TO: Drafting Committee
Criminal Records Accuracy Act
Uniform Law Commission

FROM: Robert J. Tennessen, Committee Chair
Steven L. Chanenson, Reporter
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DATE: February 8, 2018

RE: Criminal Records Accuracy Act

Based on our previous conversations and a substantial set of suggested edits we received from the Style Committee (for which we are very grateful), we have prepared a revised draft. Many issues remain to be discussed. For obvious reasons, we need to resolve all of these issues during our meeting later this month.

We are, of course, also open to discussing other issues as well.

I. Structure.

1. The Style Committee asked is we should add the word "history" to the title of the act. What does the Drafting Committee want to do here?

2. You will note the addition of numerous hyphens. The Style Committee currently mandates hyphenation of phrasal adjectives such as "criminal-history-record information." We have made those changes in the draft despite some misgivings because the non-hyphenated version is widely used in the field.

3. The Style Committee suggested several structural changes. We have not made these changes at this point, in part because it would make reviewing the substantive changes harder to follow. We do not have strong views on these structural matters and reproduce the Style Committee's recommendations for your consideration:

> The provisions relating to duties of the central repository are found in two places — Article 3 (general provisions, including dissemination) and Article 4 (mistaken identity, which is operated by the central repository). To improve the organization of the central repository material, we thought that the two articles should be made into three. Thus Article 3 would be titled "Central Repository" and include general provisions (probably 301 and 306-309), Article 4 would deal with disseminations by the central repository (probably 302-305), and Article

5 would deal with the mistaken identity registry. That's the general concept, which you can fine tune.

Also, we noticed that agencies, in various parts of the act, are authorized or required to adopt regulations on different matters, giving the act a somewhat scattered feel. We thought the structure and coherence of the act might be improved by collecting the provisions on rulemaking authority and consolidating them in one place in the act — as is done in Section 702.

And we thought that Article 5 on correction of information would better precede, rather than follow Article 4 on mistaken identity. Thus we would reverse the order of those two articles.

II. Definitions.

4. The Style Committee suggested that we remove the definition of "accurate criminal history information" from §102 because it is short and might work well in the operative language of the text. It asked if doing so would compromise the references in the act to "inaccurate" information. We are not in favor of this change, but agree that it merits discussion.

5. Is the Drafting Committee comfortable with the definition of "biometric information"? (*see also* below). Now that the Drafting Committee has limited this term to fingerprints, the Style Committee wondered whether the definition should be dropped and the word "fingerprint" used instead. For the reasons set for the in the relevant comment, we would prefer to keep this definition.

III. Clarifications.

1. Biometrics
    a. Should we clarify that multiple taking of fingerprints is unnecessary? If so, how? We have discussed this in the past, but we will need to settle on specific language, if any, during our meeting.
    b. Can an individual be required to provide biometric information if it hasn't been collected and they have been acquitted or charges dropped? Do we need more language in the text and/or comments?
    c. How, if at all, do we address the concerns raised about "big brother" in San Diego? Do the comments sufficiently address this point?

2. Dissemination Log.
    a. Should the dissemination log include the purpose of the request. *See* §105(6).
    b. The Style Committee suggested that we include language in the text of the act stating whether the dissemination log itself is a public record. In

the comment, we have previously stated that the dissemination log should follow the existing public records law of the jurisdiction. Upon reflection, we believe that the log should *not* be a public record because it could reveal confidential law enforcement behavior, but the Drafting Committee needs to determine what language, if any, is needed in the act. *Cf.* §501 (giving subject ability to access information "stored" – but not disseminated – by a repository or central repository).

3. Non-criminal Justice Purpose.
    a. At the suggestion of the Style Committee, we removed the phrase "non-criminal justice purpose," and replaced it with "a purpose other than administration of criminal justice." We do not believe that this works any substantive change.

4. Corrected Copy.
    a. The Style Committee asked if the language requiring a "corrected copy" to be provided to a subject, *see, e.g.,* § 203(b)(3)(b), mandated a paper copy. Our recollection is that this language was chosen to avoid that problem. What is the Drafting Committee's view?

IV. Mistaken-Identity-Prevention Registry.

1. The Style Committee asked if this entire article should be bracketed because of a concern over cost. We do not agree with that approach. We have, however, changed "rules" to "procedures" in an effort to address cost concerns.

2. Consistent with the Style Committee's recommendation, we made changes to the registry to allow for dissemination to similar registries maintained by any federal law enforcement agency and not just the FBI. §404(c).

3. However, we disagree with an idea raised by the Style Committee that there should be some ability to use information from this registry for other governmental purposes (*e.g.*, noncriminal support enforcement). Doing so would deter people from participating in the registry and thus defeat its purpose.

V. Correction.

1. Are the notification provisions provided for correction of a criminal history record sufficiently clear and adequate?

2. Does the Drafting Committee want to add language to the text indicating that the correction method in the act is not the exclusive mechanism for making such corrections? We have notes from our conference call that could be interpreted in that way.

VI. Specific Sections.

§102(4) [and elsewhere].

1. The Style Committee questioned the use of the words "collect, store, maintain, and disseminate" as perhaps being repetitive. While we rearranged the order of those words, we believe that they do reflect the lifecycle of criminal-history-record information in the hands of the central repository and want to be inclusive of all possible roles and actions. In short, we advocating keeping all four words.

§104(5).

1. The Style Committee encouraged us to bracket the word "court" because we had a legislative note indicating how jurisdictions could extract courts from the definition. Given our own views and the previous determination of the Drafting Committee, we rejected the idea of bracketing "court" and eliminated the legislative note. There is still a comment that addresses the opt-out approach for those jurisdictions that are interested.

§302.

1. The Style Committee asked if we want to bracket the "18" in §302(2). If so, is 18 still the number that should be included?
2. How is dissemination handled if the agency no longer exists? Do we need to address that situation? This was raised in San Diego and not resolved during our conference call. We do not believe that this is a problem that needs to be addressed.

§307.

1. We modified this section to allow researchers to have access to personally identifiable information. This had been the Reporters' intention all along, but the previous language did not reflect that.

§303.

1. Should an agency certify under §303(b) that "no record exists" or that "no record can be found"? We do not believe that this was resolved during our conference call. It is our opinion that if the central repository finds no criminal history record information, it should report that no such information exists. Again, the burden should be on the government to have accurate information and report what it believes to be accurate. Leaving the potentially erroneous impression that criminal history record information may exist does not fulfill the goals of the act. If the central repository later discovers criminal history record information, the act provides procedures for the correction and dissemination of such information.

§308.

1. Does a means of informing the public under §308 need to be clarified in the text (as opposed to just in the notes) so that a website is adequate?

§503.

1. Please look at the approach to the reviewing requests for corrections. We tried to honor the vote from San Diego by deeming unanswered requests denied instead of sustained.
2. Does that change mean that we should remove the one-time 21-day extension?
3. Please also look at subsection (c) in which we clarify that the burden of proof on the first appeal after an automatic denial because of governmental unresponsiveness is on the government.

§701.

1. Do we need to revise the sanctions in §701 in light of the motion that struck (a)(1)? This was not resolved during our conference call.
2. Do we want to bracket all of (c) in light of its chilly reception in San Diego?

§702.

1. At the Style Committee's suggestion, we removed §702(d) as duplicative of language in §701(b).
2. Concerning §702(c), does the Drafting Committee intend that administrative subpoenas be available for investigative authority under this act? If so, the Style Committee suggested that act state that explicitly.