



## Access to FBI Records under Federal and State Law

### I. FBI RECORDS ARE NOT PUBLIC RECORDS

- 5 U.S.C.A. § 552(b)

This section does not apply to matters that are—

...

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

- *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir. See Parts IV and V, *supra*. Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided. Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted." The judgment of the Court of Appeals is reversed. *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989).



## II. FEDERAL LAWS THAT AUTHORIZE FBI BACKGROUND CHECKS

- Pub. L. 92-544, 86 Stat. 115

For expenses necessary for the... acquisition, collection, classification and preservation of identification and other records and their exchange with, and for the official use of, the duly authorized officials of the Federal Government, of States, cities, and other institutions, such exchange to be subject to cancellation if dissemination is made outside of the receiving departments or related agencies...

The funds... may be used hereafter... for the exchange of identification records with officials or federally chartered or insured banking institutions to promote or maintain the security of those institutions, and, if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employments and licensing, ay such exchange to be made only for the official use of any such official and subject to the same restriction with respect to dissemination as that provided for under the aforementioned appropriation.

- 28 C.F.R. § 50.12 Exchange of FBI identification records

(a) The Federal Bureau of Investigation, hereinafter referred to as the FBI, is authorized to expend funds for the exchange of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions and, if authorized by state statute and approved by the Director of the FBI, acting on behalf of the Attorney General, with officials of state and local governments for purposes of employment and licensing, pursuant to section 201 of Public Law 92-544, 86 Stat. 1115. Also, pursuant to 15 U.S.C. 78q, 7 U.S.C. 21(b)(4)(E), and 42 U.S.C. 2169, respectively, such records can be exchanged with certain segments of the securities industry, with registered futures associations, and with nuclear power plants. The records also may be exchanged in other instances as authorized by federal law.

(b) The FBI Director is authorized by 28 CFR 0.85(j) to approve procedures relating to the exchange of identification records. Under this authority, effective September 6, 1990, the FBI Criminal Justice Information Services (CJIS) Division has made all data on identification records available for such purposes. Records obtained under this authority may be used solely for the purpose requested and cannot be disseminated outside the receiving departments, related agencies, or other authorized entities. Officials at the governmental institutions and other entities authorized to submit fingerprints and receive FBI identification records under this authority must notify the individuals fingerprinted that the fingerprints will be used to check the criminal history records of the FBI. The officials making the determination of suitability for licensing or employment shall provide the applicants the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. These officials also must advise the applicants that procedures for obtaining a change, correction, or updating of an FBI identification record are set forth in 28 CFR 16.34. Officials making such determinations should not deny the license or employment based on information in the record until the applicant has been afforded a reasonable time to correct or complete the record, or has declined to do so. A statement incorporating these use-and-challenge requirements will be placed on all records disseminated under this program. This policy is intended to ensure that all relevant criminal record information is made available to provide for the public safety and, further, to protect the interests of the prospective employee/licensee who may be affected by the information or lack of information in an identification record.



- 28 C.F.R. § 20.33 Dissemination of criminal history record information

(a) Criminal history record information contained in the III System and the FIRS may be made available:

(1) To criminal justice agencies for criminal justice purposes, which purposes include the screening of employees or applicants for employment hired by criminal justice agencies;

(2) To federal agencies authorized to receive it pursuant to federal statute or Executive order;

(3) For use in connection with licensing or employment, pursuant to Public Law 92–544, 86 Stat. 1115, or other federal legislation, and for other uses for which dissemination is authorized by federal law. Refer to § 50.12 of this chapter for dissemination guidelines relating to requests processed under this paragraph;

(4) For issuance of press releases and publicity designed to effect the apprehension of wanted persons in connection with serious or significant offenses;

(5) To criminal justice agencies for the conduct of background checks under the National Instant Criminal Background Check System (NICS);

(6) To noncriminal justice governmental agencies performing criminal justice dispatching functions or data processing/ information services for criminal justice agencies; and

(7) To private contractors pursuant to a specific agreement with an agency identified in paragraphs (a)(1) or (a)(6) of this section and for the purpose of providing services for the administration of criminal justice pursuant to that agreement. The agreement must incorporate a security addendum approved by the Attorney General of the United States, which shall specifically authorize access to criminal history record information, limit the use of the information to the purposes for which it is provided, ensure the security and confidentiality of the information consistent with these regulations, provide for sanctions, and contain such other provisions as the Attorney General may require. The power and authority of the Attorney General hereunder shall be exercised by the FBI Director (or the Director's designee).

(b) The exchange of criminal history record information authorized by paragraph (a) of this section is subject to cancellation if dissemination is made outside the receiving departments, related agencies, or service providers identified in paragraphs (a)(6) and (a)(7) of this section.

(c) Nothing in these regulations prevents a criminal justice agency from disclosing to the public factual information concerning the status of an investigation, the apprehension, arrest, release, or prosecution of an individual, the adjudication of charges, or the correctional status of an individual, which is reasonably contemporaneous with the event to which the information relates.

(d) Criminal history records received from the III System or the FIRS shall be used only for the purpose requested and a current record should be requested when needed for a subsequent authorized use.



### III. OTHER FEDERAL LAWS THAT AUTHORIZE FBI BACKGROUND CHECKS

- 28 U.S.C. § 534 (2002), see Notes (available at <https://www.govinfo.gov/content/pkg/USCODE-2011-title28/html/USCODE-2011-title28-partII-chap33-sec534.htm>)
- 34 U.S.C.A. § 40102 (2018) (caring for children, the elderly, or disabled persons)
- 28 U.S.C. § 534 (2002) (horse or dog racing)
- 7 U.S.C. §§ 12a and 21(b)(4)(E) (2000), (commodity futures trading industry)
- 42 U.S.C. § 2169 (2005) (nuclear power plants)
- 15 U.S.C. § 78q(f)(2) (2004) (securities industry)
- 49 U.S.C. §§ 44935-44936(2003) (aviation industry and airports)
- 49 U.S.C. § 44939 (2003) (flight school training)
- 49 U.S.C. § 5103a (2005) (HAZMAT-endorsed commercial driver license)
- 5 U.S.C. § 9101 (2000) (federal government national security)
- 25 U.S.C. §§ 3205 and 3207 (2000) (Indian child care).
- 42 U.S.C. § 13041(1991) (facilities contracted by federal agencies to provide child care)
- 42 U.S.C. §§ 1437d(q) (1999) (public housing housing)
- 25 U.S.C. § 4138 (1999) (Indian housing)
- 25 U.S.C. § 2701 (1988) (Indian gaming)
- 42 U.S.C. § 13726 (2000) (transporting state or local violent prisoners)
- 8 U.S.C. § 1105 (2001) (visa issuance or admission to the United States)
- Executive Order 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (follows 5 U.S.C. § 7311 (1966)) (federal employment)
- Pub. L. No. 107-188 § 201 and 212 (2002), 116 Stat. 594 (2002) (handling of biological agents or toxins)
- 46 U.S.C. §§ 70105, 70112 (2002) (seaport facility and vessel security)
- Pub. L. No. 108-458 § 6402 (2004) (private security officer employment)
- 42 U.S.C.A. § 1395cc(j) (2019) (Provider Screening and Other Enrollment Requirements under Medicare, Medicaid, and CHIP)
- Pub. L. 105-277 § 124 (Oct. 21, 1998) (employees providing direct patient care)
- Pub. L. 103-209 (1993), 42 U.S.C. 5119a (National Child Protection Act of 1993)
- Pub. L. 105-251 (1998), 112 Stat. 1885 (Volunteers for Children Act)



IV. CHALLENGE TO FBI RECORDS EXAMPLE

[DATE]

FBI CJIS Division  
Attention: Criminal History Analysis Team 1  
1000 Custer Hollow Road  
Clarksburg, WV 26306

RE: [NAME]  
DOB  
FBI No.

To Whom It May Concern:

I am writing on behalf of my client, [NAME] (release enclosed), to challenge the entry of a [DATE] arrest on her FBI Identity History Summary (copy of report enclosed). The entry shows charges of forgery, theft, and receiving stolen property, without any disposition recorded. Ms. [NAME] recently received her FBI record when seeking to become a paid child care provider for her grandchildren.

This record, to the extent it may have been accurate when created, probably has long since been expunged by the Pennsylvania State Police, who maintain the official repository of criminal records in Pennsylvania. It should likewise be expunged from the FBI's database and from Ms. [NAME]'s FBI record.

Ms. [NAME] obtained an Access and Review check from the Pennsylvania State Police of her complete criminal history record in Pennsylvania. A copy of the response is enclosed. As you can see, the State Police confirmed that Ms. [NAME] has no record at all in Pennsylvania – there are no arrests in her criminal history record.

We request that the FBI contact the Pennsylvania State Police to verify that there is no record of this arrest on Ms. [NAME]'s criminal history record, and then correct her Identity History Summary to reflect that there are no arrests on her record. We also request that you send an updated, corrected Identity History Summary to me, and to Ms. [NAME] at her address of [ADDRESS].

Thank you for your attention to this matter. Please feel free to contact me with any questions or concerns at [PHONE/EMAIL].

Very truly yours,

SMD  
Enclosures

SHARON M. DIETRICH  
Litigation Director

cc: [CLIENT NAME]