

April 19, 2012

To: DCJIS, Office of the General Counsel

Please accept the following comments pertaining to the draft new 803 CMR 2.00-9.00 et seq. – MA Department of Criminal Justice Information Services Regulations. Your consideration of these comments and suggestions is much appreciated. Furthermore, I am aware of the many hours that various community organizations have spent reviewing these proposed regulations and your serious consideration of their recommendations would also be much appreciated.

If you have any questions or would like to further discuss these remarks please contact Rosie Hunter in my office at 617-722-2060 or [rosie.hunter@mahouse.gov](mailto:rosie.hunter@mahouse.gov).

Thank you very much,

Sincerely,

Liz Malia  
State Representative, 11<sup>th</sup> Suffolk District

1. **CRA**s: I am greatly concerned about the role of consumer reporting agencies (CRAs), i.e., private background check companies. Many employers and housing agencies are hiring CRAs to conduct criminal background checks on applicants and provisionally-hired employees. Yet there is very little oversight of CRAs, and very little enforcement of those standards that they are supposed to maintain. A recent report, "Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses," by the National Consumer Law Center showed that these background reports are replete with errors, inaccuracies, misleading information, false identifications, and the dissemination of sealed or expunged information.<sup>i</sup>

As the report notes, "Criminal background checking is big business, and ensuring accurate and complete information has costs. ...Lack of accountability and incentives to cut corners to save money mean that consumers pay for inaccurate information with their jobs, and, thus, their families' livelihood."<sup>ii</sup> If we are going to allow CRAs to submit, and employers to use, their reports to make decisions affecting our Commonwealth's residents' livelihood and futures there must be more adequate regulation of these companies.

In particular, I agree with the Commonwealth CORI Coalition that, in terms of providing incentives for CRAs to act in a responsible fashion, and to limit the information they disseminate to that which the state disseminates (as provided by law), the state should take advantage of the authority provided to it by the new CORI law (Chapter 256 of the Acts of 2010<sup>iii</sup>) and either (a) base CRA access to the iCORI system on an agreement to disseminate to a client only that information to which the

client is entitled pursuant to Chapter 256, or (b) establish a pricing system on iCORI that offers a better rate to CRAs that make such an agreement.

2. **Relevance:** Please restore to the regulations the language providing that, if an agency, employer, etc. is preparing to make an “adverse decision” based upon the applicant’s criminal record, the applicant must be given the opportunity to discuss and dispute the relevance of the record. (See existing regulations, 6.11(2).)
3. **2.02 & 11.02:** In the definition of employment applicant, clarification that it also refers to volunteers should be added in.
4. **2.04 vs. 5.03(1) & (2):** In 5.03(1) the regulations note that “iCORI access requires iCORI registration,” and in 5.03(2) that “iCORI account registration requires access to a computer and the internet.” But the same point does not seem to be anywhere in 803 CMR 2.00 etc. If this information needs to be in the regulations, and if you do not want to have it in both 803 CMR 2.00 and 803 CMR 5.00, it would be best to instead put it in the regulation that is chronologically first. I.e., put these two statements in 2.04 and remove them from 5.03.
5. **2.06:** This part of the regulations states that an individual may request a copy of his/her own CORI, and how to do so. However it does not make the same important point as was made in the existing regulations that an individual has the right to see his/her own CORI. See below.
  - Existing regulations:
    - “ 6.02: Release of CORI to Individuals
    - (1) Each individual shall have the right to inspect and if practicable copy CORI relating to him or her in accordance with M.G.L. c. 6, § 175 and 803 CMR 6.00.”
  - Please also note the following from Chapter 256 of the Acts of 2010: “SECTION 35. Said Chapter 6, as so appearing, is hereby further amended by striking out section 175 and inserting in place thereof the following section:-  
Section 175. A subject *shall have the right to inspect*, and if practicable, obtain a copy of all criminal record information from the department that refers to the subject.” (emphasis added)

Therefore, please change 2.06(1) to read, “An individual has the right to inspect the individual’s own CORI and may request a copy of it by registering for an iCORI account.”
6. **2.09(9)(a):** The wording “provides written notice to the *subject* at least 24 hours before submitting the request” is problematic. Apart from the issue of whether 24 hours is long enough, there is ambiguity as to the meaning of “provides written notice.” A standard way of reading “provides written notice” could easily be that the period of 24 hours before submitting the request would start at the time the requestor put the written notice in the mail. Hence, the subject might not have even received the notice when the requestor submits the new request for CORI.
  - I suggest instead that this requirement be written such that the time period, be it 24 hours or other, before the requestor can submit the new request for CORI starts at the time the subject has received the notice.

- Please note that this problem also applies to **11.05(10)(a)**.
7. **2.11(2)**: In addition to electronically-stored CORI being password protected, I suggest that the regulations also specify that the whole device (i.e., computer) on which it is stored shall also be password protected.
  8. **2.13**: This currently only covers “required dissemination” of CORI. It should be rewritten to also cover “required dissemination” of “criminal history information received from a source other than department of criminal justice information services.” (See 5.11 for an example.) Alternately, if you leave 2.13 just covering “required dissemination” of CORI, then another section should be added to cover “Required dissemination of criminal history information received from a source other than department of criminal justice information services.” (See 2.17 & 2.18.)
    - If you adjust 2.13 so that it covers both CORI and criminal history information received from another source, then, in addition to other language changes, 2.13(1)(b) should be amended to read: “before making an adverse employment or licensing decision based on the subject’s CORI or other criminal history.” (See 5.11(1)(b).)
  9. **2.14**: 2.14 has the same problem as 2.13, in that it only covers “permissive dissemination” of CORI. It should be rewritten to also cover “permissive dissemination” of “criminal history information received from a source other than department of criminal justice information services.” Or alternately, there could be a separate section for “permissive dissemination of criminal history information received from a source other than department of criminal justice information services.”
  10. **2.15**: 2.15 says that employers or governmental licensing agencies that submit 5 or more CORI requests annually shall maintain a CORI policy. But the law is clear that they are supposed to have these policies regardless of whether their 5 background checks are CORI checks or checks on other criminal history information. See Section 19 of Chapter 256 of the Acts of 2010: “...A person who annually conducts 5 or more criminal background investigations, *whether criminal offender record information is obtained from the department or any other source*, shall maintain a written criminal offender record information policy... .”(emphasis added)
    - Either 2.15 should be adjusted so that it covers the need for criminal record policies regardless of the source of the background check information. Or if 2.15 remains as written, then there should be added another section regarding the need for a policy if the employer or agency gets its criminal history information from another source.
  11. **5.02 (and 11.02)**: In the definition of consumer reporting agency (CRA) I am concerned about it saying that, among other things, a consumer reporting agency “uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.” Potentially there are companies that do criminal background checks, etc. that manage to do so without using interstate commerce means or facilities. Under this definition they would get out of being counted as CRAs.

- I suggest simply removing the words “and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”
12. **5.06:** Please add back into this section the points that are in the existing regulations regarding requests for CORI not being made before the final application screening process, and that the standards adopted should not have the effect of discriminating.
- See existing regulations 5.05:  
“5.05: Lawful Use of CORI: ... (3) standards shall be established for determining when a request for an applicant's CORI will be made, provided that:  
(a) requests for CORI shall not be made prior to the final application screening process including compliance with all provisions relating to applicant screening in regulations of the Massachusetts Department of Housing and Community Development; and  
(b) the standards adopted must not have the purpose or effect of discrimination on the basis of race, religion, color, national or ethnic origin, ancestry, age, sex, handicap, sexual orientation, martial (sic) status, military status or receipt of public assistance.”
13. **5.09(2):** As with 2.11, the regulations should be amended to add that, in addition to the electronically-stored CORI being password protected, the whole device on which it is stored should be password protected.
14. **5.09 & 5.10:** These sections cover how long the CORIs of people that ended up being given housing can be kept (see 5.09(4)). But the regulations should also cover the rules regarding for how long the CORIs of people that applied for housing but were rejected can be kept. This should be inserted in either 5.09 or 5.10.
- Please add back in, to 5.09 or 5.10, something similar to what is in 5.05(6) of the existing regulations:  
“ 5.05: Lawful Use of CORI ... (6) CORI shall be destroyed when the applicant to whom it pertains has been housed or has received a subsidy. *If an applicant has been determined ineligible for housing or subsidy, the applicant's CORI shall be destroyed three years from the date of the application's rejection, or after all administrative and judicial proceedings concerning the rejection are exhausted, whichever is later...*”(emphasis added)
15. **5.15(2):** In addition to what is in 5.15(2)(a-e), it should be added in that public housing authorities/property management companies that administer a subsidized housing program that take an adverse housing action based on CORI need to “identify the information in the housing applicant’s CORI that forms the basis for the potential adverse action” and “provide the housing applicant with the opportunity to dispute the accuracy of the information contained in the CORI.”
- These same points may already be stated in DHCD regulations. But they should be reiterated in these regulations. This will leave less room for error, misinterpretation, etc., and it is appropriate to also have them in these regulations since they are points related to criminal records and CORI.
16. **5.17(2):** 5.17(2) is missing, and should have added into it, the equivalent of what is in 2.22(2)(b) re CRAs. i.e., “If CORI access is revoked for failure to cooperate with, or respond to, a DCJIS audit, the... shall not obtain CORI through a CRA.”

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<sup>i</sup> "Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses," Yu, Persis S. and Sharon M. Dietrich, National Consumer Law Center, April 2012, online at <http://www.nclc.org/issues/broken-records.html>.

<sup>ii</sup> *Ibid*, p. 37.

<sup>iii</sup> See M.G.L. c.6, §172(c), or Chapter 256 of the Acts of 2010: "The department may establish rules or regulations imposing other requirements or affirmative obligations upon requestors as a condition of obtaining access to the database... "