems in Pennsylvania (“Appendix E”)

- (7) A 2013 report by the National Employment Law Project on the accuracy of FBI background checks for employment (“Appendix F”).

The current form of the draft includes 15 sections. These sections are as follows:

- Section 1. Short Title.
- Section 2. Definitions.
- Section 3. Applicability.
- Section 4. Scope.
- Section 5. Duties And Authority Of Criminal Justice Agency Concerning Criminal History Record Information.
- Section 6. Criminal Justice Agency Collection and Use of Intelligence Information and Investigative Information.
- Section 7. Duties and Authority of the Central Repository.
- Section 8. Security Requirements for Criminal Justice Agencies and Central Repository.
- Section 9. Subject’s Right of Access, Review, Challenge, Correction, and Appeal.
- Section 10. Mandatory Independent Annual Audit.
- Section 11. Sanctions and Remedies.
- Section 12. Duties and Authority of [Attorney General].
- Section 13. Uniformity of Application and Construction.
- Section 14. Repeals; Conforming Amendments.
- Section 15. Effective Date.

There are several broad policy questions that we hope the committee will address during this meeting.

Among those questions are the following:

- (1) *Identification of Key Parties.* In this draft of the act, we rely heavily on the Office of the Attorney General to adopt regulations and oversee various processes designed to increase the general levels of accuracy of criminal history record information.

There are several roles that must be filled within the framework we have outlined. Notably, a party or agency will be responsible for reviewing challenges brought by individuals, conducting regular audits, and, in the event of agency noncompliance, seek (and to a lesser extent administer) sanctions. As mentioned in the discussion notes, we believe strongly in the value of a checks-and-balances approach, and want a party somewhat removed from the day-to-day operation of the criminal record system to take the lead in overseeing the functioning of the system. In the current draft, this

responsibility would extend to the handling of administrative claims regarding inaccuracy, auditing the criminal history record system, among other roles.

The agency best equipped to take on these tasks can vary significantly. In Pennsylvania, for example, the Attorney General would have the authority and resources to fulfill these requirements. In other states (*e.g.*, Minnesota), the same office may lack those abilities, and may not be the ideal authority for our purposes. What other option can we give adopting states to achieve these goals? Is there a better way to provide the necessary structures of authority and independent oversight?

(2) *Continuous and ongoing data collection.* There are a number of crucial junctions within the arrest, prosecution and adjudication systems where reportable events occur. One key focus of this draft is on ensuring that, at the point of entry – arrest – the necessary biometric identifying information is being collected. This is not the only juncture that matters and the committee may wish to consider additional venues for collecting these data.

In our exploratory research, we found, as have others before us, that there are a large number of incomplete records in many criminal history systems. In some cases, these errors are due to missing identification data (*e.g.*, biometrics), while others are the result of a breakdown of the data management procedures (*e.g.*, the linking of related records). There is also a good deal of variation between jurisdictions and agencies responsible for managing criminal history record information. This will likely feature prominently into any discussions of how to structure the act.

(3) *Incomplete records.* Criminal history record information can be considered incomplete under a variety of circumstances. These include incorrect identification (*e.g.*, typographic errors in name), lacking of key biometric identifying information, a failure to link related records, or the absence of final disposition data. These errors are, unfortunately, relatively common.

The committee will likely need to consider the implications for incomplete records and to the extent to which they can – or should – be included as part of criminal history record information. For example, if a criminal trial does not have a final disposition after a reasonable amount of time, should that reportable event be included in the criminal history record information? Recent developments at the federal level have begun to tackle issues of this nature; we may want to consider the implications for our current effort. The committee may also want to discuss the interactions between incomplete and inaccurate information, as a record that is missing key data is both substantively inaccurate and unresolved. Both are problematic, though for differing reasons, and fall within the scope of this project.

(4) *Proactively addressing identity theft as a source of inaccuracy.* Identity theft is a major concern both as a substantive threat to the victim and as a systemic threat to the accuracy of criminal history record information. The draft proposes a voluntary registry to prevent fraud victimization in Section 7 that is modeled on identity theft-specific registries managed by some states and the federal government. The registry proposed in this draft is designed to afford relief to individuals without a criminal record, or at least without a particular criminal record, from being confused with the person who does have that criminal record. In doing so, it should make it more difficult for inaccuracies based on identity theft or overt fraud (*e.g.*, an arrestee provides the name of an innocent, uninvolved individual at the time of arrest) to find their way into the criminal record system. We are, however, very sensitive to the fact that for this proposed system to work the government will gain access – admittedly on a voluntary basis – to yet more data, including biometric identifying information, about members of the general public. We tried to structure protections that should limit the potential for abuse and overreach while still accomplishing the harm reduction and accuracy improvement goals. We hope that the committee will help us evaluate whether we struck the right balance.

(5) *Individual protections.* Criminal history record information is, by its very nature, sensitive data. While some components of the record are public in many jurisdictions (*e.g.*, arrest and conviction data), the full, unified record itself is not, and access to criminal history record information is justifiably controlled. Does the proposed system make sense, especially in light of the pragmatic and operational hurdles many jurisdictions face in protecting identified data?

Despite the security protections outlined in the draft, as well as the explicit enumeration of acceptable uses, it is possible that criminal history record information may be inappropriately disseminated or employed for impermissible purposes. Some individual-level remedies are proposed in the draft, although the focus is largely on promoting entity level policies to prevent and, failing that, correct errors. In light of the scope of this draft act, are the protections of and incentives to vindicate individual rights, including a fee shifting provision in an action for damages, sufficient? Are they excessive?

(6) *Institutional Sanctions.* It is clear that any program to increase the overall accuracy of criminal history record information data systems will require additional efforts surrounding the collection (by criminal justice agencies) and management (primarily by the central repository) of data. Our preliminary research has uncovered some of the challenges with requiring these additional actions. For example, as noted in part above, even in comparatively well-performing jurisdictions, there is a high degree of variation in compliance rates associated with mandatory fingerprint collection regulations, and mandatory reporting of dispositions.

The draft does not propose any specific institutional-level sanctions. We have, however, been considering this issue from various angles. If a particular criminal justice agency – perhaps a police department or a prosecutor’s office – is simply not collecting fingerprints or submitting disposition information pursuant to the act, should there be another remedy available? The current draft of the act, in Section 11(b), does allow for injunctive relief, but that is really for individual complaints or

records and not for systemic noncompliance or incompetence. Should that injunctive relief be broadened? Should there be a more specific remedy for criminal justice agencies that do not come within a “reasonable” level of compliance? This is the “stick” side of the “carrot and stick” discussion started at our previous meeting. We now have some further ideas on which we would appreciate the committee’s input and hope that the committee members will have additional proposals as well.

(7) *“Police Blotter” information.* These records harken back to an era in which arrest information was written down chronologically and in a large ledger by a Desk Sergeant. Once heavily relied upon by newspaper reporters on the crime beat, these types of registries are still created by some Law Enforcement Agencies. Though now largely electronic, these records provide a running log of arrests collected by the police department, as well as limited identifying information about the arrestee.

In our exploratory research, law enforcement agents have informed us that (a) such information is no longer kept in the stereotypical chronological fashion of a police blotter and (b) there is a concern that exempting this information may undermine the broader goals of promoting accuracy throughout the process. Therefore, the committee may also wish to explicitly consider the explicit exclusion (or inclusion) of blotter information and, if necessary, how these data can be incorporated into the framework proposed under the act.

Blotter information would fall under the definition of criminal history record information that we have employed in this draft, as well as the definitions that are provided for in other jurisdictions. In some other cases, these records are specifically exempted from the scope of the statutes that address this topic (*e.g.*, Pennsylvania). As a committee, we may wish to consider the scope of the data that we intend to include – and will specifically exclude – from the act.