

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

FROM: Robert J. Tennessen, Committee Chair  
Steven L. Chanenson, Reporter  
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DATE: September 8, 2016

RE: Upcoming Drafting Meeting

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This memo provides an overview of the topics and questions that will need to be addressed during the September 2016 meeting of the Committee. We will gather together on Friday and Saturday, September 22 and 23, in Chicago, IL.

The current draft reflects some of the comments received at the Annual Meeting in Stowe, VT. However, for logistical reasons beyond anyone's control, we do not yet have the transcript of that meeting. As a result, we are certain that there are suggestions that cannot be addressed until the next iteration. Nevertheless, there are many important questions to answer now. In fact, it is our hope that most of the remaining substantive decisions will be made at our upcoming Chicago meeting.

The full Style Committee has not yet reviewed this draft. This may leave several issues unresolved that were discussed in Stowe. The reporters will translate the Drafting Committee's directions from the Chicago meeting into a revised draft, and submit it to the Style Committee in December. Given that we believe that the Style Committee will strongly recommend that we adopt an approach with more, shorter sections, we would like to discuss, if not decide, on the Committee's perception of this structural change. For example, as helpfully suggested and demonstrated by

Commissioner Nadeau, we anticipate creating a dissemination log section and incorporating the definition and other related provisions in that section. We anticipate a draft reflecting this change will be submitted to the Style Committee in December and will also incorporate revisions generated at our upcoming meeting.

While the Style Committee is working on the blackletter language of the draft, the reporters will be crafting more outward-facing, comprehensive Discussion Notes. Depending on the Style Committee's timing, we may circulate another full draft to be discussed during a conference call before we meet again in person. Our in-person meeting next spring will be the Drafting Committee's last time in the same room before the July 2017 ULC Annual Meeting and the final vote on the Act.

Here are the major topics and questions we believe need to be addressed at our upcoming meeting:

1. Section 2

- a. Do we want to add a definition of "accuracy" or an "accurate record" that explicitly provides that a record must be "complete" in order to be "accurate"? In that case, we may also need to include a definition for "complete." This idea is currently addressed to some extent in other places, but there is an argument that there is a lack of clarity. Compare Section 5(d) with Section 5(e). One approach might be as follows: "Accurate criminal history record information" means criminal history record information that correctly and completely reflects all reportable events relating to a subject."

- b. In response to a comment from the floor at the Annual Meeting, the current draft provides for an alternate definition of biometric identifying information in Section 2(3). This language is taken directly from a memo from Commissioner Nadeau, for which we are most appreciative. As Commissioner Nadeau observed in her note to the reporters, states may have their own rules about DNA and “may wish to retain the status quo with respect to the collection of DNA. Also, states may have strict guidelines for the collection, maintenances and preservation of DNA evidence that go beyond those provided in the act.”
- c. In Section 2(5), we need to resolve the question of the opt-in or the opt-out approach for the judiciary. The Committee has debated this in the past and the Commissioners in Stowe were divided. How does the Committee want to proceed? Alternative opt-out language is provided in the Discussion Notes.
- d. Should we add a new definition of the term “crime”? Ms. Nadeau has suggested this option as a way to avoid some of the lengthy duplication in Section 5 and elsewhere. We like that idea and propose to adopt it before sending the draft on to the Style Committee, but we did not do so now because we want to keep the current focus on the question of which offenses to include. *See* below.
- e. In Section 2(6), should criminal history record information include PFA (Protection from Abuse order(s)) or sex offender registration status?

- f. In Section 2(11), the Committee needs to resolve the question of whether the Act should include juvenile offenses in the definition of a reportable event. Will including this information inappropriately expand the scope of criminal records? Will including this information appropriately facilitate more accurate juvenile records? Could this information contradict certain state policies on the use of juvenile records?
- g. Relatedly, also in Section 2(11), the Committee must resolve whether to be more specific with regard to lower-level offenses. For example, should all misdemeanors be considered, or only particularly serious ones? To what extent should the offenses be specifically enumerated in the Act? Do we need to enumerate various gradations of offenses, as we do here?
- h. In Section 2(11), should the lack of prosecutorial action for 18 months be deemed a reportable event? This would impose a duty on the contributing justice agency to report to the central repository that 18 months have passed without any prosecutorial action being taken. This may improve not only accuracy, but also the speed of obtaining criminal history record information when requested, two central concerns of the Committee. We asked this question specifically in the Discussion Notes for the Annual Meeting, but we do not recall receiving a response.
- i. In Section 2(11)(D), is the Committee comfortable with the definition of disposition? The Discussion Notes provide a lengthier alternative

drawn from 28 CFR § 20.3(i). No one addressed this point at the Annual Meeting.

- j. In Section 2(13), does the Act need to describe when a person is “in” a state? This was raised at the Annual Meeting as a hypothetical applicable to both individuals traveling across justifications as a function of electronic communication.
- k. The Discussion Notes provide three animating principles. These principles were additions to the document for the Annual Meeting. Is the Committee comfortable with these concepts? If so, are they properly placed in the Discussion Notes?
- l. The Discussion Notes provide examples of what qualifies as a contributing justice agency. This language stemmed from the Committee’s suggestion that comparable language be removed from the text of the Act. Is the Committee comfortable with the implementation of that suggestion?

## II. Section 5.

- a. There was a suggestion at the Annual Meeting to treat veterans differently. We did not adopt that suggestion and welcome comments on or objections to that decision.
- b. We would appreciate guidance from the Committee about the timeframes in the current draft. We attempted to provide a level of consistency, but the Committee has not expressed its views on the

magnitude of the time involved. For example, there was a comment that the ten business day period in Section 5(b)(2) is too short. In the current draft, we have four general dates: short (3 business days), moderate (10 business days), long (40 business days) and very long (three years).

- c. Should the Act address what to do when there is conflicting criminal history record information reported by two contributing justice agencies about the same reportable event or should that be left to rule-making by the central repository? If the Act should address it, we would welcome advice on how to craft such a provision. If it should be left to rule-making by the central repository, should that decision be communicated in the text of the Act or in the Discussion Notes?
- d. After the last Drafting Committee meeting but before the Annual Meeting, Commissioner Reigle drafted an alternative to Section 5. We are grateful for her hard work. As the Committee did not have an opportunity to debate it, we did not incorporate it into the Annual Meeting draft. We have included it as an alternative in the current draft and look forward to discussing it.

### III. Section 6

- a. Shortly before the Annual Meeting, Mr. Ellman submitted a letter to Chair Tennessen with copies to the reporters. Mr. Ellman put paper copies on one of the tables in the back of the room during the Annual Meeting. The letter speaks for itself and is referenced here because it

primarily relates to Section 6. We thank Mr. Ellman for taking the time to submit these views in writing. We welcome comments on Mr. Ellman's suggestions, as well as recommendations on their potential incorporation.

- b. In Section 6(f), and earlier in Section 5(g), the Act does not address the costs, if any, a state may charge subjects to obtain criminal history record information about themselves. This was – and still is – highlighted in the discussion notes, but did not spark comments at the Annual Meeting according to our contemporaneous notes. We seek guidance from the Committee, including concerning Section 12(a)(4) which, in brackets, directs the responsible agency/individual to set reasonable fees and adopt a policy for indigents.

#### IV. Section 11

- a. The role of sanctions has been a topic of debate and discussion since the Drafting Committee's initial meeting. It was also a lively topic at the Annual Meeting. Perhaps in regards to this section most of all, it is unfortunate that the transcript is not yet ready. Nevertheless, our notes indicate both general and specific concerns. For example, should Section 11(a) be eliminated entirely? At least one person argued that it is too broad and will inappropriately sweep in innocent or at worst negligent mistakes – especially by low-level employees. Does the Drafting

Committee share that concern? If so, is the entire elimination of Section 11(a) its preferred response?

- b. Section 11(b) now provides subjects with reasonable attorneys' fees in actions to enjoin. This suggestion came directly from the Annual Meeting and is designed to provide incentives for private parties to bring this type of suit. Does the Committee agree with this approach?
- c. There was concern expressed at the Annual Meeting about Section 11(c) on several levels, including its minimum award of \$500 for each violation. Does this present an inappropriate financial risk to states in response to multiple minor violations of the act? If so, should the Act limit the per-suit minimum award? Alternatively, does the Committee prefer to eliminate the \$500 minimum entirely, but allow for demonstrated compensatory damages plus costs and attorneys' fees? Furthermore, should the Act speak to the question of a jury right here?
- d. At the Annual Meeting, an objection was raised to Section 11(d) because it is creating a new criminal offense. The argument was that there are already general misdemeanor crimes for this type of behavior. As mentioned in the Discussion Notes, this language is indeed based on a Model Penal Code provision. Our response to this concern is to put the language in brackets and to explain why it is bracketed in the Discussion Notes. We await the Committee's direction on this as well.

V. One Last Question

- a. One issue to which the Committee has always been sensitive is the cost to states. We are eager to hear about sections of the Act that members of the Committee believe still present challenges in this regard. Improving the accuracy of criminal records will not be free and states will need to invest if they want to improve their systems. Nevertheless, the Act should be as budget-friendly as effectiveness allows.