

March 1982

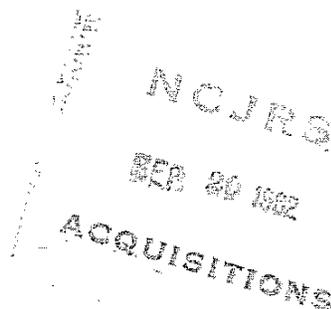
U.S. Department of Justice
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by
Search Group Inc.

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.



LOCAL POLICE INFORMATION POLICY

Report of work performed under Grant Number 80-BJ-CX-0007, awarded to SEARCH Group, Inc., of Sacramento, California, by the Bureau of Justice Statistics, U.S. Department of Justice.

Points of view or opinions stated in this document do not necessarily reflect the official position or policies of the U.S. Department of Justice.



SEARCH GROUP Inc.

The National Consortium for Justice Information and Statistics

925 SECRET RIVER DRIVE SACRAMENTO, CALIFORNIA 95831 (916) 392-2550
DR. ROBERT J. BRADLEY, Chairman STEVE E. KOLODNEY, Executive Director

PROJECT STAFF

Gary R. Cooper
Deputy Director
SEARCH Group, Inc.

Robert R. Belair
Hill, Christopher & Phillips, P.C.
Washington, D.C.

Copyright © SEARCH Group, Inc., 1981

TABLE OF CONTENTS

	Page
INTRODUCTION	1
Purpose	1
Local Role	1
Timeliness	1
Methodology	2
Scope	3
 PART I: APPLICABLE LAW	 5
Sources of Law	5
The JSIA Regulations	5
Coverage of the JSIA Regulations	5
Content of the JSIA Regulations	6
State Legislation	6
Comprehensive Statutes	6
Public Record Statutes	7
Local Ordinances and Agency Policies	8
Local Ordinances	8
Agency Policies	8
Case Law	9
Data Quality Standards	9
Dissemination Standards	9
Subject Access Standards	10
 PART II: DESCRIPTION AND ANALYSIS OF LOCAL PRACTICE AND POLICY	 11
Creation and Collection of Criminal History Record Information by Local Agencies Should Receive More Attention	11
Scope of Local Record Systems Presents Controversial and Difficult Questions	11
Eliminate Local Criminal Histories	12
Maintain Comprehensive Criminal Histories	12
Maintain Criminal Histories of Local Offenses	12
Lack of Disposition Information is a Critical Problem	13
Local Agencies Lag Behind in Automating Their Systems	13
Effects of Automation	13
Extent of Local Automation	14
Local Agencies Give Security Substantial Attention	14
Local Security Practices	15
Local Agency Officials are Concerned About Personnel and Training Deficiencies in the Records Area	15

	Page
Local Agencies Provide Subjects With Access and Challenge Opportunities	16
Local Policies on Subject Access	16
Local Policies for Investigating Challenges	16
Local Agencies Tend to Disseminate Information More Readily and Fully than State and Federal Agencies	16
Dissemination Patterns	16
Local Dissemination May Be Excessive	17
Local Dissemination Policies	18
Sealing and Purging Policies	18
Summation of Dissemination Policy	18
Agency Liability for Recordkeeping Miscues is a Theoretical Possibility, but is Seen as Little Practical Threat	18
Legal Basis for Liability	19
Agency Litigation Experience	19
Local Agency Role in Setting Policy for Running Local Criminal History Record Systems is Not Defined or Secure	19
CONCLUSION	21
Appendix 1: SURVEY RESPONDENTS	23
Appendix 2: ROSTER OF PARTICIPANTS	25
Appendix 3: SCOPE OF THE JSIA REGULATIONS	27

INTRODUCTION

Purpose

This report describes and analyzes the handling of criminal history record information* by local criminal justice agencies. The report's ultimate purpose is to identify the manner in which local agencies collect, manage, use and disseminate criminal history record information; and to analyze the impact of that activity on the quality and utility of criminal history records and the privacy and security interests of record subjects.

Local Role

The local role in handling criminal history records is not as well studied as that of state and federal agencies. However, local criminal justice agencies are usually the first, and sometimes the only, point of contact for criminal record subjects. Therefore, their practices and policies have the most profound effect upon the quality and utility of criminal history record information, and upon the privacy

*In the paper we use the now widely accepted terminology defined in the SEARCH report Standards for Security and Privacy of Criminal Justice Information (Technical Report Number 13) and in the Justice System Improvement Act Regulations, 28 C.F.R., Sect. 20.1 et seq. (formerly known as the LEAA Regulations).

Criminal history record information is defined as information collected by criminal justice agencies on individuals and consists of identifiable descriptions, such as photographs and fingerprints, and notations of arrests, detentions, indictments, informations, or other forms of criminal charges, and any dispositions arising therefrom, sentencing, correctional 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.

rights and interests of criminal record subjects.

In addition, on an aggregate basis, local criminal justice agencies maintain criminal history record information about a far greater number of individuals than state or federal systems maintain. Local agencies are also the major source for criminal history record information held in state and federal repositories. As of April 1981, the FBI's Identification Division was receiving arrest information nationally from 16,823 police departments and 3,403 sheriff's offices.

Comparatively speaking, little information has been developed or published about the criminal history record information policies and practices of local agencies. A literature search for other studies or published reports on this subject uncovered little applicable information. Thus, remarkably little has been known about the development of local criminal justice recordkeeping policies and practices, and little attention has been given to their effect on criminal justice agency performance or on the security and privacy interests of record subjects.

Timeliness

Several factors point to the start of the 1980's as a watershed in the development of criminal justice information policy.

First, the nation's criminal justice system has now had over five years of experience with the Justice System Improvement Act Regulations (JSIA Regulations) originally issued by the Law Enforcement Assistance Administration (LEAA) and formerly known as the LEAA Regulations. These regulations set uniform, minimum privacy and security standards for criminal history record information maintained by state and local agencies which have used federal (LEAA) monies in their criminal history information systems. Sufficient time has elapsed to assess the impact of the JSIA Regulations on local agency practice.

Second, during the mid to late 1970's concern for the protection of individual privacy in the handling of criminal history records peaked. Today, the nation appears to be moving toward new principles and new policies which give criminal justice agencies greater discretion in handling criminal history records and greater latitude in using and disclosing these records for criminal justice and other public purposes. A period in which the primary concern has been for individual privacy rights seems to be giving way to a new period of concern about the effective handling of criminal history records.

Third, by 1980 the critical technological and administrative elements of a framework for the collection, maintenance and dissemination of criminal history records was largely in place. During the 70's virtually every state authorized and established a statewide repository to collect, maintain and disseminate criminal history record information. This development has been encouraged, and indeed in many ways made possible, by the development in the last decade of affordable computer software and hardware. By 1980 many states, and a few localities, have at least partially automated their criminal history record systems. This development promises to have a profound effect, not only on the way in which criminal history record information is handled, but on who does the handling and who makes the rules for such handling.

Finally, a review of applicable law and practice suggests that the emphasis in the 80's will not be on the disclosure and use of criminal history record information, but on the "quality"--the accuracy and completeness--of this data. Accurate and complete criminal history record information serves the interests of both criminal justice agencies and record subjects. Because local criminal justice agencies are almost always the original source for criminal history record information, their role in ensuring the accuracy and completeness of criminal history data is key. For this reason, local agencies are likely to be the focus of a

good deal of scrutiny and attention over the next few years.

All of these factors suggest that it is timely to review local agency handling of criminal history record information and to assess the policy implications of such practice. This review is not meant to be exhaustive. Rather it has been designed as an important beginning which will assist criminal justice in developing policies for the 80's which encourage the effective use of reliable and complete criminal history record information in a way that provides practicable protections for subject rights and interests.

Methodology

SEARCH used four research approaches and sources in conducting this study. First, reports, articles, monographs and other published discussions of local agency policy and practice were reviewed. A search of the standard reference sources including Criminology and Penology Abstracts, the Criminal Justice Periodical Index, the Index to Legal Periodicals, the Public Affairs Information Service Index and an automated search of the National Criminal Justice Reference Service Library produced only a handful of materials.

Second, applicable statutes, ordinances and regulations were reviewed. A representative set of municipal ordinances was reviewed to provide a sense of the way in which city councils and other local legislative bodies are addressing criminal history record issues.

Third, a cross section of local police agencies throughout the country were surveyed. The survey targeted a select group of agencies which were asked to complete a questionnaire about their security and privacy policies and about various practices and experiences related to criminal history record handling.* Local agencies were also asked to provide SEARCH with

*A list of criminal justice agencies responding to the questionnaire is attached as Appendix 1.

copies of their policies or rules, as well as any other relevant material.

A primary purpose of the survey was to examine the extent to which local agencies have developed and implemented written regulations or policies regarding the various aspects of criminal history record handling such as collection, use, security, subject access, dissemination, and sealing and purging. The survey also sought to determine whether the policies were developed pursuant to the JSIA Regulations, state statutory or regulatory requirements, local ordinances or local agency initiative.

In addition, agencies were asked to indicate whether their record systems are automated or manual, whether they contain a requirement that the local agency check with the central state repository before disseminating records and whether the agency has ever been sued for mishandling criminal history records. Lastly, agencies were asked to describe significant problems encountered in implementing security and privacy policies and rules.

In all, one hundred local criminal justice agencies, predominantly police agencies, are represented in the survey response. The responses came from large and medium sized agencies as well as small agencies scattered throughout the country. It appears that the responses represent a fairly broad cross section of local police agencies.

Fourth, on February 25, 1981, SEARCH convened a one-day conference of representatives from a cross section of local criminal justice agencies.* The number of attendees was limited in order to have

an opportunity to discuss in detail applicable policies and practices.

Scope

This paper contains two substantive parts. Part I presents a description of the law affecting local agency handling of criminal history record information. This section includes a discussion of the JSIA Regulations, state statutes, local ordinances, and applicable case law. Because the JSIA Regulations, state statutes and case law have been fully discussed in other SEARCH publications, discussion of these topics in this report has been limited to an overview of these sources of law.

Part II describes and analyzes local agency practice. This discussion suggests that much of local agency practice is governed by the discretion of local officials and is not governed (or is only loosely governed) by applicable law. The discussion of agency practice and policy looks at agency collection of criminal history record information, the scope of local agency systems, disposition reporting problems, automation issues, security, personnel and training, subject access to information, third party dissemination of information, agency experience with legal action aimed at redressing allegedly improper agency recordkeeping practices, and the effects and implications of different sources of law and policy.

Part II of the report also includes an analysis of the implications of current law and practice and an identification of issue areas that need further attention. This analysis does not include formal or specific recommendations, but rather suggests broad issue areas that need further attention or analysis.

*A listing of the attendees and their agencies is attached as Appendix 2.

PART I

APPLICABLE LAW

Sources of Law

Some of the most vexing and persistent policy issues in a federal system are those which arise from the relationship between state and federal entities. Although local political entities do not enjoy a constitutional status, local home rule charters give municipalities and other political jurisdictions a voice. Not surprisingly, the handling of criminal history records by local agencies is beset by numerous, troubling issues involving intergovernmental relations.

In regard to who sets policy, a few generalizations can be made. First, the nation does not have a comprehensive, federally imposed policy for the handling of criminal history records. The Congress made substantial, but ultimately unsuccessful efforts at enacting such a policy in the mid-1970's.

The closest thing to a national policy is embodied in the JSIA Regulations now administered by the Bureau of Justice Statistics (BJS) in the Department of Justice. However, as we discuss below, the coverage of these regulations is not comprehensive because those local agencies which never received LEAA monies in support of their criminal history record systems are not covered, and because states and localities are essentially free to set their own dissemination policies.

Second, there appears to be a split between those states whose statute and/or regulations set criminal recordkeeping standards for all state and local agencies and those states whose statute and/or regulations only set standards for state but not local agencies. Even in states which have adopted statewide (i.e., applying to local jurisdictions as well as state agencies) standards, local jurisdictions or agencies are often able to add their own standards to extend or supplement the state standards.

Finally, the courts have had an enormous impact on policy for handling criminal history record information. Their influence derives not only from their interpretation and application of statutory mandates but from their authorship of "judge made law" based on common law and constitutional precepts.

This part of the report looks at all these sources of law.

The JSIA Regulations

The JSIA Regulations were issued pursuant to the only criminal justice information and privacy standard enacted by Congress during the 1970's. The Crime Control Act of 1973 amending the Omnibus Crime Control and Safe Streets Act of 1968 required that all criminal history records collected, maintained or disseminated by state and local criminal justice agencies pursuant to support from what was then the Law Enforcement Assistance Administration must be kept complete and secure, must be made available for review and challenge by record subjects, and must be used only for law enforcement and other lawful purposes.* Pursuant to this statute, LEAA in 1976 issued comprehensive regulations for the handling of criminal history records by state and local criminal justice agencies.

Coverage of the JSIA Regulations

The JSIA Regulations cover every state and local agency that has received monies from LEAA, or BJS, in support of their criminal history record system. As a practical matter, this means that virtually every state criminal justice agency is covered and perhaps one-half of local criminal justice agencies, including most criminal justice agencies in large metropolitan areas.

*42. U.S.C., Section 3771(b).

The Regulations require covered agencies to develop policies and implement operational procedures in five areas: accuracy and completeness, dissemination, audit, security, and subject access. The JSIA Regulations only cover criminal history record information. The Regulations expressly exclude a number of important types of criminal justice information from their definition of criminal history record information. Specifically, the Regulations exempt wanted person information, original records of entry stored on a chronological basis such as in police blotters, court records of public judicial proceedings, published court or administrative proceedings, traffic offense records, and announcements of executive clemency.

Notwithstanding these limitations and exceptions, the JSIA Regulations set out relatively comprehensive standards for handling criminal history data that must be met by local criminal justice agencies that have received LEAA monies.

Content of the JSIA Regulations

The JSIA Regulations contain detailed standards that: require state and local agencies to disseminate complete and accurate records, restrict agency dissemination of non-conviction information except to other criminal justice agencies, require agencies to give subjects an opportunity upon request to inspect and challenge their criminal history records, require annual state audits of a representative sample of state and local agencies to ensure compliance with the Regulations, and impose detailed and comprehensive requirements for maintaining the security of records.*

Two points should be emphasized about the JSIA Regulations. First, the Regulations do not preempt state and local discretion for setting dissemination policy. The Regulations merely require that any dissemination of non-conviction record in-

formation for non-criminal justice purposes be made pursuant to a statute, ordinance, executive order, or court order which, in the view of appropriate state or local officials, authorizes the dissemination. Thus, states and localities are entirely free to set their own dissemination policies regardless of whether they are more or less restrictive than the JSIA Regulations--provided that they do so by official action.

Second, although the JSIA Regulations are not, by their terms, applicable to agencies that have not received funds from LEAA or from BJS for the support of record systems, many agencies which have not received such funding may still be subject to the Regulations. These agencies may be covered by virtue of "use and dissemination" agreements with other criminal justice agencies. Such agreements are required of local criminal justice agencies in order to obtain information from central state repositories. For this reason, as well as in view of the influence that the JSIA Regulations have had on the content of state statutes, the impact of the JSIA Regulations on the policies of local agencies has greatly exceeded the strict coverage of these Regulations.

State Legislation

Today, in varying ways and to various extents, all 50 states have adopted statutes that deal with some aspects of the collection, use and dissemination of criminal history records. However, not all of these statutes are comprehensive, and not all of these statutes are applicable to local criminal justice agencies.

Comprehensive Statutes

Sixteen states have adopted comprehensive criminal history record statutes that govern the handling of state and local criminal history records by local agencies within their states: Alabama, Alaska, California, Colorado, Connecticut, Hawaii, Louisiana, Maine, Maryland, Massachu-

*A description of the JSIA Regulations, in outline form, is attached as Appendix 3.

setts, Montana, Nebraska, Nevada, Pennsylvania, Virginia and Washington.* Most of these statutes conform generally to the approach of the JSIA Regulations.

In addition, four jurisdictions, Florida, Kentucky, New Mexico, and the Virgin Islands, have adopted statutes that cover limited aspects of criminal history record practice by local agencies.** Thus, in all, twenty jurisdictions have adopted statutes that impose criminal history record standards on local criminal justice agencies within their borders.

Many of the states which have not adopted a criminal history records law that covers locally generated and maintained criminal history record information have, at least, adopted a statute covering criminal history data generated or maintained at the criminal records repository. Customarily, the state statute places limits on local agency redissemination and use of

criminal history information obtained from the repository. For example, local agencies are often only permitted to use information obtained from the repository for criminal justice purposes. In addition, there is sometimes a quid pro quo for local agency access to repository information. The local agency must report all arrests and dispositions to the repository.

Public Record Statutes

Apart from statutes that deal specifically with criminal history record information, one other type of state statute often affects the dissemination practices of local criminal justice agencies: public record laws. Today every state has such a law, whether it be a brief statement that official records are available for viewing and copying unless otherwise specifically provided by law, or a more "modern," comprehensive freedom of information law providing that information held by government agencies is public subject only to exceptions specifically enumerated in the statute.

The impact of these public record laws on the availability of criminal history records is, in many cases, not clear. In general, a comprehensive criminal history record law, where it exists, will prevail over a public record law on the issue of the public availability of criminal history records. However, in states where the legislature has not dealt comprehensively or directly with the issue of criminal history record dissemination, public record laws may make such records generally available to the public. This is particularly the case if the public record law makes all agency held data public subject to enumerated exceptions, since the exceptions seldom include criminal history records.

In at least one state, Florida, the state attorney general has ruled that the state public record law applies to criminal history records and makes them generally

*Alabama: Ala. Code § 41-9-590(1); Alaska: Alaska Stat. § 12.62.010; California: Cal. Penal Code §§ 13300, 13301 (West); Colorado: Colo. Rev. Stat. § 24-72-301; Connecticut: Conn. Gen. Stat. Ann. §§ 54-142g et seq. (West); Hawaii: Haw. Rev. Stat. §§ 846-1 et seq.; Louisiana: La. Rev. Stat. Ann. §§ 15:575 et seq. (West); Maine: Me. Rev. Stat. §§ 16-611 et seq.; Maryland: Md. Ann. Code of 1957 §§ 27-742 et seq.; Massachusetts: Mass. Gen. Laws Ann. §§ 6-167 et seq. (West); Montana: Mont. Rev. Codes Ann. §§ 44-5-101 et seq.; Nebraska: Neb. Rev. Stat. §§ 29-3501 et seq.; Nevada: Nev. Rev. Stat. §§ 179A.070 et seq.; Pennsylvania: Pa. Stat. Ann. §§ 18-9101 et seq. (Purdon); Virginia: Va. Code §§ 9-107 et seq., 19.2-387 et seq.; Washington: Wash. Rev. Code Ann. §§ 10.97.010 et seq.

**Florida: Fla. Stat. Ann. §§ 943.01 et seq. (West); Kentucky: Ky. Rev. Stat. Ann. § 17-150 (Baldwin); New Mexico: N.M. Stat. Ann. §§ 29-10-1 et seq.; Virgin Islands: V.I. Code Ann. tit. 3, § 881(g).

available for public inspection and copying at local criminal justice agencies.* On the other hand, in Texas criminal history records have been found by the courts and the attorney general to be excluded from the coverage of public record laws.** In Ohio, the records of the state bureau of identification are specifically excluded from the coverage of the public records law, but, according to the state attorney general, most criminal justice agencies in the state, notwithstanding this exclusion, treat criminal history records as public records.***

ordinances regulating the handling of criminal history records. Although no extensive survey of local criminal history record ordinances has yet been undertaken, it appears from information compiled in connection with this study that few such ordinances have been enacted.

SEARCH's survey of local agencies, for example, found only eleven agencies out of the one hundred responding which indicated that their city or county had adopted ordinances dealing with criminal history records. In general, local ordinances are few

	<u>Written Policies in Effect</u>		
	<u>Yes</u>	<u>No</u>	<u>Being Developed</u>
Collection (policies for the creation or obtaining of criminal record data)	62	24	14
Internal Management and Use	77	12	11
Dissemination	84	7	9
Subject Access	83	9	8
Sealing and Purging	65	22	13
Security	76	10	14

Local Ordinances and Agency Policies

Local Ordinances

Local criminal justice agencies may, of course, be subject to local city or county

*Attorney General's Opinion No. 77-125, November 30, 1977, "Public Records, Availability of Arrest Records."

**Opinion of the Attorney General of Texas, May 14, 1976, entitled Open Records Decision No. 127.

***Letter from William J. Brown, Attorney General (by Jack E. McCormick, Supt., Ohio Bureau of Criminal Identification) to Steve E. Kolodney, Executive Director, SEARCH Group, Inc., dated August 26, 1980.

in number and, where they exist, narrow in scope. They seem not to be a significant factor nationally in setting local criminal justice agency policy for the handling of criminal history records information.

Agency Policies

By contrast, most local criminal justice agencies have adopted written policies to govern their own handling of criminal history record information.

The SEARCH survey, for instance, found that a sizeable majority of local criminal justice agencies have adopted relatively comprehensive criminal history record policies. The table above indicates whether agencies responding to the survey have adopted policies in six major areas of record concern. (Since exactly 100 agencies responded to the survey, the numbers of responses also represent percentages of total responses.)

Not surprisingly, more comprehensive policies tend to be found in larger agencies, and particularly in agencies located in states that have comprehensive state statutes and strong security and privacy programs at the state level. Examples from the survey include Alexandria, Virginia; San Jose and agencies in other cities in California; Seattle; Portland; and several Texas agencies. In reviewing the materials submitted by agencies in these states, particularly California, Virginia and Texas, it was evident that local agencies have benefitted greatly from guidance and technical assistance from the state.

Thirty-one percent of the agencies responding to the SEARCH survey indicated that their policies were implemented in response to the requirements of the JSIA Regulations. Another twenty-seven percent said that they were influenced by both the JSIA Regulations and state statutory or regulatory requirements. Thirty-two percent indicated that their policies were influenced only by state requirements. Only ten percent claimed to have acted solely on local initiative. As noted above, only eleven agencies indicated that their local jurisdictions had adopted ordinances which governed their record handling policies.

Case Law

The courts apply the same common law and constitutional standards to local agency handling of criminal history record information that they apply to state and federal handling of such information. Over the last few years SEARCH has written a great deal about court authored constitutional and common law standards--most recently in a 410-page compendium entitled Case Law Digest. Therefore, no attempt will be made here to present a comprehensive or detailed analysis of this case law. Rather, what follows is a brief sketch of the constitutional and common law standards that affect local agency handling of criminal history record information.

By the mid-1970's, the courts reached what appears to be a high-water mark for the imposition of constitutionally man-

dated, privacy oriented standards for the handling of criminal history record information by criminal justice agencies. For a time, it sometimes seemed that many of the basic recordkeeping operations conducted by criminal justice agencies would be "constitutionalized" and thus subject to court imposed standards.

Data Quality Standards

Today, virtually all that is left of a once robust constitutional interest in handling criminal history records is a vague constitutional "notion" that criminal justice agencies, including local agencies, must adopt reasonable procedures to ensure that the criminal history record information which they disseminate is accurate and complete.

In cases where agencies disseminate criminal history record information which turns out to be incomplete or inaccurate, and which thereby damages a criminal history record subject, the courts appear to be willing still to impose constitutionally mandated remedies if the agency did not have procedures in place that were reasonably designed to ensure the accuracy or completeness of the data.* These remedies typically involve sealing or purging the inaccurate or incomplete criminal history record information or other limitations upon its further dissemination. In extreme circumstances, the court may be willing to impose sanctions on the offending criminal justice agency.**

Dissemination Standards

In the wake of the Supreme Court's landmark 1976 decision in Paul v. Davis,*** there appears to be little or no

*See, for example, Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974); Maney v. Rattcliff, 399 F.Supp. 760 (E.D. Wisc. 1975); and United States v. Kalish, 271 F.Supp. 968 (D.C. P.R. 1967).

**Testa V. Winguist, 451 F.Supp. 388 (D.R.J. 1978).

***424 U.S. 693 (1976).

restriction placed by the Constitution on agency dissemination of criminal history record information (provided that the information is accurate and complete). Paul v. Davis, and its progeny announce, rather emphatically, that the Constitution neither requires nor prohibits criminal justice agencies from disclosing criminal history record information to third parties. The effect therefore is to give criminal justice agencies and federal, state and local legislators wide discretion to set criminal history record dissemination policy.

The only constitutionally imposed limitation on this discretion is a seeming willingness by at least some courts to require criminal justice agencies to disclose to the public certain types of criminal history record information--usually contemporaneous arrest or conviction information or information that otherwise retains a public character.* However, beyond this nascent and nebulous public access right there do not appear to be any constitutional restrictions on the disclosure, or non-disclosure, or criminal history record information.

Subject Access Standards

Finally, in certain circumstances, it appears that the courts may also be willing to say that criminal history record subjects have a constitutional or a common law right of access to their criminal history record information. Failure of a local agency to permit a criminal history record subject to look at his record (and such a failure today is rare given statutory and regulatory access requirements) can lead a court, even in the absence of a statutory access right, to order the agency to give

*See, for example, Tennessee Newspaper, Inc. v. Levi, 403 F.Supp. 1318 (M.D. Tenn. 1975).

the subject access. Courts can base this type of order on a subject's constitutional due process rights or fair trial rights, or on a common law holding that record subjects have a property interest in their records and thus must be able to review the records.*

In rare instances criminal justice agencies and their employees have common law liability for dissemination of criminal history data to private parties, even though the disclosure does not violate statutory or regulatory provisions. Theoretically, such disclosures could violate common law privacy or defamation standards. In order for a criminal justice agency to be liable for dissemination several factors must be present: (1) there must not be a statutory or regulatory provision that authorizes the dissemination; (2) the jurisdiction must recognize the tort doctrine of invasion of privacy or the tort doctrine of defamation; (3) the subject of the record must be damaged by the disclosure; and (4) the disclosure must not be privileged.

Ordinarily, criminal justice agencies and their employees will enjoy a qualified privilege to make disclosures of criminal history data. However, the privilege can be lost if the disclosure is overbroad, gratuitous or otherwise unreasonable. The privilege can also be lost if the disclosure was made with malice--a disregard for the data's truth or falsity, or if it was made in a manner that is entirely unrelated to the official's duties ("outside the scope of employment").**

*See, for example, Gardner v. Florida, 430 U.S. 349 (1977); and Hutchins v. Texas Rehabilitation Commission, 544 S.W.2d 802 (Tex. Civ. App. 1976).

**See, for example, Carr v. Watkins, 177 A.2d 841 (Md. 1962).

PART II

DESCRIPTION AND ANALYSIS OF LOCAL PRACTICE AND POLICY

Creation and Collection of Criminal History Record Information by Local Agencies Should Receive More Attention

Perhaps the criminal history record issue that has received the least attention from local criminal justice agencies is the creation and acquisition of criminal history record information. The SEARCH survey found, for example, that the weakest area of criminal history policy development among local agencies is that of policies related to collection. Although sixty-two agencies responding to the survey indicated that they have written policies regarding collection, a review of copies of the actual policies which many agencies provided along with their survey responses suggests that most of these collection policies are not definitive. Very few of the written policies turn out to include substantive provisions containing criteria for record initiation or for acquisition of criminal history record information from other jurisdictions.

At present, it appears that most local agencies automatically create a criminal history record, or add criminal history information to an existing record, upon arresting an individual. Many jurisdictions make exceptions for traffic arrests, drunk driving arrests, and certain minor misdemeanor arrests. Naturally, in every jurisdiction the arresting officer has great discretion in the first place as to whether to book or formally arrest the individual.

Although most local agencies will check their own files upon arresting an individual to see if that individual already has a criminal history record, many local agencies apparently do not routinely check with their state's central repository. And few

agencies check with other in-state or out-of-state agencies, even where there is an indication that the individual has had an involvement with that jurisdiction. Thus, local agencies are unlikely to have complete criminal history record information about many of the individuals that they arrest.

There appears to be some diversity regarding fingerprinting practice. Many local agencies fingerprint individuals for all arrests. Other agencies fingerprint only for more serious offenses. Virtually every local agency will accept criminal history record information from other agencies or jurisdictions even though it is not accompanied by a fingerprint record.

Scope of Local Record Systems Presents Controversial and Difficult Questions

A controversial issue of growing importance concerns the scope of local criminal history record systems. There appears to be very little consensus today as to what types of criminal history record information, if any, ought to be maintained at the local level. This lack of consensus is important because, inevitably, over the next few years fundamental choices will be made about the role that local agencies will play in the criminal history record system.

Clearly, local criminal justice agencies will continue to create criminal history record information (through the arrest process) and will continue to be users of criminal history record information. However, it is not at all clear to what extent and in what way local agencies will maintain and manage criminal history record information.

Eliminate Local Criminal Histories

At one extreme, some local officials argue that no cumulative criminal history record information ought to be kept at the local level. Instead, local agencies ought to rely entirely on criminal history information obtained from the state repository, ideally via an automated hook-up. These officials point out that if local agencies can retrieve criminal history information quickly and cost effectively, and if the quality of the information is high, local agencies have no need for their own system--and indeed save money and manpower by eliminating their system.

Advocates of this approach also argue that as automated technology develops and proliferates, local police can look forward to automating their arrest blotter. Presumably an automated blotter system would include a capability to search the blotter by name. Thus, when necessary, local agencies could construct their own criminal history rap sheet from the chronologically indexed, event oriented information which they are already obligated by law and tradition to maintain.

Maintain Comprehensive Criminal Histories

At the other extreme, some local criminal justice officials assert that local agencies should attempt to keep a complete criminal history record about individuals who are arrested in their jurisdiction. The record should include all in-state arrests and dispositions (as obtained from the repository) as well as out-of-state information, where available.

Local officials acknowledge that maintaining this kind of criminal history record requires local agencies to periodically update the rap sheet, or at least check with the repository (as required by the JSIA Regulations) before disseminating information. However, the SEARCH survey found that at present only forty-three percent of the agencies responding check with the state repository before disseminating criminal history data.

Although many local agency officials are attracted by the idea of maintaining their own, relatively comprehensive system, most local agency officials evidently recognize that local maintenance of relatively complete criminal history record data is expensive and in many states redundant and unnecessary. In addition, this approach encourages the maintenance of numerous redundant criminal history data bases and thereby threatens privacy and individual rights interests.

Maintain Criminal Histories of Local Offenses

The approach to local maintenance of criminal history record information which appears to be favored by most local officials is to maintain only criminal history information about local offenses at the local level. Local agencies following this approach would rely upon the state repository to maintain criminal history information about an individual's offenses in other jurisdictions.

This approach has the advantage of permitting localities to keep their own name indexed, cumulative record of an individual's offenses in their jurisdiction, rather than rely exclusively on a state system. Local officials point out that state systems are passive, with little or no capability to check the accuracy or completeness of their information. Apparently, some local criminal justice officials believe that a significant percentage of criminal history record information maintained in state repositories is inaccurate or incomplete. If this is true, state repositories--like their federal and local counterparts--suffer from a chronic and vexing problem for criminal justice information systems; how to obtain dispositions and other updating information in a reliable and timely manner.

Finally, local agencies that rely exclusively on a state system lose all control over the criminal history record information which they created and which pertains to individuals who they may be prosecuting or with whom they may have other direct

contact. Many local officials are unwilling to surrender this much control.

The choice of approach may have a profound effect upon system performance and upon subject privacy and other individual rights. As state repositories develop and as telecommunications technology becomes less expensive and more reliable, the advantages for local agencies of relying more or less exclusively on state repositories may come to outweigh the advantages of maintaining criminal histories. However, at this point in time the relative merits of the competing approaches are by no means so clear. This critical issue deserves further attention.

Lack of Disposition Information is a Critical Problem

The frequent failure of criminal history record information to contain all available dispositions is perhaps the most critical problem confronting local, as well as state and federal officials responsible for managing criminal history record systems. Four respondents to SEARCH's survey said that difficulty in obtaining court dispositions is a particular problem. While no comprehensive statistical information has been compiled about the extent to which local agency criminal history data lacks dispositions, it seems safe to conclude that most local agencies often maintain criminal history information without available dispositions, or wait for substantial periods of time (well beyond the 90 days limit set by the JSIA Regulations) before receiving dispositions.

Some officials attending the SEARCH conference recommended that local agencies establish automated telecommunications with the courts in order to obtain disposition information reliably and quickly. Another official said that before a local agency can expect to obtain disposition information quickly and reliably, the agency must employ someone to pursue the dispositions. Although some local agency representatives reported that their agencies do take the initiative in contacting courts, and otherwise following up for

dispositions, many agencies appear to take a more passive approach.

Local Agencies Lag Behind in Automating Their Systems

Over the last decade issues involving technology and system organization for handling criminal history records have attracted considerable attention.

Effects of Automation

Automated recordkeeping has an undeniable, marked effect on criminal history recordkeeping systems. Automated systems can collect, store, organize and retrieve criminal history information on a far greater scale and with far more speed than is possible in a manual system.

While this development has undoubtedly increased the utility of criminal history records to criminal justice agencies and other users, it has also posed a threat to the interests of record subjects. Automation has made possible, and indeed has encouraged, the centralization and concentration of records. In addition, automation, in the words of one federal privacy study group (the Privacy Protection Study Commission), has also made it easier--and cheaper--to say "yes" to information requests. In this sense automation has helped to increase pressures to disseminate criminal history records.

On the other hand, automated recordkeeping systems can assist local agencies in improving the quality of their data and in protecting the privacy and security of their data. For example, it can be easier and less expensive to update records in automated systems than it is in manual systems. Automated systems can also cost-effectively and readily create audit trails, such as dissemination logs, so that the integrity of the system is better protected. Security can also be strengthened in automated systems, contrary to popular myth, through the use of codes and other kinds of software protections that help to ensure that only authorized users obtain access to the system.

Extent of Local Automation

Despite the advantages of automation, research indicates that most local agencies have not automated their criminal history systems. Thirty-five of the agencies responding to SEARCH's survey reported that their record systems are entirely manual. Another fifty-five agencies indicated that their systems are partly manual and partly automated. Only ten agencies reported that their record systems are completely automated.

Local agencies operating with manual systems have greater difficulty in correcting and updating their data, greater costs in operating their systems, greater difficulty in auditing their systems, and greater security risks in protecting their systems than do agencies with automation.

Even in cases where local agency systems are completely or largely automated, some evidence suggests that local agencies are likely to continue to maintain a "back-up" paper system. Sometimes this "back-up" system continues to be used for day-to-day purposes, while the automated system is used to respond to bulk requests, studies and other kinds of project-oriented requests.

Because state and federal criminal history record systems are so much further along in automating, there is a real risk that local agency systems and records will become inconsistent with state and federal records in language, format, or content. A gap appears to be developing between the technological haves (state and federal criminal justice agencies) and the technological have-nots (local criminal justice agencies). Just as the 1970's brought information technology to federal and state criminal justice agencies, it seems clear that the 1980's need to bring this same technology to local agencies.

Local Agencies Give Security Substantial Attention

Security represents an agency's ability to keep its promises about confidentiality and dissemination and to maintain the integrity of the system by protecting against

tampering or destruction of the system. In other words, the purpose of security policies and procedures is to ensure that information is not used, disseminated or manipulated except where authorized by applicable law or policy.

A number of local criminal justice officials stress that security as a pure or abstract concept cannot be achieved. One criminal justice official expressed his thoughts as follows:

There is no such thing as security.

* * *

I suppose that what I am saying is that strict adherence to security and privacy regulations is a myth so long as human beings are allowed to deal with information systems.

* * *

In other words, most persons will respect security and privacy regulations, but there will always be those who will not and, in the absence of oversight and enforcement, these less-than-ethical persons will continue to operate with impunity. (Written response of William R. Bracke, Assistant Police Chief, Cincinnati, Ohio to SEARCH questionnaire, March 11, 1981.)

The view expressed by this criminal justice official, and shared by many other criminal justice officials, is that any system, no matter how sophisticated or how technically secure, is only as good as the people involved in the system.

An example of this problem was provided at the SEARCH conference. Reportedly the police chief of a small township used a privileged computer terminal some years ago to remove his own personal traffic history from the computerized regional criminal history record system. In this particular case, the police chief was apprehended because the automated system had a request log which automatically kept a

record of his improper action. The chief was subsequently indicted, prosecuted and convicted of tampering with the system. He was ultimately removed as police chief.

Local Security Practices

Despite, or perhaps because of, the inevitable security threat posed by in-house personnel, the SEARCH survey indicates that most local agencies give security substantial attention. Seventy-six of the agencies reporting said that they had developed and implemented written security policies. Another fourteen agencies indicated that they were in the process of developing such policies. Altogether ninety agencies indicated that they either have in place or are developing security policies.

A review of the actual policies submitted with agency survey responses indicates that, in fact, most agencies have adopted written security policies. Many of these policies are brief and non-technical. However, this characteristic may be explained largely by the fact that most local record systems are either entirely or partly manual.

Apparently, the extensive security provisions in the JSIA Regulations have had an influence. A significant number of local agency security policies implement the substance of the JSIA Regulation's security provisions.

One very specific and interesting security problem was given particular attention at the SEARCH conference. According to attendees, many local agencies are concerned about the security of their police radio communications. It is widely known that citizens often monitor these radio communications. In so doing citizens may overhear the communication of at least rudimentary criminal history information. Although technology exists for scrambling or coding this information, most, if not all, local agency representatives believe that it would not be practicable or affordable to use sophisticated scrambling or coding devices.

Local Agency Officials are Concerned About Personnel and Training Deficiencies in the Records Area

Personnel and training problems appear to be quite serious for local managers of criminal history record systems. In fact, personnel training was the most frequently cited problem in the SEARCH survey. Thirty-six agencies reported that training and education of personnel, particularly in privacy and security concepts, has been a problem.

At the SEARCH conference a number of officials expressed their sense that many local criminal justice agencies consider their communications and records department to be the "dumping ground" for unsatisfactory employees. Some criminal justice officials recommended that sworn personnel be taken out of the records room because customarily they accord that function little importance. Instead, they should be replaced by professional, civilian record managers.

One criminal justice official expressed the problem of sensitizing criminal history record clerks to privacy and security concepts as follows.

We do train new employees on the job, [we] have many conference training sessions on privacy and security and attempt to keep the clerks on top of what is going on. This is easier said than done, however, for two reasons. First shift work makes the task cumbersome, and second, and most importantly, the records clerks are not really career oriented and they do not exactly have an insatiable appetite for privacy and security knowledge." (Response of Ledra G. Brady, Supervisor, Central Records Division, Department of Police for Howard County, Maryland, March 25, 1981.)

Local Agencies Provide Subjects With Access and Challenge Opportunities

Today, the right of subjects of criminal history records to inspect their records is nearly universal. The JSIA Regulations require all criminal justice agencies covered by the Regulations to permit subjects to inspect their criminal history records. Moreover, about forty percent of the states have adopted legislation which also gives criminal history record subjects the right to inspect their records.

The inspection right is generally coupled with the right to challenge the accuracy and completeness of the records. Indeed, one of the basic purposes of the inspection right is to permit criminal record subjects to correct or update their records. The federal access scheme, and many of the state schemes, only give record subjects a right to inspect their records not a right to obtain an actual copy. However, the federal regulations and most state laws make an exception if the subject wishes to challenge the accuracy or completeness of a particular part of the record and therefore needs to physically possess a copy of the allegedly inaccurate or incomplete entry.

Local Policies on Subject Access

Eighty-three of the agencies responding to the SEARCH survey indicated that they have adopted written policies for subject access. Another eight of the agencies indicated that such policies are in the process of being developed. Only nine local agencies indicated that they do not have, or are not planning to have, written policies guaranteeing a subject a right of access to his records. Even in the case of these nine agencies, record subjects are likely to have a right of access based on federal or state law. These agencies simply lack their own written guarantee of such a right.

Local Policies for Investigating Challenges

Apparently, only one controversy mars local administration of subject access and

challenge rights. Agencies appear to be undecided about the extent to which they should investigate or take other affirmative action to ensure that appropriate corrections or amendments are in fact made. Some local agencies profess a keen interest in correcting inaccuracies and in updating records, and therefore express a willingness to spend time and money in investigating credible claims by records subjects that their information is inaccurate or incomplete. In particular, agencies are likely to be willing to investigate the accuracy of arrest information which they have authored.

By contrast, many local agencies appear to be reluctant to investigate the accuracy or completeness of dispositions. In part this reluctance stems from the fact that disposition information originates in the courts, often at another level of government. In addition, it can be expensive and time consuming for local agencies to investigate and correct incomplete or inaccurate disposition information.

Local Agencies Tend to Disseminate Information More Readily and Fully than State and Federal Agencies

From a privacy standpoint dissemination is always the key question. It need hardly be said that if a criminal history record is not disseminated it poses little privacy threat to the record subject. On the other hand, if the record is to be used effectively it must be disseminated within the criminal justice community and, under some circumstances, outside that community. Perhaps not surprisingly, a great deal of thought and debate has centered on this tension in dissemination policy.

Dissemination Patterns

As noted earlier, law and policy regarding dissemination of criminal history records often varies according to jurisdiction. Nevertheless, a few general patterns are recognizable. First, criminal history record information is ordinarily shared relatively freely among criminal justice agencies.

Second, conviction information is usually shared relatively freely among all types of requestors, including members of the public. The JSIA Regulations, for example, set minimum restrictions on dissemination of non-conviction information, but do not place restrictions upon the dissemination of conviction information.

Third, also as noted earlier, in the last part of the 1970's, the courts became noticeably less willing than they previously had been to restrict agency dissemination on the basis of constitutional concerns. This development gives legislators and criminal justice officials and other policy-makers more discretion than they previously enjoyed to set criminal history record dissemination policy.

Local Dissemination May Be Excessive

Some privacy proponents contend that local criminal justice agencies have abused this discretion by releasing criminal history record information, including non-conviction information, to employers, the media, and other private groups. Critics contend that many local agencies are able to widely disseminate criminal history record information because they are not covered by federal or state confidentiality safeguards. Critics also contend that more than a few agencies which are in fact covered by federal or state confidentiality provisions, simply ignore those provisions.

A study of the use of criminal history record information prepared for the Congress' Office of Technology Assessment speculates that many local agencies do provide members of the business community with substantial amounts of criminal history record information.

Local police departments are most easy to make inquiries to, since they are readily accessible in several senses of the word. Moreover, they can serve, under some circumstances, as conduits to other data banks with a broader scope.

* * *

Where inquiries are made at the local level, a variety of information may be provided in response. It may include everything from police intelligence information (which may not necessarily involve actual arrest and prosecution for the violation of a law), to arrest information unaccompanied by disposition information, to information regarding convictions for serious, germane crimes. Some of the potential for such variations can be traced to the informality with which such inquiries can be made: since no written communication need change hands, nor record kept, and since interpersonal relationships may be the basis for such requests, control of the transmission of this information is difficult.*

Local criminal justice officials, while not acknowledging overt wrongdoing on the part of their colleagues, do point out that an "information buddy system" exists at the local level. They emphasize that casual or academic observers often overlook the fact that at the local level--and this is largely not the case at the state and federal level--the flow of information is a "two-way street." Local law enforcement officials need to have a steady flow of information from local employers, landlords, creditors, the media and other community members in order to perform their law enforcement mission effectively. In exchange, it is not surprising that local officials are receptive to requests from these same parties for criminal history information about potential employees, tenants, borrowers or figures of local public interest.

*An Assessment of the Social Impacts of the National Crime Information Center and Computerized Criminal History Program, Bureau of Governmental Research and Service, University of South Carolina at p. 237 (1979).

Local Dissemination Policies

Notwithstanding a sensitivity to the informational needs of the private sector, most local agencies have adopted written policies for dissemination which largely parallel the JSIA regulations. Eighty-four of the agencies responding to the SEARCH survey, for example, indicated that they have implemented written dissemination policies. Another nine agencies stated that they are in the process of developing such policies. Moreover, looking behind the survey answers, it appears that reasonably comprehensive dissemination standards are in fact contained in most of the written policies that were submitted along with the survey responses.

In reviewing these policies it is apparent that most are comprehensive enough to provide significant guidance to record clerks and personnel handling criminal history records. Indeed, most of the local regulations either incorporate the JSIA Regulations verbatim, or follow the format of the JSIA Regulations but expressly provide that dissemination of non-conviction data to non-criminal justice recipients can be done in accordance with proper authority. Interestingly, some of the local agencies responding to the survey go further than the JSIA Regulations require and provide that non-criminal justice requestors may be provided only with conviction data, and with non-conviction data if it concerns current offenses.

Local officials also indicate that they seldom distinguish between in-state and out-of-state requestors. It was originally thought that our study might find that local agencies often make a sharp distinction between in-state and out-of-state requestors--even among criminal justice agencies. However, this distinction does not appear to exist in practice.

Sealing and Purging Policies

One other set of standards has a critical impact on local dissemination practice. Sealing and purging standards either prohibit dissemination of records except in

certain extreme and enumerated circumstances (sealing standards) or destroy the data altogether and thus make future dissemination impossible (purging standards). Sixty-five agencies responding to the survey indicated that they have adopted their own sealing and purging policies; another thirteen local agencies plan to develop such policies.

However, a review of the actual written policies suggests that agency characterization of their development of sealing and purging standards is somewhat exaggerated. In reality, it appears that most local agency sealing and purging policies merely incorporate their states' statutory sealing and purging provision (thirty-four states now have such provisions). Beyond this, however, most local agencies appear not to have adopted their own sealing or purging policies. The one exception to this statement involves a few agencies that purge or seal records of persons who have reached an advanced age.

Summation of Dissemination Policy

By way of summation, it appears that most local agencies have adopted written dissemination policies and that most of these policies are modeled after the JSIA Regulations' dissemination formula. In keeping with that formula, many local agencies have taken advantage of the JSIA's dissemination flexibility in order to authorize dissemination to non-criminal justice agencies in enumerated circumstances. At the same time, a large minority of local agencies have adopted relatively tough standards which forbid the dissemination of non-conviction information to non-criminal justice agencies except for very current non-conviction information.

Agency Liability for Recordkeeping Miscues is a Theoretical Possibility, but is Seen as Little Practical Threat

Local criminal justice agencies and their employees may have liability when their handling of criminal history records

violates a statute or regulatory provision, or when they breach a constitutional or common law duty owed to a record subject.

Legal Basis for Liability

This potential for liability is best thought of as involving three types of legal standards. First, statutory and regulatory recordkeeping and privacy schemes often include explicit provisions that penalize agencies and their officials for recordkeeping violations. For example, the JSIA Regulations provide that any agency or individual violating any part of the Regulations, "shall be subject to a fine not to exceed \$10,000.00."* Most state laws also include penalty provisions for criminal history recordkeeping violations.

Second, local agencies and their employees can be liable for violations of a record subject's constitutional rights. In the wake of recent court decisions, as noted earlier, a subject has only the most limited and uncertain constitutional right of confidentiality in his criminal history records. However, a subject may have a constitutional right of access to his records, and may have a constitutional right to insist that his criminal history records are maintained in a system that takes reasonable steps to ensure their accuracy and completeness. When agencies violate these constitutional rights they may be subject to injunctions and monetary penalties. Indeed, according to one recent court case, a local criminal justice agency may even be liable to another criminal justice agency for providing incorrect criminal history information to that agency.**

Third, agencies and their employees may be liable to criminal history subjects for a breach of a common law duty. Common law duties are not expressed in statutory or constitutional provisions, but instead rest on court authored principles of fairness and responsibility. In the record-

keeping area, as noted earlier, criminal justice agencies and their employees can be liable to record subjects for violations of common law rights of privacy or for defamation. However, only a small number of lawsuits have found criminal justice agencies liable for breach of these common law duties.

Agency Litigation Experience

Five agencies responding to the SEARCH survey indicated that they had been sued over their record handling practices. No specifics were provided in four instances, other than an indication that the suits were resolved favorably for the agencies involved. The fifth case involved an unsuccessful attempt by a record subject to expunge his record after he was found not guilty.

Most local officials appear to believe--probably correctly--that there is relatively little risk of legal liability connected with the handling of criminal history record information.

Local Agency Role in Setting Policy for Running Local Criminal History Record Systems is Not Defined or Secure

At present four types of entities play a role in setting policy for local handling of criminal history records. First, the federal government, through the JSIA Regulations, has a substantial and direct impact on local agency policy. Interestingly, our study suggests that the JSIA Regulations have had an even greater indirect impact by influencing the content of state and local record management schemes.

Second, state legislatures play a key role in setting policy for local management of criminal history record systems. Approximately twenty states have adopted statutes which prescribe standards for local agency handling of criminal history records. In many other states the central repository imposes requirements on local agencies as a condition for obtaining information from the repository.

*28 C.F.R., Section 20.25

**Testa v. Winquist, 451 F.Supp. 388 (D.R.I. 1978).

Third, of course, local jurisdictions and, very importantly, local agencies, have some de jure responsibility for setting policies and even greater de facto responsibility.

Finally, the courts play an important but declining role in setting the parameters of permissible record management practice by articulating constitutional and common law standards and by interpreting and applying existing legislative standards.

It may well be that this kind of polygot sharing of control is not only representative of a unique "American" approach to policy setting, but provides a useful and constructive approach to regulating local criminal history record systems. However, it may also be that such sharing of control results in inappropriate and unwanted policies; or results in unnecessary and destructive tensions between policy and practice; or results in a muddled and fuzzy set of policies and practices.

During the mid-1970's the federal government threatened to preempt the field by enacting comprehensive criminal history record legislation. The courts also enjoyed a period during the mid-1970's of especially

strong influence on the criminal history recordkeeping process. As noted throughout this report, the courts have recently retreated from that position. More recently the states have been in the ascendancy based both on state legislation and on the growing importance of central state repositories.

Obviously, decisions about who is to set standards for operating criminal history record systems profoundly affects what those standards will look like. For example, to the extent that local jurisdictions and their agencies have a greater role in setting policy, the dissemination of criminal history record information to non-criminal justice agencies will be likely to increase.

From both theoretical and practical standpoints, credible arguments can be made in support of selecting the federal government, state governments or local jurisdictions and agencies for the predominant role in setting local criminal history information policy. More study is needed about the implications of making this decision.

CONCLUSION

This report represents a first effort to review the applicable law and, as well, review local agency policy and practice for handling criminal history record information. The report also discusses the implications of the relevant law and the policy and practice for criminal justice operations and for individual rights and interests.

One of the key issues to be resolved in the years ahead is to select the jurisdictional level at which policy will be made to govern local agency handling of state and local criminal history data. As noted earlier, federal influence is significant, and apparently it is growing. However, at present only sixteen states comprehensively regulate local agency practice. Thus, local agencies in most states still enjoy broad discretion to set their own policies for handling criminal history record data-- particularly locally generated data. Indeed, the extent of this discretion may have increased in recent years because the courts have retreated from regulation of criminal history record practices.

At the time of this writing there is not only uncertainty as to who should make the rules for local agencies, but uncertainty as to what those rules should be. For example, it is apparent that local agency representatives differ about whether local agencies should maintain complete criminal history files on all offenders with whom they have had contact, or maintain only local criminal history data about such offenders, or maintain no criminal history data at all and instead rely on the state repositories.

There is also uncertainty about local agency dissemination policy and practice.

Local agencies are sometimes charged with improper, or at least inappropriate, disclosure of criminal history data to non-criminal justice agencies. However, in their defense, local agencies are often subject to intense pressures from local employers, landlords, the media and others for access to criminal history data. Those pressures, together with what appears to be a more general trend toward loosening confidentiality restrictions, leave many local officials uncertain as to the development of rules for non-criminal justice dissemination of criminal history data. In addition, local agencies continue to search for satisfactory policies and procedures for automation, security and personnel training.

Finally, there is difficulty in assuring the quality of local data bases. In part this difficulty is related to the development of policies and practices regarding automation, security and personnel training, and in part this difficulty is related to the persistent problem of timely and reliable disposition reporting. This problem is further exacerbated by local agencies' need to check with the central state repository prior to using or disseminating information, if the agencies hope to be aware of in-state dispositions and other in-state events.

Manifestly, criminal justice policy-makers need to give more attention to identifying local agency policy and practice, to identifying local agency needs, and to identifying and resolving the key policy issues set out in Part II and briefly identified above.

Appendix 1

SURVEY RESPONDENTS

Arizona

Maricopa County Sheriff's Office
Phoenix Police Department
Tucson Police Department

California

Butte County Sheriff's Department
Fremont Police Department
Fresno Police Department
Garden Grove Police Department
Humboldt County Sheriff's Department
Huntington Beach Police Department
Long Beach Police Department
Los Angeles Police Department
Marin County Sheriff's Department
Oakland Police Department
Pasadena Police Department
Riverside Department of Police
San Bernardino County Sheriff's
Department
San Diego County Sheriff's Department
San Diego Police Department
San Jose Police Department
Stockton Police Department
Torrance Police Department
Tulare County Sheriff's Department

Colorado

Aurora Police Department
Colorado Springs Police Department
El Paso County Sheriff's Department
Lakewood Department of Public Safety
Larimer County Sheriff's Department
Pueblo Police Department

Connecticut

Hartford Police Department

District of Columbia

Government of the District of Columbia
Metropolitan Police Department

Florida

Bradenton Police Department
Brevard County Sheriff's Department
Fort Lauderdale Police Department
Hialeah Police Department
Pinellas County Sheriff's Department
Metropolitan Dade County Police Safety
Department
Sarasota County Sheriff's Department

Illinois

Winnebago County Sheriff's Department

Iowa

Black Hawk County Sheriff's Department

Kansas

Sedgwick County Sheriff's Department
Shawnee County Sheriff's Department

Louisiana

Jefferson Parish Sheriff and Tax
Collector
Ouachita Parish Sheriff's Department

Maryland

Howard County Police
Montgomery County Department of Police
Prince George's County Sheriff's
Department

Massachusetts

New Bedford Office of the Sheriff
Springfield Police Department
Worcester Department of Police

Michigan

Ann Arbor Police Department
Detroit Police Department

Ingham County Sheriff's Office
Livonia Division of Police

Missouri

Berrien County Sheriff's Department
Independence, Missouri Police Department
Kansas City, Missouri Police Department
Metropolitan Police Department of
St. Louis
Springfield Police Department

Nebraska

Douglas County Sheriff
Lancaster County Sheriff's Department
Omaha Police Division

New Jersey

Patterson Police Department

New Mexico

Albuquerque Police Department

New York

Chemung County Sheriff's Department
Monroe County Sheriff's Department
Onondaga County Sheriff's Department
Syracuse Department of Police

North Carolina

Charlotte Police Department
Greenboro Police Department
Mecklenburg County Sheriff's Department

Ohio

Ashtabula County Sheriff
Cincinnati Police Division
Cleveland Department of Police
Columbus, Ohio Division of Police
Hamilton County Sheriff's Department

Oklahoma

Tulsa Department of Police

Oregon

Jackson County Sheriff's Office
Multnomah County Division of Public
Safety

Pennsylvania

Mercer County Sheriff

Rhode Island

Providence Chief of Police

South Carolina

Lexington County Sheriff's Department

Tennessee

Metropolitan Government of Nashville and
Davidson County

Texas

Arlington Police Department
Bell County Sheriff's Department
El Paso Police Department
Garland Police Department

Utah

Salt Lake County Sheriff's Department
Weber County Sheriff's Department

Virginia

Alexandria Police Department
Arlington County Police Department
Chesapeake Police Division
Norfolk Police Department
Portsmouth Police Department
Richmond Department of Public Safety
Roanoke Police Department

Washington

King County Police
Kitsap County Sheriff
Spokane Chief of Police
Tacoma Police Department

Wisconsin

Waukesha Sheriff's Department

Appendix 2

ROSTER OF PARTICIPANTS
LOCAL POLICE INFORMATION POLICY WORKSHOP

William Bracke
Assistant Chief of Police
Cincinnati Police Division

Ledra C. Brady
Supervisor
Central Records Division
Department of Police for Howard County

Walter V. Hawkins
Executive Major
Ann Arbor Police Department
Michigan

Carol G. Kaplan
Director
Federal Statistics and
Information Policy Division
Bureau of Justice Statistics
U.S. Department of Justice
Washington, D.C.

William F. Roche, Jr.
Director of Administration
New Haven Department of Police Services

William L. Parker, Jr.
Legal Advisor
Metropolitan Police Department
Nashville, Tennessee

Herbert E. Plump
Captain, Division of State Police
Department of Law and Public Safety
West Trenton, New Jersey

John V. Streeter
Director of Planning
Alexandria Police Department
Virginia

Appendix 3

SCOPE OF THE JSIA REGULATIONS

The JSIA Regulations contain the following requirements for the quality of criminal history record information [28 C.F.R., Section 20.21(a)].

1. Agencies must ensure that criminal history record information is complete and accurate.
2. Complete records should be maintained at a central repository (to be complete a record has all dispositions occurring within the state within 90 days after the disposition occurred).
3. Agencies must establish procedures whereby they query the central repository prior to disseminating information unless: (a) time is of the essence; and (b) the repository is incapable of responding within that time period.
4. An "accurate record" is defined as a record that does not contain erroneous information.
5. Criminal justice agencies must institute a process of data collection, entry, storage and systematic audit that will minimize the possibility of recording and storing inaccurate information.
6. If inaccurate information is found, an agency must notify all criminal justice agencies known to have received such information.

JSIA Dissemination Standards

The JSIA Regulations set minimum uniform standards for disseminating criminal history record information [28 C.F.R., Section 20.21(b)(c)].

1. No limits are put on the dissemination of conviction data.
2. Agencies must limit the dissemination of non-conviction data (arrest data without a disposition if the arrest data is more than one year old, plus nolle prosses, dismissals and acquittals), except to: (a) criminal justice agencies for criminal justice purposes; (b) to any person as authorized by statute, ordinance, Executive Order, court rules, decisions or orders as interpreted by state or local officials; (c) individuals in agencies pursuant to a specific agreement to provide criminal justice administrative services; and (d) individuals in agencies for research, evaluative and statistical purposes.
3. Non-criminal justice agencies that receive criminal history record information can only use this information for the purpose for which it was given.
4. Agencies cannot confirm the existence or non-existence of criminal history record information except to a requestor who is entitled to actually receive the data.

JSIA Subject Access Standards

The JSIA Regulations contain the following provisions for subject access and review [28 C.F.R., Section 20.21(g)].

1. Agencies must permit a criminal history record subject to have access to and review his criminal history record information.
2. Access must be permitted at any time provided there is no undue burden to the agency.
3. The criminal history record subject must be given a copy of his record if necessary for the exercise of his right to challenge and correct the information.
4. The individual must have an administrative appeal right if the agency refuses to correct a record which the individual believes is inaccurate.
5. Upon request, an individual whose record has been corrected must be given the names of all non-criminal justice agencies to which the non-corrected data has been given.
6. The agency must notify all criminal justice agencies to which the non-corrected data has been given.

JSIA Audit Standard

The JSIA Regulations contain the following audit provision: the state is required to audit a representative sample of state and local agencies annually to ensure compliance with the Regulations. To facil-

itate audits, all covered agencies must keep a log showing the names of all persons to whom criminal history record information has been disseminated and the date of such dissemination [28 C.F.R., Section 20.21(b)].

JSIA Security Standard

The JSIA Regulations contain what is easily the most detailed legal mandate for maintaining data in a secure environment [28 C.F.R., Section 20.21(f)]. Among the security provisions contained in the JSIA Regulations are the following.

1. Agencies must use effective and "technologically advanced" software and hardware for computerized systems to prevent unauthorized access.
2. Computer programs must be used that will record any penetration attempts.
3. Adequate physical security measures must be instituted.
4. The criminal justice agency responsible for a particular record system must have the right to screen personnel who will have direct access to the system and must have the right to transfer or remove such personnel if they violate security procedures.
5. Agencies must ensure that all personnel involved with criminal history record information are familiar with the JSIA Regulations.