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July 11, 2016

Mr. Robert J. Tennesen
Chair, ULC Drafting Committee on Criminal Records Accuracy
2522 Thomas Ave. S.
Minneapolis, MN 55405

Re: Comments on the July 2016 Draft Model Bill from the Drafting
Committee on Criminal Records Accuracy

Dear Mr. Tennesen:

I write on behalf of the Consumer Data Industry Association ("CDIA") to respectfully offer comments on the draft model bill from the Drafting Committee on Criminal Records Accuracy ("Committee"). CDIA's comments in this letter amplify the comments I offered in person at the Committee meeting earlier this year. I was hoping that some of our sensible changes would have been incorporated in to the most current version of the draft, but since they have not, I must comment again.

As you know, CDIA, founded in 1906, is the international trade association that represents approximately 150 consumer data companies. Our members are the leading providers of criminal background checks for employment screening in the United States. Employers, as well as landlords and property managers, use criminal histories provided by our members to screen job or residential applicants to keep their businesses, customers and employees safe.

We are grateful that you and your committee have taken a thoughtful approach to the process and that you have allowed observers like CDIA to be heard. Improved criminal records from the government can only increase the already accurate records provided by the private sector. We agree with the Committee on the goal our comments will help us agree on how we reach that goal. In that spirit, we offer four comments:

- The duty to disseminate criminal history record does not include residential screening, licensing, and other screening, but it should;

- The draft model bill again inappropriately restricts access to criminal history record information by allowing dissemination only when “constitutionally required or as directed by [state] law”;
- Administrative hurdles that delay the provision of criminal history record information only serve to delay a hiring or residential decision, much to the detriment of employees, employers, tenants and landlords; and
- The time-tested accuracy and dispute resolution procedures of the FCRA serve as a better model for dispute resolution than those contemplated by the draft bill.

1. The draft bill does not allow criminal histories to be provided for residential screening, but should make such an allowance to protect people and property.

Draft § 6(e) specifically excludes residential screening as one of the uses for which criminal history record information must be disclosed by custodians of records. This should not be the case. Screening of applicants for tenancy is critical to protecting the safety of other tenants and the rental property itself. This is true whether the law requires it,¹ because case law demands it,² or because it is the right thing to do to protect people and property.

At the October 2015 and March 2016 meetings of the Committee, when CDIA raised the problem that residential screening was excluded from the list of acceptable purposes for criminal history record access, there was a comment made that the inclusion of residential screening would exceed the Committee’s accuracy mandate by wading in to access issues. Residential screening purposes are no different than employment purposes and the favoritism of the latter at the expense of the former makes no sense. These two purposes were treated equally in the final report to the ULC Scope and Program Committee of the Study Committee on Criminal Records Access and Accuracy. That report discussed “the use of criminal records by employers and landlords to bar persons with criminal records”. The report noted that

[t]he accuracy of criminal records has become increasingly important given the widespread availability and use of this information beyond the traditional

¹ See, Pub. L. 105-276. The Quality Housing and Work Responsibility Act of 1998 supported Public Housing Authorities’ right to exclude applicants with a criminal history and use their discretion to determine which applicants were possible risks to the safety of the community.

² See generally, Comment: *The Implied Warranty of Habitability, Foreseeability, and Landlord Liability for Third-Party Criminal Acts Against Tenants*, 54 UCLA L. Rev. 971. CDIA is not suggesting that criminal background checks should be required for residential decisioning, but that there are courts that have and will hold landlords negligent for a landlord’s failure to conduct a criminal background check.

purpose of law enforcement. Criminal records are now used to determine eligibility for employment, housing, credit, and other purposes.³

The final report to the ULC Scope and Program Committee of the Study Committee on Criminal Records Access and Accuracy, a founding document of and touchstone for the work of the Drafting Committee, treats residential screening as equal to employment screening. The Drafting Committee should follow this equal recognition.

A larger problem with Draft § 6(e) is that it dramatically limits public records requests to employment, licensing, or certification, without regard for overriding state constitutional and statutorily protected open records laws.

Another problem posed by the limitation on dissemination posed by the current draft is that it limits access to criminal information. It was long ago decided that the Committee would address accuracy issues, and not access issues.

2. The draft model bill again inappropriately restricts access to criminal history record information by allowing dissemination only when “constitutionally required or as directed by [state] law”

Section 6(d)(3) allows dissemination only when “constitutionally required or as directed by [state] law”. This again impedes access to criminal history record information, which is not germane for the Committee to address. There are laws, like the Fair Credit Reporting Act (“FCRA”) that permit or allow background checks for all manner of employment and residential screening situations, but this law does not specifically direct a criminal records check to occur.⁴ By limiting the situations where a criminal check is directed by state law, the draft model bill limits access to criminal records well beyond what is allowed under present law. We again encourage the Committee to substitute “directed by” for “not prohibited by a law of [this state]” or “in accordance with a law of [this state]”.

3. Administrative hurdles that delay the provision of criminal history record information only serve to delay a hiring or residential decision, much to the detriment of employees, employers, tenants and landlords

The draft bill places significant administrative hurdles in the way of a central repository disseminating a criminal history record report to a requestor. For example, Draft §§ 6(e)(1) and (2) require central repositories to research final dispositions and

³ Study Committee on Criminal Records Access and Accuracy to Scope and Program Committee, 3, Dec. 16, 2013 (emphasis added).

⁴ 15 U.S.C. § 1681 *et seq.*

redact certain records where there are no ongoing proceeding seeking a conviction. When a job applicant needs a job, however, he generally needs one yesterday and when a prospective tenant is looking for an apartment, she generally needs the security of a lease right away. Employers and landlords are often looking to fill a vacant position or apartment on the spot. The administrative delays contemplated by the draft bill are intrusive for consumers and business. The delays ignore more streamlined ways with a proven accuracy impact. For example, as explained in more detail below, the existing federal FCRA provides a more streamlined mechanism for ensuring accuracy and completeness of data about consumers.

Delays in the hiring process could have the unintended consequence of forcing an employer or landlord to move on to the next person on the list, for whom she does not have to wait for a return of criminal history record information.

4. The time-tested accuracy and dispute resolution procedures of the FCRA serve as a better model for dispute resolution than those contemplated by the draft bill.

The draft bill creates an accuracy standard for criminal history record information in the hands of the central repository and then imposes an elaborate and arduous dispute resolution regime, including an administrative hearing and appeal process, on central repositories. We would again encourage the Committee to look closely at FCRA as a better example to follow in the draft bill than those provisions already in the bill.

Since 1971, the FCRA has served employers and applicants alike to allow vibrant and lawful use of criminal history information, provisions to ensure maximum possible accuracy, and substantial systems to correct any inaccuracies that may exist. The FCRA is “an intricate statute that strikes a fine-tuned balance between privacy and the use of consumer information.”⁵ Many states have their own state FCRA laws.⁶

The FCRA governs consumer reports, regulates consumer reporting agencies and companies that use consumer reports, and protects consumers. Consumer reporting agencies are required to maintain reasonable procedures to assure maximum possible accuracy.⁷ Companies that use consumer reports to take “adverse actions” against consumers are required to notify consumers of that fact, and provide them with contact information for the consumer reporting agency providing the information.

⁵ Remarks of FTC Chairman Tim Muris, October 4, 2001 before the Privacy 2001 conference in Cleveland, Ohio.

⁶ *Eg.*, Cal. Civ. Code § 1785 *et seq.*; N.Y. Gen. Bus. L. § 380 *et seq.*

⁷ 15 U.S.C. § 1681e(b).

Consumer reporting agencies are, in turn, required to provide consumers with a complete and accurate copy of all of the information regarding the consumer that is on file with the consumer reporting agency. There are many other consumer protections as well. For example:

- Those that furnish data to consumer reporting agencies cannot furnish data that they know or have reasonable cause to believe is inaccurate, and they have a duty to correct and update information.⁸
- Consumers have a right to dispute information on their consumer reports with consumer reporting agencies or lenders and the law requires dispute resolution within 30 days (45 days in certain circumstances). If a dispute cannot be verified, the information subject to the dispute must be removed.⁹

Rather than building a system that delays the release of criminal history record information like the barrier placed by Draft § 6(f)(2), the Committee should consider the FCRA example where an accurate record is built at the beginning of the process as established through reasonable procedures to assure maximum possible accuracy found in the FCRA (15 U.S.C. § 1681e(b)). If there is a dispute to the accuracy or completeness of the record, as in the FCRA, the consumer can file a dispute. These procedures are spelled out in § 1681i of the FCRA. The Committee should consider the FCRA as a model approach.

4. Conclusion

CDIA is grateful for the opportunities we have had to be heard throughout the ULC process. We agree that criminal history information in the hands of the government – courts, central repositories, law enforcement – can be improved with respect to its accuracy and completeness. For more than a generation, the private sector has been held to a high standard for accuracy and dispute resolution and we welcome similar guidance for records in the hands of the government. Improved criminal records from

⁸ *Id.*, § 1681s-2(a)(1)-(2).

⁹ *Id.*, § 1681i(a)(1), (5).

the government can only increase the already accurate records provided by the private sector. We agree with the Committee on the goal and we hope our comments here will help us agree on how we reach that goal.

Sincerely,

A handwritten signature in blue ink, appearing to read 'E. Ellman', with a long horizontal flourish extending to the right.

Eric J. Ellman
Senior Vice President, Public Policy and Legal Affairs

cc: Steven L. Chanenson, Reporter
Jordan M. Hyatt, Associate Reporter