

Kentucky Sheriffs' Association

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Senate and House Committee Members:

The Kentucky Sheriffs' Association (KSA) would like to thank both the House and the Senate Committee members for the opportunity to address you all on Kentucky Sheriff's issue and law enforcement issues of concerns.

- **Federal Background Checks-** The Federal Government passed a law (Title 5) requiring law enforcement to complete back ground checks for potential employees of the federal government who may need certain levels of clearance. Sheriff's and Local Law enforcement Agencies have been receiving these back-ground request to complete and send back to an agent or an investigator on any information found with in the county where the request has been sent. **(See Attached Federal Law)**

In January 2023 the Attorney General Office issued an opinion that Kentucky Law Enforcement must have to reply with federal request for criminal history information. **(See Attached Opinion)**

Special Agent David "Bryan" Taylor LE Liaison Office Defense Counterintelligence & Security Agency is with us today to discuss the Federal Background checks and requirement by local Law Enforcement. Special Agent Taylor is also a retired Chief of the Lawrenceburg Police Department.

- **Mental Health Involuntary Hospitalization**
- **Transports of Prisoner (Juveniles) State Classification of Systems Video Arraignments**

Retired Sheriff Jerry Wagner

KSA Executive Director



U.S. Department of Justice

Washington, D.C. 20530

Dear State and Local Law Enforcement Agencies and Courts:

Throughout the last decade, the Federal Government has experienced a number of insider threat events, including instances where classified national security information was released to the public. More alarmingly, individuals employed by the Federal Government have been wounded or killed while at federal facilities due to criminal acts by individuals previously vetted for employment with the Federal Government.

I am writing to you today to emphasize the importance of compliance with Title 5, United States Code Section 9101 – the federal law that requires the sharing of Criminal History Record Information (CHRI) with Federal Government Agencies for background investigation purposes.

After fatal incidents at places like Fort Hood, TX and the Washington Navy Yard, reviews commissioned by the President and Congress were conducted to identify vulnerabilities in policies and processes involving federal background investigations for civilians, military, and contractor personnel. A significant finding of these reviews showed there needs to be higher degree of compliance nationwide with 5 U.S.C. § 9101.

We're asking for your help. It is critical that federal, state, and local criminal justice agencies collaborate on CHRI sharing. We must reduce gaps in our current processes to ensure that we have the most complete and accurate background vetting program possible. This will guarantee that only the most trustworthy candidates are employed to protect our vital national security information, our people and this nation.

Some reasons cited for non-compliance were lack of funding and resources, the absence of up-to-date automated data systems, and policy barriers. If technical or budgetary barriers impede your ability to achieve full compliance with 5 U.S.C. § 9101, the National Criminal History Improvement Program and the Federal Emergency Management Agency Grant Program may be available to assist. Additional information providing background for this request and the statutory requirements discussed can be found in the Enclosure.

We appreciate all your efforts and your full cooperation in tackling this critical issue.

Sincerely,

Theophani Stamos
Law Enforcement Liaison, State and Local Law Enforcement Coordination Section

Enclosure

BACKGROUND

In September 2013, following the Washington Navy Yard shootings, the President directed the Office of Management and Budget to conduct a comprehensive review of the Federal Government's employee suitability, contractor fitness, credentialing, and security clearance procedures.

At about the same time, Congress directed (in Section 907(f) of the National Defense Authorization Act for FY 2014) the Security, Suitability, and Credentialing (SSC) Performance Accountability Council (PAC)—the senior interagency group responsible to the President for SSC reform—to convene a Task Force on Records Access to examine the policies and procedures that determine the level of access to public records provided by State and local authorities in response to investigative requests by the Federal Government. Section 907(f)(4) directed the task force to provide recommendations to improve the degree of cooperation and records-sharing between State and local authorities and the Federal Government.

On February 28, 2014, the Suitability and Security Processes Review *Report to the President* was issued, and its recommendations were approved by the President on March 3, 2014.¹ One of the findings was that there needs to be a higher degree of compliance nationwide with the criminal history record information (CHRI) sharing requirements of 5 U.S.C. § 9101. Specifically, the Report noted that a relatively large percentage of State and local law enforcement entities had failed to fully comply with this law and recommended the PAC review relevant statutes to determine if changes were necessary. The Report also recommended Federal funding mechanisms be identified to encourage cooperation and compliance with existing statutes.

On May 9, 2014, the Records Access Task Force *Report to Congress* was issued, outlining its findings and recommendations, including the recommendation to amend 5 U.S.C. § 9101 and to establish a Federal Background Investigations Liaison Office.

ACTIONS TAKEN TO IMPROVE CHRI SHARING

Revisions to 5 U.S.C. § 9101, as recommended by the task force, were signed into law by the President on November 25, 2015. The revised law requires sharing CHRI with key Federal Government agencies for background investigations conducted for national security, public trust, employment and suitability/fitness purposes on behalf of the Executive branch. (*The revised requirements are provided on Page 2.*)

On October 1st, 2019, the Office of Personnel Management's National Background Investigations Bureau (NBIB) merged with the Department of Defense's Defense Security Services forming the Defense Counterintelligence and Security Agency (DCSA). The DCSA established the Federal Law Enforcement Liaison Office (LELO) to oversee education initiatives, resolve issues that may develop between Federal investigative service providers and State and local criminal justice agencies, and promote CHRI sharing.

IMPORTANCE OF SHARING CHRI

When State or local criminal justice agencies are unable to fully comply with 5 U.S.C. § 9101, it poses substantial challenges for Federal Government decision makers. Missing or incomplete CHRI in Federal background investigations could result in someone being approved for a public trust or sensitive position with the Federal Government, or gain access to classified national security information, in error, which poses an unacceptable risk to the national security and to the protection of people, property, and information.

¹ The Security and Suitability Processes Review *Report to the President*, dated February 2014, can be found at <https://obamawhitehouse.archives.gov/sites/default/files/omb/reports/suitability-and-security-process-review-report.pdf>

5 U.S.C. § 9101, CHRI SHARING REQUIREMENTS

5 U.S.C. § 9101, as amended, mandates that:

Upon request by a covered agency, criminal justice agencies shall make available all criminal history record information regarding individuals under investigation by that covered agency, in accordance with Federal Investigative Standards jointly promulgated by the Suitability Executive Agent and Security Executive Agent, for the purpose of-

- (A) determining eligibility for-
 - (i) access to classified information;
 - (ii) assignment to or retention in sensitive national security duties or positions;
 - (iii) acceptance or retention in the armed forces; or
 - (iv) appointment, retention, or assignment to a position of public trust while either employed by the Government or performing a Government contract; or
- (B) conducting a basic suitability or fitness assessment for Federal or contractor employees, using Federal Investigative Standards jointly promulgated by the Security Executive Agent and the Suitability Executive Agent in accordance with-
 - (i) Executive Order 13467 (73 Federal Register 38103), or any successor thereto; and
 - (ii) the Office of Management and Budget memorandum "Assignment of Functions Relating to Coverage of Contractor Employee Fitness in the Federal Investigative Standards", dated December 6, 2012;
- (C) credentialing under the Homeland Security Presidential Directive 12 (dated August 27, 2004); and
- (D) Federal Aviation Administration checks required under-
 - (i) the Federal Aviation Administration Drug Enforcement Assistance Act of 1988 (subtitle E of title VII of Public Law 100-690; 102 Stat. 4424) and the amendments made by that Act; or
 - (ii) section 44710 of title 49.

FEDERAL PROGRAMS THAT CAN HELP

The National Criminal History Improvement Program (NCHIP) provides financial assistance to improve the quality, timeliness, and immediate accessibility of criminal history records and related information to enhance information sharing. This program is managed by the Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (BJS). The NCHIP accepts applications for financial assistance on an annual basis; information about this program is available at https://www.bjs.gov/content/pub/pdf/nchip20_sol.pdf. Agencies with open NCHIP awards can reach out directly to BJS to discuss how current awarded funds may be used to comply with this law.

The Department of Homeland Security has also identified the Federal Emergency Management Agency Grant Program as another source of financial assistance to help your agencies automate their CHRI to share with the Federal Government. Information regarding this grant program may be found at <https://www.fema.gov/non-disaster-grants-management-system>.

Title 5 and Authorities Overview

Title 5 USC 91, §9101 - Criminal History Record Info

- Federal law (Title 5 USC 91, §9101(b)(1))
Upon request by a covered agency, criminal justice agencies shall make available all criminal history record information regarding individuals under investigation by that covered agency, in accordance with Federal Investigative Standards jointly promulgated by the Suitability Executive Agent and Security Executive Agent.
- The term “[criminal history record information](#)” means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, information(s), or other formal criminal charges, and any disposition arising therefrom, sentencing, correction supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. The term includes those records of a State or locality sealed pursuant to law if such records are accessible by State and local criminal justice agencies for the purpose of conducting background checks.

Covered/Authorized agencies include:

- Department of Defense
- U.S. Office of Personnel Management
- Department of Transportation
- Federal Bureau of Investigation
- Central Intelligence Agency
- Department of State
- Department of Homeland Security
- Office of the Director of National Intelligence
- An executive agency that
 - Is authorized to conduct background investigations under a Federal statute; or
 - Is delegated authority to conduct background investigations in accordance with procedures established by the Security Executive Agent or the Suitability Executive Agent under subsection (b) or (iv) of section 2.3 of Executive Order 13647 (73 Fed. Reg. 38103), or any successor thereto.
 - A contractor that conducts a background investigation on behalf of an agency described in subparagraphs (A) through (I).

United States District Court for the Eastern District of California ruled in United States of America v. The State of California July 23, 2007; Congress prescribes in 5 U.S.C. 91, §9101 (b)(4) that Chapter 91 “shall apply notwithstanding any other provision of law or regulation of any State or of any locality within a State or any other law of the United States.” This clause clearly expresses Congress’s intent that Chapter 91 preempt any contrary state law, that the term 5 U.S.C. § 9101(b)(1).

United States. v. State of California; the court ruled that the government has a legitimate interest in determining the suitability of individuals seeking access to classified information and employment in sensitive national security positions. Arrest records advance that interest because “arrest related information tends to reveal behavior and sometimes patterns of behavior,” and “may indicate involvement in criminal or dishonest activities” (Czajkowski Decl. ¶ 11.) and an arrest that has later been reclassified under California law as something other than an arrest constitutes a “disposition arising therefrom” and therefore falls squarely within § 9101(a)(2)’s meaning of CHRI.

United States. v. State of California; although criminal activity or arrest may be re-classified; an arrest without charges is still classified as criminal history record information under Title 5, USC 91, §9101.

Federal law Title 5 USC 91, §9101(b)(4)) there is no liability for legally releasing CHRI to DOD/DCSA within the guidelines of the law.



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January 3, 2023

OAG 23-01

- Subject:* Whether federal agencies have authority to require Kentucky agencies to disclose criminal history information for background checks and national security review procedures.
- Requested by:* David J. Hicks, Chief Law Enforcement Liaison
Defense Counterintelligence and Security Agency
- Written by:* Rachel Wright
Assistant Attorney General
- Syllabus:* Subject to consent by the individual being investigated and a request by a covered federal agency, Kentucky criminal justice agencies shall provide criminal history information for purposes of background checks and national security review procedures.

Opinion of the Attorney General

The Defense Counterintelligence and Security Agency has asked the Office of the Attorney General to clarify whether criminal justice agencies in Kentucky are authorized and required to release criminal history record information to covered federal agencies under 5 U.S.C. § 9101. For the reasons that follow, it is the opinion of this Office that criminal justice agencies in Kentucky are required to provide criminal history background information upon request to a covered federal agency insofar as the individual under investigation has consented.

The Defense Counterintelligence and Security Agency is a federal security agency housed within the Department of Defense.¹ One of the agency's primary functions is personnel vetting, which includes conducting background investigations and continuous screening for the federal and contractor workforce.² The agency performs background investigations for several reasons, including to determine an individual's eligibility for government employment and whether an individual may serve in a national security sensitive position, have access classified information, and perform work under certain government contracts.³

Congress passed 5 U.S.C. § 9101 to ensure that all states participated in this important information-sharing duty.⁴ Prior to its passage, while many states and localities provided requested information voluntarily, a significant number did not, hindering the ability of covered federal agencies to conduct effective investigations.⁵ To eliminate this ambiguity, 5 U.S.C. § 9101(b)(1) mandates that criminal history record information be provided to covered federal agencies upon request.

In relevant part, this statute requires that “[u]pon request by a covered agency, criminal justice agencies shall make available all criminal history information regarding individuals under investigation by that covered agency.”⁶ Such requests are allowed for purposes enumerated in the statute, including but not limited to, determining eligibility, conducting suitability or fitness assessments for Federal or contractor employees, and Federal Aviation Administration checks.⁷

Thus, pursuant to this statute, covered federal agencies are entitled to receive criminal history record information from state and local criminal justice agencies

¹ Def. Counterintelligence & Sec. Agency, *Frequently Asked Questions*, <https://www.dcsa.mil/about/faq/> (last visited Jan. 3, 2023).

² Def. Counterintelligence & Sec. Agency, *About Us*, <https://www.dcsa.mil/About/> (last visited Jan. 3, 2023).

³ 5 U.S.C. §9101(b)(1)(A)(i)-(iv), Def. Counterintelligence & Sec. Agency, *Background Investigations*, <https://www.dcsa.mil/mc/pv/investigations/> (last visited Jan. 3, 2023).

⁴ H.R. Conf. Rep. No. 99-373, at 24, 25 (1985) (“[W]hile many states and localities have cooperated voluntarily in providing criminal history record information to DOD, OPM, and CIA for the purpose of determining eligibility for access to classified information or assignment to or retention in sensitive national security duties, a significant number of states and localities because of their laws or policies have not done so, which has limited the ability of DOD, OPM and CIA to conduct effective investigations.”).

⁵ *Id.*

⁶ 5 U.S.C. § 9101(b)(1).

⁷ *Id.* Under 5 U.S.C. § 9101(a)(6), the term “covered federal agencies” includes any of the following: the Department of Defense, the Department of State, the Department of Transportation, the Office of Personnel Management, the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Homeland Security, and Office of the Director of National Intelligence, and “[a]n executive agency that [] is authorized to conduct background investigations under a Federal statute.”

once the federal agency requests it.⁸ The requesting covered federal agencies include, among others, the Department of Defense.⁹ Since the Defense Counterintelligence and Security Agency is an agency within the Department of Defense, it is a covered agency that may make such a request.

After the request is made, “criminal justice agencies” are required to comply.¹⁰ This includes state and local courts, agencies, and their subunits that “perform[] the administration of criminal justice . . . and allocate[] a substantial part of [their] annual budget to the administration of criminal justice.”¹¹ To demonstrate the importance of this requirement, 5 U.S.C. § 9101(b)(4) provides that it will preempt any state or local laws.¹²

There is, however, one requirement that must be satisfied before a “criminal justice agency” must release the requested information: consent. A criminal history record information must be provided over to a requesting federal agency only after the individual under investigation provides written consent.¹³ Once an agency has the individual’s consent, it must provide the criminal history record information requested.

Conclusion. For these reasons, it is the opinion of this Office that criminal justice agencies in Kentucky must comply with federal requests for criminal history record information so long as the following prerequisites are met: (1) the federal agency that makes the request is a “covered agency” under 5 U.S.C. § 9101(a)(6); and (2) the individual under investigation has consented to the investigation. When these conditions are satisfied, a Kentucky criminal justice agency must provide the requested information pursuant to federal law.

Daniel Cameron
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⁸ 5 U.S.C. § 9101(b)(1) (1985).

⁹ 5 U.S.C. § 9101(a)(6).

¹⁰ 5 U.S.C. § 9101(b)(1) (“...criminal justice agencies *shall* make available all criminal history record information regarding individuals under investigation by that covered agency[.]”).

¹¹ 5 U.S.C. § 9101(a)(1).

¹² 5 U.S.C. § 9101(b)(4) (“This subsection shall apply notwithstanding any other provision of law or regulation of any State or of any locality within a State, or any other law of the United States.”)

¹³ 5 U.S.C. § 9101(c).