U.S. Department of Justice
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Criminal Justice Information Policy

RESEARCH ACCESS TO CRIMINAL JUSTICE DATA

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Preface

Current concern over the extend and impact of criminal activity has heightened the need for comprehensive indepth study of the broad issues relating to the causes, levels and control of crime. Attention must also be directed toward the identification, development and evaluation of techniques to improve the effectiveness of all components of the criminal justice system. This is particularly relevant in light of the fiscal constraints which will continue over the coming years.

Research and statistical analysis in the area of criminal justice are critical to the achieving objectives. Data are necessary to establish trends in crime, to evaluate the effectiveness of new control techniques and to project future needs of the criminal justice system. Similarly, empirical research is needed to isolate factors associated with criminal recidivism, to test new theories of correctional treatment and to assist criminal justice agencies in developing greater responsiveness to witness and victim needs.

Research in these areas, however, often requires direct access to identifiable records maintained by criminal justice agencies. Such data are often sensitive and potentially damaging and must be treated with appropriate concern for its confidentiality. For this reason, a

variety of statutes and regulations have been enacted over the passt decade to protect against unauthorized uses of such personal data.

In keeping with its mandate to ensure confidentiality of statistical data and to reeview related information policy issues, BJS has recently supported a study of the impact which privacy legislation in the area of criminal justice has had on the necessary access to criminal justice data by legitimate researchers and statisticians.

As described in the report, the study basically concludes that confidentiality limitations do not necessarily preclude data access for reesearch and statistical purposes, provided adequate assurances and protections are utilized. We hope that the empirical review of this issue can serve as a valuable resource to researchers and statisticians engaged in criminal justice project activities.

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EXECUTIVE SUMMARY

The study described in this report, conducted under the sponsorship of the Department of Justice's Bureau of Justice Statistics, represents an attempt to develop a variety of empirical evidence related to the impact of confidentiality-related statutes on research activity. The specific context of the study is criminal justice-related research. The study's focus is on research access to confidential criminal justice records, because it is during the process of access--in which researchers and criminal justice agencies mutually resolve questions of access and its conditions--that issues regarding confidentiality are most directly encountered. Although the substantive context of the study was limited, the major research issues are significant to social science research in general. These are:

- Issue 1: To what extent and in what ways have privacy and confidentiality legislation had an impact on research activity?

- Issue II: What confidentiality-enhancing protections or conditions (procedural, statistical or legal) are employed by researchers in the access and use of confidential data?

- Issue III: What are the real conditions of research access to confidential agency records and in what ways do confidentiality statutes or concerns interact with the access process?

These issues were addressed through a national study involving surveys of samples of criminal justice agencies and researchers. Because the Bureau of Justice Statistics has responsibility for the implementation and assessment of Section 818(a) and 818(b) of the Omnibus Crime Control and Safe Streets Act, there was a special interest throughout this study on these two Federal statutes (and the implementing regulations) in terms of their impact on research activity and their interaction with other state-level laws and regulations.

With respect to the three issues of interest, the study findings can be summarized as follows:

Issue I: <u>To What Extent And In What Ways Have Privacy And Confidentiality Legislation Had an Impact On Research Activity?</u>

Perhaps the most important issue to the research community regarding the growth of privacy legislation during the last decade is the possible impact of this legislation on research activity. As discussed above, the primary intent of most of this legislation was to enhance

individual privacy and to protect the confidentiality of various kinds of personal information by controlling the collection, use and dissemination of identifiable data. As well-intentioned as much of this legislation was, there were concerns that confidentiality protections extended to various kinds of records by these laws could potentially pose barriers to research access and the use of those records.

In terms of these concerns, the study indicated that:

1) there has been no general "chilling effect" on criminal justice research activity due to privacy and confidentiality statutes;

2) there are agency-specific "chilling effects" (as indicated by agency refusal rates) largely due to the presence or absence of research access provisions in the statutes governing agency records; agencies governed by statutes without these access provisions tend to refuse all research requests for confidential data;

3) the Federal CHRI regulations with their research access provision have served a critical role in facilitating research activity; they have served as an important standard for state-level criminal justice privacy statutes and regulations and, thus, the research access provision of the Federal regulations has been diffused to a majority of states;

4) research access problems due to privacy and confidentiality statutes are somewhat attenuated because researchers:

   - often avoid agencies with restrictive policies in the first place,
   - use various legal and procedural strategies to gain access without violating statutory provisions, and
   - can often drop agencies altogether or replace them with other more cooperative agencies with few serious consequences for the research; and

5) researchers are generally supportive of privacy and confidentiality legislation, but believe research access provisions should be included in these statutes.

Issue II: What Confidentiality-Enhancing Protections Or Conditions Are Employed By Researchers In The Access And Use Of Confidential Data?

Inherent in the Federal regulations implementing both Sections 818(a) and 818(b) of the Omnibus Crime Control and Safe Streets Act is the notion that facilitating research access to identifiable data carries with it the responsibility to protect the confidentiality of that data. Both

regulations embody an attempt to balance confidentiality concerns with the researcher's need to know. The research access provision the Federal CHRI regulations states that research access to identifiable CHRI is conditioned on the negotiation of a confidentiality agreement limiting the use of the data to research purposes and ensuring the confidentiality and security of the data. The regulations implementing Section 818(a), the research shield statute, place similar conditions on the use of identifiable data.

In general, while criminal justice researchers have been able to gain access to identifiable (and sensitive) data on individuals (although not always in the agency of their choosing), the issue of confidentiality protection remains. In one sense, the responsibility has simply shifted from the agency which allowed the researcher access to the researcher who now has the data.

In terms of identification of confidentiality enhancing techniques in use by criminal justice researchers, the study found:

1) confidentiality (or non-disclosure) agreements, imposing a variety of confidentiality-enhancing conditions on the researchers, are a typical feature of criminal justice research involving access to confidential agencydata; the DOJ and similar state CHRI regulations, are the major legal impetus for this condition;

2) the real protection these agreements afford individuals--in the absence of a researcher shield and the possibility of administrative or legal demands for confidential research data--is unclear;

3) researchers are employing procedural solutions to confidentiality problems and, in general, seem supportive of privacy and confidentiality legislation and concerns; and

4) the DOJ researcher shield is finding varied, if limited, use and seems particularly valuable when researchers encounter external pressure for confidential data or when subjects or agency personnel are particularly concerned with confidentiality issues; the limited use of the shield is mostly due to the fact that researchers have been able to get the data they want without the extra leverage the shield can provide.

Issue III: What Are The Conditions of Research Access To Confidential Agency Records?

The conditions of access imposed by criminal justice agencies in handling research requests for confidential data are embodied in both the statutory and administrative mandates that govern agency record-keeping and in more informal criteria reflected in agency decision-making. It is important to remember that even when research

access to confidential records is statutorily authorized, actually allowing access is at the discretion of the agency. Not surprisingly, the ways in which agencies exercise this discretion--that is, the conditions under which researcher access to confidential data is permitted--research requests--vary considerably from agency to agency, even when governed by similar or identical statutes. In many cases, access provisions are based on considerations independent of the confidentiality.

The findings of this study regarding the conditions of research access to confidential data indicate that:

1) a statutory or administrative provision allowing research access to confidential data is the critical necessary condition for granting access; this provision typically requires that the researcher be bonafide and enter into a confidentiality agreement; the results of the agency survey clearly indicate that without a legal basis for granting access, agencies will deny requests;

2) beyond a legal basis for allowing access, agencies also consider other factors in deciding which requests to grant; the most important of these are the utility and quality of the proposed research and the costs and disruptions associated with allowing access;

3) another important factor seems to be the extent to which an agency holds a "research value", that is, believes in the free flow of information for purposes of knowledge development; the state correctional agencies in the survey seemed to hold such a value and, thus, took a more cooperative and proactive stance regarding research requests; however, they were also more likely to refuse requests if they thought the proposed research was not of sufficient quality;

4) although, the above factors seemed to account for agency decision-making regarding "ordinary" research requests, the researcher data suggests that additional considerations become important when a research request involves data that could be potentially damaging to the agency; and

5) the control and discretion that agencies exercise when dealing with research requests for confidential or sensitive data, and their concomitant ability to avoid research directed toward accessing the agency, its policies or programs, raise important questions about the rights of agencies to control research activity about them and the methods appropriate for social research about organizations.

In conclusion, the findings of this study provide little evidence of any broad or systmatic impairment of research activity in criminal justice as a result of privacy and confidentiality statutes and regulations. Nonetheless, there was evidence of at least three distinct types of confidentiality-related problems that do have a direct bearing on research activity. Criminal justice researchers do have problems with:

- gaining access to confidential records in agencies where there are no statutory provisions allowing access to these records;

- gaining access to confidential agency records (or subjects) when the proposed research is potentially threatening to the agency itself (that is, the agency's privacy is at stake); and

- insuring the confidentiality of research data in the face of external pressures (whether legal or administrative) when the research data receives no statutory protection (i.e., a researcher's shield).

INTRODUCTION

During the past decade there has been substantial concern over potential threats to the confidentiality of identifiable criminal justice data about individuals. Laws, regulations and access policies, designed to limit non-criminal justice access to these data have been implemented by Federal, State and local agencies. This growth in control over access to data has been the source of concern among criminal justice researchers who have expressed fears that with increased protection of criminal justice data, researchers will no longer be able to obtain the data necessary to their research.

This potential conflict between, on the one hand, efforts on the part of the criminal justice community to adequately limit access to data concerning citizens which is protected by law and, on the other, the need for access to such data for the conduct of research is the topic of concern in this report. The report describes the major issues surrounding researcher access to confidential criminal justice data and presents some empirical evidence concerning those issues.

Specifically, the report addresses the following questions regarding the current situation with respect to access by researchers to protected criminal justice data.

- Are the fears expressed by the research community supported by the experiences of criminal justice agencies and researchers working in the field?
- Has research become difficult or impossible because of confidentiality-based restrictions on access to data?
- What have researchers done to safeguard the data they are using?
- What are the conditions which govern researcher access to confidential criminal justice data?

Chapter I provides background to these issues. The basic conflict between criminal justice needs to protect data and researcher needs for access are discussed. Techniques which have been developed to allow researcher access while maintaining confidentiality are also described, as is the legislative environment which forms the context of the issues.

In Chapter II the issues themselves are discussed and the study conducted to address these issues is described.

Chapter III presents the study results, in terms of the issues outlined in the preceeding chapter.

The study methods including survey sampling procedures and the content of interviews are found in Appendix I.

CHAPTER I
BACKGROUND

Public policy issues regarding individual privacy and the confidentiality of personal information have been triggered, in part, by the acceleration of the collection of personal information by public and private entities and advances in computer technology which have broadened the potential for information storage and processing. The misuse of personal information can result in unwarranted intrusions of privacy, unfair decisions about a person, social embarassment and personal suffering, and even legal sanctions. As a consequence, the last decade has seen the enactment of a wide range of privacy-related legislation at both the Federal and State levels. These privacy and confidentiality laws--governing medical and school records, criminal records, criminal justice information, employment and financial data, and other personal information routinely collected by government agencies--provide statutory protection by controlling the collection, storage, flow, dissemination, access, and use of personal information.

Paralleling the enactment of privacy legislation (and its constraining influence on the collection and utilization of data), there has been an increase in demands for personal

information and data to support research and statistical activity in this country. Over the last decade, there has been a significant increase in government-supported research efforts designed to identify and define social problems and develop solutions to these problems. These efforts have been marked by the creation of large data bases and the application of computers to link, analyze, and store these data. In much research, access is required to types of information which can be used to identify individuals (e.g., name, date of birth, social security number, address). Not only are identifiers often essential to the integrity of the research process, in their absence it can be impossible to apply important research techniques.[1] It is the researcher's need for access to data, and particularly identifiable data, which creates a tension between research needs and privacy and confidentiality concerns. Many of the privacy and confidentiality statutes enacted in the last decade have provisions bearing directly on the confidentiality of research and statistical data (that is, provisions that control or affect the disclosure of information) as well as other provisions which could, in one fashion or another, affect the research and statistical enterprise. In many cases, the primary intent of these laws was not directed at constraining research activity. As Boruch and Cecil (1979) noted in reference to the Privacy Act and the Family Educational

Rights and Privacy Act (FERPA): "Their origins lie not in the abuses of records by social researchers, but rather in the administrative abuse of administrative records. The laws' impact on social research, and the impact of similar laws at the State level, are often incidental (p. 15)." Whether incidental or not, the issue of the potential and real impact of these laws and associated regulations on research is a critical one.

The Need for Identifiable Data

The need by social researchers for data identifiable to individuals is essentially based on the scientists' need to link data, rather than on any interest in particular individuals. In criminal justice research, a researcher studying the criminal careers of juveniles may need to connect arrest data on specific individuals at different points in time and, thus, needs to uniquely identify each piece of arrest data. Because criminal justice processing involves events occurring in a number of agencies (e.g., police, courts, corrections) and because agency recordkeeping is independent, criminal justice research typically involves multiple data sources. Thus, a researcher studying drug use and criminal behavior may need to link data from a variety of sources--court records, police records, correctional records, interview data--and will need unique identifiers

for each record. Again the researcher's interest is not in any specific individual, or in reporting an identifiable individual's experience, but in establishing general relationships.

As Boruch and Cecil (1979) state, "the identification of a respondent ordinarily serves as an accounting device in social research, rather than as a vehicle for making judgements about an individual" (p. 265). In fact, it is this limited interest in personal information that distinguishes research and statistical activity from administrative activity, where personal information is collected in order to make decisions about specific individuals. Nonetheless, the social scientist often needs identifiable data and in the absence of it may be unable to conduct a particular study, may lose important control over the research process, or may have to engage in far more time-consuming and costly data collection activities.

The Need for Confidentiality Protections

In criminal justice research, whether the data is collected from criminal justice agency records or from individuals, the information can be of an extremely sensitive nature (e.g., self-reported criminal behavior, arrest records, etc.) and its disclosure to the wrong parties

could result in improper use and harm to the individual. It is the researcher's need for identifiable data of this type that can place the researcher at odds with personal privacy and confidentiality concerns. The cooperation of individuals, whether in providing data to public agencies or researchers, is based on the idea that the data will be used only for the specific purposes for which it was collected and that its confidentiality is guaranteed. The confidentiality of data refers here to the condition of the data; data are considered confidential if, by law, they cannot be disclosed to those outside the criminal justice system in an identifiable state.

It could be argued, given the purposes of research and of researchers, that individuals or agencies providing researchers with confidential data have nothing to worry about, since short of outright theft or accidental disclosure, researchers would never have any reason to disclose identifiable data. However, the last decade has seen numerous instances of forced disclosure, that is, instances in which judicial, legislative, or administrative bodies attempted to force researchers to provide identifiable data that were collected for research purposes under a promise of confidentiality. Carroll and Knerr (1975) collected data on 200 incidents in which social scientists encountered confidentiality problems,

many of which involved either subpoenas of data, threats of subpoenas, or other attempts to pressure the release of the data. In one incident reported by Knerr and Carroll (1978), two researchers conducting DOJ-sponsored research on the behavior and treatment of sex crime victims, were subpoenaed by a Colorado county court and ordered to disclose research records pertaining to two alleged victims. The records were sought to assist in the possible prosecution of two suspects. When the researchers refused to provide the records on confidentiality grounds (that is, that sensitive research and treatment programs of this type are totally dependent on confidentiality promises and that the DOJ regulations mandated subject anonymity as a condition of the research), the judge held them in contempt and had them incarcerated. The researchers were released when the alleged victims agreed to the release of the records. The above example highlights not only the sensitivity of the data criminal justice researchers often collect, but draws attention to the public's competing interest in the disclosure of confidential research data (in this case, represented by the court's demand for the data in order to further the cause of justice). Finally, it draws attention to the serious dilemmas and consequences researchers may face if they insist on maintaining confidentiality. Although incidents like the above are not common, they have received enough

attention to make social scientists aware of the potential pressures they may face regarding disclosure of confidential data and of the inadequacy of mere promises of confidentiality. Social scientists in general have believed that promises of confidentiality are an essential component of the trust relationship between the public and the scientist and bear directly on the public's cooperation with research projects and the validity of information they provide scientists.[2]

Confidentiality-Enhancing Techniques

Partly because of social scientists' growing concerns regarding their ability to keep research data confidential, and partly because of the confidentiality concerns of the providers of research data (that is, the public and public agencies), there has been considerable development in the last decade of procedural and statistical strategies designed to enhance the confidentiality of research data (Boruch and Cecil, 1979). For example, procedural solutions like the use of aliases, data brokers or link-file systems can be applied to numerous research studies involving record linkage and reduce or eliminate the researchers' need to collect and/or maintain identifiable data. These solutions can allow the researcher to collect data in cases where confidentiality concerns or laws would otherwise prevent data

collection. The application of these techniques, however, can often be costly and difficult, and can reduce the researcher's control over the data collection process.

There are a variety of statistical methods available for protecting the confidentiality of data that are particularly useful in situations where identifiable individuals are asked to provide sensitive information about themselves. These techniques--including randomized response methods, and micro-aggregation of sampling or response units--do not remove identifiers from responses, but rather involve the introduction of random error into subject responses such that any subject's "true" response is unknown. Although these methods do provide protections to individuals, because they are statistical methods, it is not entirely clear to what extent subjects understand the nature of the protections and, thus, whether the protections do enhance response validity and subject cooperation.

Researcher Protection

The government has also responded to the issue of the confidentiality of research data by creating legal protections for researchers, through statute or executive action. These statutes offer various kinds and degrees of testimonial privilege for researchers, allowing

them to resist a subpoena or other formal demands for confidential information. For example, a number of Federal laws--the Public Health Services Act (Public Law 91-513), the Controlled Substances Act (Public Law 91-513), the Drug Abuse Office and Treatment Act (Public Law 92-255), and the Alcohol Abuse Act (Public Law 93-282)--are designed to facilitate research in the areas of drug and alcohol abuse and mental health by providing researchers in these areas with specific kinds of testimonial privilege. As previously discussed, underlying these laws is the fact that social and behavioral scientists can and have been subpoenaed by judicial, legislative, and administrative agencies and ordered to disclose confidential information. The consequences for the researcher are obviously serious; he can breach his promise of confidentiality and perhaps seriously harm the research subject by disclosing sensitive information or face legal sanctions himself. Cognizance of these potential consequences is a source of research concern over data access and release.

Because research in the criminal justice area often involves sensitive data like self-reported criminal activities and because this type of information is particularly relevant to the justice process (and thus, susceptible to subpoena), special needs have arisen for testimonial privilege in this area. As a

result, Federal statutory protection for researchers supported under the Omnibus Crime Control and Safe Streets Act of 1968 as amended was included as an amendment to that Act in 1973. These protections were set forth in Section 524(a) of the Crime Control Act of 1973 (PL 93-83) and are now included as Section 818 of the Omnibus Crime Control and Safe Streets Act. This statute is somewhat unique among statutes providing researchers with testimonial privilege because it automatically confers immunity upon the researcher without any formal application process or administrative decision. The regulations implementing the Act (28 CFR Part 22) indicate that the Act was designed to facilitate the research process and protect the confidentiality of identifiable research data by restricting the use and transfer of these data to research/statistical activities. Under the Act, all identifiable research or statistical information is with limited exceptions, immune from administrative or judicial process. Researchers receiving data are also required to enter into a formal agreement that describes the procedures they will use to ensure the confidentiality and security of the data. Subject to these limitations, however, the regulations allow for the re-transfer of data for additional research/statistical activities. The immunity afforded by such a confidentiality statute can have a range of beneficial effects on the research process. Obviously, it can

assure subjects that the information they provide will only be used for research purposes and, thus, can promote subject cooperation and increase response validity. It can also assure criminal justice agencies and programs with confidential data that allowing researchers access to the data will not endanger the agency or the subjects of the data because of the provision of statutory immunity. It can help ward off administrative or other demands for research data before they reach a formal or legal stage. Finally, statutory protections of this type could make researchers more willing to engage in research involving sensitive data and topics, because they are statutorily prepared to protect that data.

Privacy Legislation

Although some confidentiality-related legislation (mostly at the Federal level) has been enacted to specifically protect the confidentiality of information researchers collect (i.e., researcher shield statutes), most of the privacy and confidentiality laws passed in the last decade at the Federal and State levels have been designed to protect the privacy of individual citizens and enhance the confidentiality of the data they provide public and private entities. These laws--governing information for example, in arrest, bank, employment, medical, school, and tax

records--provide protection by controlling the kinds of information that can be collected, and the use and dissemination of the data. In the criminal justice area during the 1970's concern focused on the centralization and automation of criminal history records and the potential danger to citizens if these records were not provided with adequate privacy and confidentiality protections. Section 524(b) of the Crime Control Act of 1973 (now Section 818(b) of the Omnibus Crime Control and Safe Streets Act) embodied the Federal response to these concerns and was designed to insure the privacy and security of criminal history record information (CHRI)[3] collected, stored, and disseminated via manual or automated systems that were funded (in whole or part) under the law. The related regulations (28 CFR Part 20) issued in March, 1976 required each State to develop a plan setting forth operational procedures: to insure the completeness and accuracy of information; to limit the dissemination of information; to develop audit and quality control procedures; to provide for the security of the information; and to allow individual access and review. By the end of 1976, all States had submitted a plan detailing procedures for compliance with the regulations.

In order to protect the confidentiality of specific records, most privacy-related laws establish parameters for dissemination of

identifiable records by defining legitimate users or legitimate uses. Of major concern to researchers regarding these Federal statutes or any of the hundreds of related State-level statutes is the issue of whether these statutes allow researchers to gain access to the identifiable records regulated by the law and under what conditions. Researchers were quick to note that many of these laws, in their attempt to insure the confidentiality of identifiable records, carried with them potentially adverse effects on research activity.[4]

Of major relevance to criminal justice research and statistical activities is Section 818(b) of the Omnibus Crime Control and Safe Streets Act, described above, which defines the boundaries for the dissemination of non-conviction data, but allows the governed agencies to set stricter or looser dissemination requirements in accord with State or local statutues, policies, or court orders. With respect to research, the regulations permit (but do not require) the dissemination of identifiable data without individual consent for research, statistical or evaluative activities pursuant to a formal agreement with the Criminal Justice Agency authorizing access, limiting the uses to research, and insuring the confidentiality and security of the data. The scope of dissemination of data for research purposes is

therefore governed by State CHRI statutes, rules or regulations, or individual agency policy.

The Federal investment in the development of criminal justice information systems, the specific mandate of Section 818(b) of the Omnibus Crime Control, and Safe Street Act and privacy concerns in general have led to a proliferation of state and local legislation and policies related to the privacy and confidentiality of the diverse types of criminal justice data maintained in State and local agencies' information systems. By 1981, all fifty States had implemented some form of legislation to regulations in response to these Federal legislation[5].

Despite the proliferation of State statutes and related policies governing research access to various data maintained in criminal justice information systems, little is known, in a formal sense, regarding the actual practices of State and local criminal justice agencies in this area. As a recent review of State legislation pertaining to privacy and security of criminal history information[6] concludes "...State laws that expressly authorize researcher access do not apply to local Criminal Justice Agency dissemination policies...the question of researcher access may depend more on local agency policy than on State law" (55). There is currently no empirical information

describing the impact of State and local privacy and confidentiality statutes and policies on the types of data collected and maintained in criminal justice information systems, on the ability of researchers to access various types of data, or on the conditions and practices governing access.

CHAPTER II
ISSUES AND METHODS

As is discussed above privacy statutes exist at the Federal and State level covering a wide variety of different records and information collected and maintained by public agencies. With respect to access to records for research purposes, Federal and State privacy statutes generally fall into three categories:

- those that do not allow research access to identifiable data under any conditions (they may specify, however, that researchers can access non-identifiable data);
- those that allow research access to identifiable data (in many cases, only when pursuant to an informal or formal confidentiality agreement between the researcher and agency governing the uses and handling of the data); and
- those that allow research access to identifiable data only with the written consent of the individual.

It is important to recognize that in almost all cases, the release of identifiable information, when allowed, is at the discretion of the agency.

As mentioned previously, researchers have expressed the view that many of these statutes, while perhaps strengthening individual privacy, have needlessly restricted research activity. This position reflects the researcher's view that the threats to individual privacy and confidentiality posed by research are simply not that great and/or that there are sufficient techniques available to protect privacy and insure confidentiality without unreasonably restricting research activity. Researchers have expressed a range of concerns regarding the potentially deleterious impact on research of privacy-related legislation. These can be described as follows:

- identifiable data simply will not be released and, therefore, certain types of research activities (e.g., longitudinal and

correlational research, follow-up studies, record and validity checks, etc.) will not be possible;

- the costs and time involved in negotiating for and accessing identifiable data will increase;
- less data may be collected and stored in identifiable form, or data may be destroyed, and thus less data will be available for research purposes;
- in order to access certain data, agency personnel may control the preparation of data or the selection of samples and, thus, the researcher will lose control over the research process;
- informed consent requirements will affect the quality and validity of certain kinds of research or even result in its termination; and
- agencies may use confidentiality concerns or statutes in order to impede legitimate research access in situations where the agency may fear the potential implications of the research.

Privacy and confidentiality statutes can also pose problems for the agencies governed by

them. For example, these statutes can require the development and implementation of procedures (e.g., for allowing individual access and review or for the maintenance of dissemination logs) which could require additional agency resources. Also, as discussed earlier, many of these statutes contain significant ambiguity regarding the release or dissemination of information which can make it unclear whether particular agency records are governed and in what ways. A study of the interface among State Criminal Justice Information Systems (Calpin and Kreindel, 1979) found that "State and local interpretations of the definition of CHRI seem to be a major factor affecting responses to the (LEAA) privacy and security regulations and the concomitant implementation of procedures to achieve compliance with the regulations (p. 76)." Finally, agencies can have legitimate fears about the potential ramifications (legal and otherwise) of releasing certain information given the ambiguities in the law (SEARCH Group Inc., 1980) and, moreover, the inability of researchers at times to ensure the confidentiality of information in the face of legal subpoena.

Purpose of Study

What has evolved in the last decade with respect to the confidentiality of research data, then, is a statutory and regulatory environment that

is somewhat complex because of (1) the number of Federal, State, and local laws and policies affecting access to data, (2) ambiguities in these laws, and (3) increasing demands placed on agencies by researchers for various data. Within this complex environment, it is likely that a wide variety of formal and informal agency and researcher practices have evolved that finally determine what data are released and under what conditions.

There are important questions that are largely untouched by social science inquiry regarding the nature of the practices that have evolved (given the proliferation of privacy and confidentiality statutes). What are the real refusal rates with respect to access of various types of data maintained by different agencies? What are the costs (for researchers and agencies) associated with establishing the confidentiality of data? To what extent have researchers terminated or modified certain kinds of proposed research because of problems of data access and/or confidentiality? To what extent has the collection and storage of various types of data by agencies been affected by confidentiality requirements? In terms of research inquiry in this area, it is important to point out that research problems, including those of data access, are not new. The question for research in this area is not whether individual researchers have encountered specific

problems, but whether this statutory environment that has developed in the last decade has had any larger (or macro-level) effect on the nature of research activity.

The development of procedural and statistical strategies (designed to establish data confidentiality while allowing research and statistical uses of that data) and the availability of statutory protection like that provided by Section 818 of the Omnibus Crime Control and Safe Streets Act raise a number of additional research questions. Within the potentially "chilling" environment of privacy and confidentiality laws and regulations, it is important to know to what extent researchers have been able to draw on various techniques or legal protection in order to facilitate research. What kinds of confidentiality and data problems have proven to be amenable to particular types of solutions and strategies? To what extent are researchers aware of the variety of techniques that are relevant to resolving confidentiality problems?

Surprisingly, social scientists have devoted little research attention to the impact and effects of statutory attempts to enhance privacy and establish confidentiality on research and statistical activity. Nor have they written much about the formal and informal practices they engage in or accommodations they make in

order to access agency records. Regarding research access, Lundman and McFarland (1976) noted that the social research literature is "relatively devoid of accounts of rejection in the context of gaining access...(p. 505)" and call for greater publication and study of research access experiences. What discussion of research access there has been is largely based on studies of a few agencies (Robbin 1981) or on single research experiences (Geller, 1978; Spencer, 1973; Sherman, 1980). Similarly, with respect to researcher shield statutes, Nelson and Hedrick (1981) wrote:

> "Given the saliance of the empirical questions, it is somewhat curious that the evaluation community has not applied its methods to study the statutory innovations as experiments in legal protection. Because the policy issues presented by statutory protection of social data remain very much alive...it is a critical time for the research community to begin an empirical assessment of the present statutory schema (p. 3)."

Predictably enough, social scientists have dramatized the most potentially negative implications of various laws for their work, but there has been little evidence (outside of the individual case or anecdote) indicating that the laws are wreaking any real havoc among social

scientists. It is likely, however, that the development of law in this area has brought about significant changes--some subtle, some more dramatic--in the ways that researchers go about the business of designing research, gathering data and protecting it and in the ways agencies collect, store, and disseminate it. As Reiss (1976) noted, "legal regulation carries with it its own consequences that must be investigated by behavioral science inquiry if regulation is to be both enlightened and in keeping with constitutional imperatives." The study described in this report, conducted under the sponsorship of the Department of Justice's Bureau of Justice Statistics, represents an attempt to develop a variety of empirical evidence related to the impact of confidentiality- related statutes on research activity. The specific context of the study is criminal justice-related research. The study's focus is on research access to confidential criminal justice records, because it is during the process of access--in which researchers and criminal justice agencies mutually resolve questions of access and its conditions--that issues regarding confidentiality are most directly encountered. Although the substantive context of the study was limited, the major research issues are significant to social science research in general. These are:

- To what extent and in what ways have privacy and confidentiality legislation had an impact on research activity?

- What confidentiality-enhancing protections or conditions (procedural, statistical or legal) are employed by researchers in the access and use of confidential data?

- What are the real conditions of research access to confidential agency records and in what ways do confidentiality statutes or concerns interact with the access process?

Methods

In order to address these issues, a national study was designed involving surveys of samples of Criminal Justice Agencies and researchers. Because the Bureau of Justice Statistics has responsibility for the implementation and assessment of Section 818 (a) and (b) of the Omnibus Crime Control and Safe Streets Act, there was a special interest throughout this study on these two Federal statutes (and the implementing regulations) in terms of their impact on research activity and their interaction with other State-level laws and regulations.

The survey of criminal justice agencies included 84 Criminal Justice Agencies in 12 States in the

primary sample and 76 agencies in 38 States in the supplementary sample. These agencies were contacted in person (primary sample) or via telephone (supplementary sample). Interviews with agency personnel focused on the statutory framework controlling research access within the agency, the policies and procedures the agency employs for research access and the agency's recent experience with research access. (See Appendix I, for more detail concerning the agency survey sampling procedures and topics and questions).

The researcher survey was conducted via telephone. Forty researchers were included; twenty representing researchers funded under the Safe Streets Act, twenty representing other criminal justice researchers with recent publications. This survey pursued issues related to research access from the perspective of the researcher. Researchers were asked to describe their experience with obtaining access to confidential agency data, including both successful and unsuccessful attempts at research access. (Details concerning the researcher survey are included in Appendix I).

CHAPTER III
STUDY FINDINGS

The results of the survey offer some important insights with respect to the actual nature of conflicts between the research and the criminal justice communities over confidentiality of research data.[7] These results are described below in terms of the three major isses posed in Chapter I:

- Issue I: To what extent and in what ways have privacy and confidentiality had an impact on research activity?
- Issue II: What confidentiality-enhancing protections or conditions are employed by researchers in the access and use of confidential data?
- Issue III: What are the conditions of research access to confidential agency records?

Issue I: To What Extent And In What Ways Have Privacy And Confidentiality Legislation Had an Impact On Research Activity?

Perhaps the most important issue to the research community regarding the growth of privacy

legislation during the last decade is the possible impact of this legislation on research activity. As discussed above, the primary intent of most of this legislation was to enhance individual privacy and to protect the confidentiality of various kinds of personal information by controlling the collection, use and dissemination of identifiable data. As well-intentioned as much of this legislation was, there were concerns that confidentiality protections extended to various kinds of records by these laws could potentially pose barriers to research access and the use of those records.

The Agency Survey: The agency survey revealed that in almost every Criminal Justice Agency visited, either all or part of the targeted records (CHRI, inmate or probation records, criminal case files in court or prosecutor records) were made confidential by State or Federal law or policy. At the same time, however, about two-thirds of these agencies indicated that there was some statutory or administrative authority for research access to confidential records. For half of the agencies with a research access provision (and particularly, Central State Repositories, local police and State corrections), the source of authority for research access was the Federal CHRI regulations (28 CRF Part 20) or State CHRI regulations containing a research access provision modelled on the Federal regulations.

Data on research requests and refusals clearly indicate that a research access provision is the single most important factor bearing on agency refusals--that is, agencies operating under statutes or regulations which do not contain such a provision refuse (in accordance with the law) to allow researchers access to confidential records. Of the 75 agencies with a provision for research access, only one refused all research requests. Of the 29 agencies without a research access provision, 15 refused all research requests. Reinforcing the significance of the research access provision in CHRI regulations are agency reasons for refusals. Over half of the agency's refusing requests indicated that it was the law (specifically, CHRI regulations) which prevented them from releasing the data.

Overall, then, the survey suggested not so much a general "chilling effect" on research activity due to privacy and confidentiality statutes, but an agency-specific "chilling effect" in those agencies whose relevant statutes do not have a research access provision like that in the Federal CHRI regulations. Agencies with an access provision averaged almost five (4.6) research requests per year and refused an average of less than one (.8) of these requests (17.4%); By contrast, agencies without an access provision also averaged approximately five (4.6) requests per year, but refused 3.2 of them

(69.6%). Agency reasons for refusals indicate that agencies with a research access provision exercise their discretion by turning down requests mostly because of the poor quality of the proposed research or because of the potential costs and disruptions to the agency.

These data suggest that the Federal CHRI regulations and the State and local adoption of the research access provision have played a major role in facilitating research access to identifiable CHRI (and in many cases, other kinds of confidential agency data). Given the proliferation of potentially restrictive privacy legislation governing CHRI during the seventies, the absence of the Federal research access standard--in effect, legitimizing research use of confidential data pursuant to a confidentiality agreement--could have resulted in major barriers to criminal justice research activity. This research access provision, legitimatizing researchers as users of CHRI, may have also had the effect of routinizing research access via the confidentiality agreement, thus reducing the need, in some cases, for long and complex negotiations or the use of time-consuming legal (e.g., court orders) or procedural solutions.

The Researcher Survey: The results of the researcher survey provide even less evidence of "chilling effects" due to privacy and

confidentiality statutes than the agency survey. It's important to note, however, that the forty researchers in this survey--because they were either published in research journals or were LEAA grantees--may represent a more successful and prestigious group of criminal justice researchers than would be represented in some hypothetical random sample of all criminal justice researchers.

Only 26 of the 40 researchers (65%) were able to describe one or more serious access problems (e.g., access denied) and only half of these researchers said that the agency denied access by citing a restrictive confidentiality statute or policy. In 5 of these cases, the researcher said confidentiality was not the real problem, but was used as a smokescreen. More important, rarely (in only 2 of the 32 problem incidents) was a study dropped because of a failure to gain access; in half of these incidents, the researchers either dropped the agency from the study or added a replacement.

When the researchers were asked to describe confidentiality-related problems, only six described access problems related to specific privacy and confidentiality statutes. More researchers saw informed consent requirements (as represented in the Federal human subject regulations) and the costs and delays related to gaining access as problems than statutory

restrictions. When asked specifically about the impact of privacy and confidentiality statutes, many of the researchers saw them as a "good thing". Only four made reference to a "chilling effect"; one of these saw marginal researchers (e.g., graduate students) as more likely to be affected, while another thought these laws were creating more problems in the juvenile research area. A number of researchers, however, recommended the inclusion of a research access provision like that in the Federal CHRI regulations in all confidentiality statutes.

Again, one of the reasons why these criminal justice researchers did not perceive privacy and confidentiality statutes as posing major problems for research activity probably has to do with the prevalence of research access provisions in statutes and agency policy. Data from the researcher survey suggest that when access problems are encountered on confidentiality grounds, researchers can pursue numerous strategies to avoid terminating their research. The researcher data on access incidents showed researchers using legal strategies (e.g., gaining a court order, or becoming a temporary employee of the agency) and procedural strategies (e.g., various link file systems) to gain access in situations where confidentiality statutes or concerns might have normally restricted access. When access is still denied, researchers can often drop or

replace the agency, in some cases with little costs to the research itself. There is no doubt that researchers often learn which agencies are likely to be cooperative. This is not to imply that confidentiality statutes create no real problems beyond the requirements of negotiating access or seeking more cooperative agencies (e.g., agencies with no statutory restrictions on access). There are many cases where researchers have a particular interest in a specific agency; this is particularly true in evaluative research. Similarly, dropping a particular agency can affect the generalizability of research findings in cases where an agency may have represented a certain research variable (e.g., a rural court in a study of urban-rural influences). While the termination of a study is relatively rare, the researcher survey results showed that researchers often have to modify studies because they can't get access to certain confidential data. This can mean employing less adequate data sources (in terms of reliability and validity) and more costly sources, or simply foregoing certain variables.

Summary of Results: In sum, the data from the two surveys indicate that:

1) there has been no general "chilling effect" on criminal justice research activity due to privacy and confidentiality statutes;

2) there are agency-specific "chilling effects" (as indicated by agency refusal rates) largely due to the presence or absence of research access provisions in the statutues governing agency records; agencies governed by statutes without these access provisions tend to refuse all research requests for confidential data;

3) the Federal CHRI regulations with their research access provision have served a critical role in facilitating research activity; they have served as an important standard for State-level criminal justice privacy statutes and regulations and, thus, the research access provision of the Federal regulations has been diffused to a majority of States;

4) research access problems due to privacy and confidentiality statutes are somewhat attenuated because researchers:

   - often avoid agencies with restrictive policies in the first place,

   - use various legal and procedural strategies to gain access without violating statutory provisions, and

- can often drop agencies altogether or replace them with other more cooperative agencies with few serious consequences for the research; and

5) researchers are generally supportive of privacy and confidentiality legislation, but believe research access provisions should be included in these statutes.

Issue II: What Confidentiality-Enhancing Protections Or Conditions Are Employed By Researchers In The Access And Use Of Confidential Data?

Inherent in the Federal regulations implementing both Sections 818(a) and (b) of the Omnibus Crime Control and Safe Street Act is the notion that facilitating research access to identifiable data carries with it the responsibility to protect the confidentiality of that data. Both regulations embody an attempt to balance confidentiality concerns with the researcher's need to know. The research access provision of the Federal CHRI regulations states that research access to identifiable CHRI is conditioned on the negotiation of a confidentiality agreement limiting the use of the data to research purposes and ensuring the confidentiality and security of the data. The regulations implementing Section 818(a), the research shield statute, place similar conditions on the use of identifiable data.

In general, while criminal justice researchers have been able to gain access to identifiable (and sensitive) data on individuals (although not always in the agency of their choosing), the issue of confidentiality protection remains. In one sense, the responsibility has simply shifted from the agency which allowed the researcher access to the researcher who now has the data.

Agency Survey: The agency survey showed that 37 of the 55 agencies allowing access to confidential data require a confidentiality agreement. The majority of these agencies (27 of them) referred to Federal, or similar State, CHRI regulations as the source of this condition, again showing the pervasive influence of the Federal regulations particularly on CSR's and local police departments. These confidentiality agreements typically specify a number of confidentiality-enhancing conditions including limiting the use of the data to research purposes; insuring the physical security of the data; specifying the destruction or return of the data at the end of the research; and forbidding any presentation of data that might identify an individual.

Of the 18 agencies not employing confidentiality agreements as a condition of access to confidential data, 15 required a court order which, typically, specifies restrictions similar to confidentiality agreements. Thus, with rare

exceptions, criminal justice agencies are not allowing researchers access to confidential data without imposing a set of confidentiality-enhancing conditions.

Although these conditions can enhance the confidentiality of identifiable data and, thus, protect the individuals, there is little evidence that researchers, in and of themselves, pose a real threat to the individuals by accessing and using confidential data. A more important threat in criminal justice research is represented by the legal and administrative bodies that might attempt to subpoena or otherwise gain control of sensitive data and use it for non-research purposes (Knerr, 1977). Thus, there are important questions regarding the extent to which a confidentiality agreement between an agency and a researcher protects individuals. Almost all confidentiality agreements contain a clause assigning any civil or criminal liabilities from misuse of the data to the researcher and indemnifying the agency against these liabilities. In much the same way that Riess (1979) has noted that informed consent agreements really protect the researcher and not the subject, the confidentiality agreement seems directed toward protecting the agency.

A case law search by Cohrssen (1981) could find no cases involving the Federal regulations implementing 818. Similarly the social science

literature does not offer any evidence regarding the ability of a criminal justice researcher to use a confidentiality agreement as a means of resisting a subpoena for research data. Analyses of cases involving the confidentiality of various kinds of research data (Cohrrsen, 1981; Nelson and Hedrick, 1981) suggest that the courts would not compel disclosure from a researcher, if the data were available from the agency or other sources. Where this is not the case (e.g., in research studies where confidential data are collected directly from the subject), the courts, in the absence of statutory researcher shield provision, have generally used a balancing test, that is, do the public benefits emanating from forced disclosure of confidential data (and the breach of researcher-subject confidentiality) outweigh the benefits of protecting the confidentiality of the data. Of course, as Nelson and Hedrick (1981) point out, this balancing is a subjective process and one likely to vary from court to court. In essence, it is the ambigious legal status of the researcher-subject relationship that makes researcher shield statutes, conferring testimonial privilege on the researcher, so important.

The Researcher Survey: The researcher survey further supports the prevalence of confidentiality-enhancing conditions as routine features of criminal justice research involving

confidential data. Over 60% of the access incidents involved a confidentiality agreement between the agency and the researcher. Additionally, 19 of the 40 researchers had employed a special procedural method for enhancing confidentiality (i.e., a link file system) as part of an access incident. As Boruch (1980) has pointed out, it is critical that social researchers not depend on legal solutions to confidentiality problems, but rather employ a full range of legal, procedural and statistical solutions.

Although the researchers and studies represented in these access incidents may not be representative of all criminal justice researchers and studies, the prevalence of these somewhat sophisticated procedural solutions suggests that researchers are responding to confidentiality issues in a responsible and constructive manner. In general, the researchers' views on privacy and confidentiality statutes were positive. They indicated that confidentiality concerns were important and that researchers should respond to them and sharpen their research practices in this area (despite the fact that this inevitably increases the time and costs involved in research). Of course, researchers were also for researcher access provisions and researcher shield statutues, both of which facilitate research access to confidential data.

The Researcher Shield: With respect to researchers reliance on a statutory 'shield' protecting against disclosure requirements, previous studies (Knerr, 1977; Nelson and Hedrick, 1981) have shown that legal and administrative attempts to pressure researchers to reveal confidential data are not rare, although few of these incidents end up in court. Although not a focus of this study, the researcher survey turned up two research incidents in which researchers received significant pressures from agency personnel to reveal confidential data they had collected from subjects. One of these researchers was funded by LEAA and was able to use the LEAA researcher shield (Section 524(a)) to end the pressure. Similar to Nelson and Hedrick's (1981) study of the use of researcher shield grants in drug research, the data here support the convenience, if not outright necessity for a shield of this sort. Of the 20 LEAA-funded researchers, five (25%) had made some use of this statutory shield. In the above case it was used to protect the data; in four other cases it was used to either assure subjects or agency personnel to cooperate in the research effort since the confidentiality of the data could be legally assured. The shield seems particularly important in cases where pressures for data release are encountered, or where agencies or subjects are particularly concerned about the confidentiality of the data. The somewhat

limited use of this shield by LEAA-funded researchers in facilitating access is mostly due to the fact that access can usually be achieved without reference to the shield (largely because of the statutory research access provisions governing agency records). Another value of these shields (and one not explored in this study) was revealed in the Nelson and Hedrick study. In that study, 24% of the researchers said they would not have undertaken their particular study unless such a shield was available.

Summary: In conclusion, with respect to confidentiality-enhancing conditions, this study indicates that:

1) confidentiality (or non-disclosure) agreements, imposing a variety of confidentiality-enhancing conditions on the researchers, are a typical feature of criminal justice research involving access to confidential agency data; the DOJ and similar State CHRI regulations, are the major legal impetus for this condition;

2) the real protection these agreements afford individuals--in the absence of a researcher shield and the possibility of administrative or legal demands for confidential research data--is unclear;

3) researchers are employing procedural solutions to confidentiality problems and, in general, seem supportive of privacy and confidentiality legislation and concerns; and

4) the DOJ researcher shield is finding varied, if limited, use and seems particularly valuable when researchers encounter external pressure for confidential data or when subjects or agency personnel are particularly concerned with confidentiality issues; the limited use of the shield is mostly due to the fact that researchers have been able to get the data they want without the extra leverage the shield can provide.

Issue III: What Are The Conditions of Research Access To Confidential Agency Records?

The conditions of access imposed by Criminal Justice Agencies in handling research requests for confidential data are embodied in both the statutory and administrative mandates that govern agency record-keeping and in more informal criteria reflected in agency decision-making. It is important to remember that even when research access to confidential records is statutorily authorized, actually allowing access is at the discretion of the

agency. Not surprisingly, the ways in which agencies exercise this discretion--that is, the conditions under which researcher access to confidential data is permitted--research requests--vary considerably from agency to agency, even when governed by similar or identical statutes. In many cases, access provisions are based on considerations independent of the confidentiality.

Agency Survey: The most important data on this issue came from the agency survey, as reflected in the description of statutory provisions, agency policy and actual agency practice. Most of these data, however, reflect the formal and/or routine conditions and decision-making rules agency officials employ when handling research requests. At best, it represents the general or "ordinary" conditions and rules of access. On the other hand, the data from the researcher survey on access and problem incidents represent a much more selective set of research experience for at least two important reasons. First, as previously discussed, these researchers are most probably a more successful and prestigious group of researchers than the general population of criminal justice researchers. Second, and more importantly, their selection of access incidents to describe was probably influenced by their understanding of the nature of the study. Thus, they likely selected those access incidents in which access negotiations and conditions and confidentiality concerns were most salient.

The data on agency requests and denials indicate that the first critical criterion guiding access determinations is whether the agency has a statutory or administrative basis for allowing access to the requested records. Thus, for many Criminal Justice Agencies--particularly those governed by a research access provision similar to that in the CHRI regulations--the critical condition (or "first hurdle") for access is that the researcher is bonafide and willing to sign a confidentiality agreement. A major finding of this study was the extent to which the presence or absence of a research access provision was predictive of agency refusals.

It is not surprising, given agencies' growing legal responsibility for criminal justice records during the 1970's and the potential liability arising from their mishandling, that agencies adhere so strictly to statutory and administrative regulations. The importance to agencies of legal propriety in this area is also reflected in the researcher data on factors influencing access. Four of these factors--informed consent, confidentiality agreements, court orders and temporary employee status--generally represent attempts to meet formal statutory or administrative conditions.

Given that an agency can allow access to confidential records and given that the researcher is bonafide and willing to enter into

a confidentiality (or similar) agreement, agencies then seem to respond to a number of alternative (or secondary) criteria. These criteria--including the utility or significance of the research, the soundness of the research and the time/cost/disruption associated with allowing access--are reflected both in the formal research policies of some agencies (particularly, state correctional agencies) and in their reasons for refusing requests.

Almost every type of Criminal Justice Agency employed considerations of the time, costs and/or disruptions associated with allowing research access. State correctional agencies--which have the most thoroughly developed research access policies and express the most active interest in the external research they support--were the most likely to be concerned with both the utility and significance of the research and the quality of the proposed research (i.e., its soundness of conception and design). The utility of the study for the agency was also a significant factor mentioned by researchers in accounting for successful access experiences.

While officials in the agency survey did not say they had rejected research requests because the proposed study and data requested could reflect negatively on their agency, they did spontaneously voice concerns regarding certain types of research (namely, studies examining

agency policies, practices and programs) and researchers (described as "whistle-blowers" or "finger-pointers"). In part, because of the increasing public funding of agencies and programs directed toward the amelioration of social problems and needs, the last decade has seen considerable growth in research that is evaluative in nature. This research is oriented towards the assessment of whether things are working the way they are intended, that is, towards the accounting of success and failure. Spencer (1973), in his discussion of problems of conducting research on bureaucracies, summarizes the problem posed by this evaluative-type research: "While many sociologists view their profession as providing legitimacy for the dispassionate 'debunking' of social myths, they have no legal sanction, normative appeal, or legal immunity to enter public bureaucracies for the purpose of conducting a social audit (p. 94)."

The research of Gordon, et. al. (1979) pointed out that, while requests for favorable information tended to receive "normal" treatment from public agencies, requests for potentially unfavorable information received special treatment. In these cases, the agencies envinced special concern regarding the reason the information was requested and the identity of the requestor. Thus, their access model includes not only a valence for the information

requested, but a valence for the requestor based on the requestor's reputation and previous interactions with the agency.

Researcher Survey: Although the agency survey did not reveal the researchers' (or researchers' organizations') reputation or prior experience with the researcher as important decision-making factors, the results of the researcher survey suggest otherwise. This may reflect the fact that many of the studies described by the researchers were non-ordinary, that is, involved requests for data for research purposes that could be threatening to the agencies. The nature of the studies in many of the access and problem incidents--involving, for example, research on police shootings, prison overcrowding, inmate misbehavior, and so on--clearly held potentially negative ramifications for the agencies involved. Thus, the researchers saw a number of causal factors as important in gaining access that implied a relationship that would allay (to some degree) agency fears regarding the intent of the researcher and his study. Thus, "prior experience with the agency" was the most frequently used factor in accounting for access (60% of the researchers). Additionally, "trust-building" (35% of the researchers) and the "reputation of the researcher's organization" (25% of the researchers) were also frequently used as explanatory factors.

Thus, it seems that when researchers request information for research that could reflect negatively on agencies, access problems will be more severe and refusals more frequent. In these cases, the researcher's relationship with an agency can be of critical importance in facilitating access, insofar as this relationship can allay agency fears regarding the uses of the data and the researcher's intentions. As discussed previously, the problems created when access is denied by a particular agency can vary depending on the type of research proposed. In some cases, when the study is of a particular agency or institution, it may have to be terminated or depend on less adequate data sources (e.g., public data). More often, researchers either drop the agency from the study or seek alternative agencies, a solution that can create a variety of sampling problems (and inevitably, lead to selective samples of cooperative agencies). More generally, researchers may eventually shy away from sensitive topics and non-cooperative agencies, and instead design research that is safe and relatively easy to conduct.

Summary: In summary, the findings of this study regarding the conditions of research access to confidential data indicate that:

1) a statutory or a ministrative provision allowing research access to confidential

data is the critical necessary condition for granting access; this provision typically requires that the researcher be bonafide and enter into a confidentiaity agreement; the results of the agency survey clearly indicate that without a legal basis for granting access, agencies will deny requests;

2) beyond a legal basis for allowing access, agencies also consider other factors in deciding which requests to grant; the most important of these are the utility and quality of the proposed research and the costs and disruptions associated with allowing access;

3) another important factor seems to be the extent to which an agency holds a "research value", that is, believes in the free flow of information for purposes of knowledge development; the State Correctional Agencies in the survey seemed to hold such a value and,

   thus, took a more cooperative and proactive stance regarding research requests; however, they were also more likely to refuse requests if they thought the proposed research was not of sufficient quality;

4) although, the above factors seemed to account for agency decision-making

regarding "ordinary" research requests, the researcher data suggests that additional considerations become important when a research request involves data that could be potentially damaging to the agency; in these cases, the agency's prior experience with the researcher and their perception of his intent can be critical factors; thus, the element of trust seems central where the research could be potentially damaging to the agency; and

5) the control and discretion that agencies exercise when dealing with research requests for confidential or sensitive data, and their concomitant ability to avoid research directed toward assessing the agency, its policies or programs, raise important questions about the rights of agencies to control research activity about them and the methods appropriate for social research about organizations.

CHAPTER IV
CONCLUSIONS

The findings of this study provide little evidence of any broad or systematic impairment of research activity in criminal justice as a result of privacy and confidentiality statutes and regulations. Nonetheless, there was evidence of at least three distinct types of confidentiality-related problems that do have a direct bearing on research activity. Criminal justice researchers do have problems with:

- gaining access to confidential records in agencies where there are no statutory provisions allowing access to these records;
- gaining access to confidential agency records (or subjects) when the proposed research is potentially threatening to the agency itself (that is, the agency's privacy is at stake); and
- insuring the confidentiality of research data in the face of external pressures (whether legal or administrative) when the research data receives no statutory protection (i.e., a researcher's shield).

Two of the above problems--gaining access to confidential records and insuring the confidentiality of research data--have been

addressed at the Federal level by regulations implementing Section 818(a) and 818(b) of the Omnibus Crime Control and Safe Streets Act. The evidence from this study suggests that these regulations have been effective as a regulatory approach to achieving a balance between the researcher's need to access confidential data and the need to insure the confidentiality of that data. Section 818(b) has provided a statutory basis for research access to confidential CHRI (with the confidentiality agreement employed as a means of providing various confidentiality protections). At the same time, researchers funded by the Safe Streets Act have had the extra statutory protection provided by Section 524(a), which makes their research records immune from legal subpoena.

Section 818(a) and 818(b) taken together, then, are the basis of a model that, if extended to the state level, would likely benefit the research enterprise without posing any significant risks to individuals. It seems reasonable to include research access provisions (including requirements for confidentiality agreements) in State-level privacy legislation affecting the confidentiality of criminal justice records. At the same time, it is important to extend to researchers an effective statutory shield against forced disclosure of identifiable data, so that researchers can

guarantee the confidentiality of the data they collect. Similar recommendations have been made for Federal privacy legislation by the Privacy Protection Study Commission (1977) and state legislation (Robbin, 1981).

The final problem facing criminal justice researchers--that is, the issue of institutional privacy--is a more complex one and one not likely to be easily solved through regulation. Reiss (1979b) has written:

> ...research on deviant persons and organizations is a dangerous activity that often leads to dangerous knowledge in social life. Our kind of research on deviant persons and organizations, therefore, may lead to both flagrant violation of rights and flagrant violation of convention. Both eventually may invite flagrant regulation and control. (p. 93)

In much the same way that the journalists' role has become a major public issue, it is likely that social researchers, insofar as they pursue "dangerous" knowledge, will face similar scrutiny. Questions regarding the rights and responsibilities of researchers and of the researched will be posed, reformulated, and posed again. As Reiss notes, those questions are likely to shift from somewhat misplaced concerns regarding the specific dangers of social research for the individual and his

privacy to more serious and problematic concerns about the dangers of social knowledge in general.

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Footnotes

[1]See Boruch and Cecil (1979) for an excellent discussion of the need for identifiers in various types of research processes and activities.

[2]See Boruch and Cecil (1979) for a discussion of the diverse and somewhat inconsistent findings regarding confidentiality promises and subject cooperation.

[3]Criminal history record information (CHRI) refers to the data collected by criminal justice agencies that identify offenders and summarize their history of events, legal proceedings, dispositions and correctional events.

[4]See Sasfy and Siegel (1981) for a summary of researcher's concerns regarding the potential negative impact of privacy legislation on research activity.

[5]See Search Group, Inc. (1980).

[6]See Search Group, Inc. (1981)

[7]See Sasfy, J., and Siegel, L. (1982) for a detailed description of the results of the surveys.

END