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April 19, 2012

Georgia Critsley, General Counsel
Department of Criminal Justice Information Services
200 Arlington St., Suite 2200
Chelsea, MA 02150

Re: Comments on Proposed DCJIS Regulations

Dear General Counsel Critsley:

I am submitting comments that are included below on behalf of the Union of Minority Neighborhoods. The Union of Minority Neighborhoods is a grass roots community organization founded in 2002 that focuses on community empowerment and equal opportunity in Boston's communities of color. The mission of the Union of Minority Neighborhoods is to strengthen democracy through civic engagement and to address issues that directly affect communities of color, including but not limited to race discrimination, economic development in minority neighborhoods, and the reform and impact of criminal offender record information (CORI) laws.

General Comments

The proposed regulations should be rewritten in a way that employees, employers, landlords, and tenants can more easily understand their rights and obligations even if they do not have an attorney.

Present Employees and Tenants

The proposed regulations should be revised to instruct employers that present employees are entitled to the same CORI or criminal background reporting protections that apply to prospective employees.[1] The proposed regulations are silent on this issue, but the statute governing release and use of criminal record offender information (CORI) provides that a "requestor" is permitted to obtain CORI "to evaluate current and prospective employees" and "to evaluate applicants for rental or lease of housing." G.L. c. 6, § 172(a) (3). CORI is an issue not only for prospective hires or tenants but may

[1] At the recent public hearing on the proposed regulations, a management side attorney from Seyfarth Shaw also requested clarification on this issue.

be the very reason why an employee gets fired or a landlord tries to terminate a tenancy. Present employees may apply for other positions, transfers, promotions, contract extensions, or may wish to remain in their current at-will positions. Present tenants may apply for transfers and their leases and at-will tenancies are subject to renewal and modification. The plain language of the statute indicates that the legislature intended that the new protections pertaining to workers or tenants are triggered whenever the requester uses CORI or other criminal history reports to make "any decision" pertaining to employment or housing.

> In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any source . . . .
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> G.L. c. 6, § 171A, as added by St. 2010, c. 256, § 19.

Moreover, Section 172 repeats that "[i]n connection with any decision regarding employment, . . . housing or professional licensing," a person shall (1) provide a copy of the report before questioning the applicant about the report; and (2) provide a copy if an adverse decision is made based on the report. G.L. c. 6, §172 (c) as amended by St. 2010, c. 256, § 21. Thus, the scope of the Section 171A and 172(c) employment and housing protections is very broad and goes beyond initial hiring or housing screening.

If individuals immediately lost their CORI related rights as soon as they were hired or moved into an apartment, this would defeat the very purpose of enacting CORI legislation in the first place and the more recent broadening of CORI related protections. The CORI statute was enacted to "promote rehabilitation" and "access to employment, housing, and social contacts necessary to that rehabilitation." Globe Newspaper Co. v. District Attorney for Middle Dist., 439 Mass. 374, 384 (2003). The major impetus for recent CORI reform legislation was the detrimental effect that even minor criminal records were having on opportunities for employment. See e.g., Gregory I. Massing, Cori Reform-Providing Ex-Offenders with Increased Opportunities Without Compromising Employers' Needs, 55 Boston B.J. 21 (2011). The Governor's Executive

Order on CORI declares that the Commonwealth has "compelling interests" in "empowering individuals to obtain gainful employment and housing." Regarding the Use and Dissemination of Criminal Offender Record Information by the Executive Department, MA Executive Order No. 495 (January 11, 2008). In sum, excluding present employees or tenants from these important CORI protections is inconsistent with the public policies behind the CORI statutes and the plain language of the statute.[2]

Blanket policies and relevance of CORI.

"Open Access to CORI" will likely give access to CORI to many small landlords and employers who had no prior access to CORI. As a starting point, the proposed regulations should include language that warns employers that any blanket policy against hiring of individuals with criminal records is illegal absent a special business justification or statutory exception. The U.S. Equal Employment Opportunity Commission (EEOC) takes the position that blanket hiring policies that automatically reject any job applicant with a criminal record violate civil rights laws. Hiring policies that exclude all workers with criminal records are discriminatory and violate Title VII of the Civil Rights Act of 1964 absent a business necessity. This is because using criminal records as a bar to employment, whether or not the records are relevant, has a disparate impact on protected minority groups. See EEOC Policy Guidance 915.061. For more information, visit the EEOC web site at http://www.eeoc.gov/policy/docs/arrest_records.html

At the recent public hearing on the proposed regulations, many people with criminal record histories provided compelling testimony about the pervasiveness of discrimination based on a criminal record. Counsel for the Department of Early Education & Care, which has the highest level of access to CORI, testified that her agency reviews CORI at the last stage of the hiring process after applicants are deemed qualified and gives them a chance to address concerns about CORI. She indicated that this makes the hiring process "fair" and is not burdensome. The proposed regulations, however, eliminate provisions in the existing regulations (803 CMR 6.11(2)) that permit job applicants to dispute the relevance of CORI when they are rejected for a job based on CORI.

The deletion of the relevancy provision is at odds with the legislature's effort to address the problem of employers not hiring job applicants because they have CORI. There is nothing in the CORI reform legislation that suggests, let alone requires DCJIS to

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[2] For more extensive comments on housing issues, we direct you to the comments of Massachusetts Law Reform Institute and other housing advocates.

abandon the present provisions that ensure minimal fairness in the hiring process.[3] The failure of DCJIS to retain the relevancy provision will make it easier for employers to implement blanket policies against hiring of individuals with records without discussion, let alone accountability.

Deleting the relevancy provision also will strike a blow to the thousands of individuals and many grassroots organizations who worked tirelessly on the passage of CORI reform. Eliminating the relevancy provisions eviscerates the protections and benefits provided by "ban the box" and the requirement to supply the CORI. This, in turn, will erode public confidence in the fairness and efficacy of the new law and/or the policies of DCJIS.

Ban the Box and other Anti-Discrimination Provisions

The Legislature has gone to great lengths to prohibit discrimination based on criminal records by enacting "ban the box" (G.L. c. 151B, § 4 (9½)) and other CORI related anti-discrimination protections (G.L. c. 151B, § 4 (9)) that apply to job applicants with criminal record histories. The regulations should address these protections in detail and include information about what employers may NOT ask during the hiring process. The regulations also should do so in a way that is easy to understand. It takes a very good eye and an employment lawyer specialist to begin to discern the meaning of the proposed regulations. For example, some sections of the regulations refer to an "Employment Applicant" which is defined in Section 2.02 as an applicant "who meets the requirements for the position for which the individual is being screened," while other sections refer to a CORI "subject" although the rights of the same prospective employee may overlap. Section 2.08 states that screeners are prohibited from asking an "employment applicant" or housing applicant to provide a copy of his or her own CORI. However, the prohibition extends to all individuals even if they are not qualified for a job or are already admitted into housing as tenants. See G.L. c. 6, § 172 (d), as amended by St. 2010, c. 256, § 21 ("Except as authorized, it shall be unlawful to request or require a person to provide a copy of his criminal offender record information.") Section 2.05 describes various levels of access to CORI, but does not tell the reader who falls under each of the categories.

The proposed regulations also should specify that absent special statutory authority, employers are NOT permitted to ask about any sealed records and employees do not need to disclose the existence of sealed records. The web site of the Massachusetts

[3] The comments of the Massachusetts Employment Rights Coalition voice these same concerns in more detail.

Commission Against Discrimination website explains "ban the box" and the anti-discrimination provisions in simple language that might be adopted in the new regulations. The main web site address is: http://www.mass.gov/mcad/

YOUTHFUL OFFENDERS

Sections 2.03 (2) and 2.03 (5) (a) pertaining to juvenile records needs correction because the sections indicate that Juvenile Court cases where the person was charged as a youthful offender are part of CORI. This conflicts with statutory authority and case law. While adult sentences may be imposed in Juvenile Court youthful offender cases, only cases that are transferred to another court for trial of the youth as an adult are part of CORI.

The statute defining CORI provides that:

> Criminal offender record information shall be limited to information concerning persons who have attained the age of 17 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 17; provided, however, that if a person under the age of 17 is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information.

G. L. c. 6, § 167, as amended by St. 2010, c. 256, §4.

It is well established that youth who are found delinquent by the Juvenile Court are not convicted of an offense because "[a]n adjudication concerning a juvenile is not, of course, a conviction of crime." Dep't of Youth Services v. a Juvenile, 384 Mass. 784, 786 (1981). "Moreover, even as to the category of children adjudicated 'youthful offenders,' the statute does not label a 'youthful offender' as 'criminal'." Commonwealth v. Connor C., 432 Mass. 635, 641-642 (2000). Sections 52 through 63 of Chapter 119 govern juvenile delinquency and youthful offender cases in Juvenile Court. Section 53 of Chapter 119 similarly provides that:

> Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not

be deemed criminal proceedings.
G.L. c. 119, § 53.

"The 'adjudication of a juvenile as a youthful offender subjects him to more severe penalties, including State prison sentences, . . . but it does not transform his illegal act from an act of delinquency into a crime, and does not change the statutory obligation to treat him 'as far as practicable' as a child 'in need of aid, encouragement and guidance' rather than as a criminal." Commonwealth v. Anderson, 461 Mass. 616, 630 (2012), quoting Commonwealth v. Connor C., 432 Mass. at 641–642. "The distinction our law recognizes between a child and adult adjudication exists partly to avoid the infringement of a child's constitutional rights, and partly to avoid the attachment of criminal stigma to children who may be amenable to rehabilitation." Id. at 629.

The Juvenile Court has no jurisdiction over murder cases involving individuals who are age 14 or older. G.L. c. 119, § 74. Youth are tried as adults when they are age fourteen or older and are accused of first or second-degree murder. G.L. c. 119, § 72B. These cases appear on adult CORI.[4]

The various sections should be revised to state that CORI shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he or she attained the age of 17, unless the case was transferred to the Superior Court for trial of the individual as an adult.

SECOND CORI REPORTS WITHOUT FURTHER AUTHORIZATION

Section 2.09(9)(a) provides that employers and government agencies can obtain a second CORI report on the same CORI subject if they request it within a year of the original request and "provide written notice to the *subject* at least 24 hours before submitting the request." This section should be amended so that the period runs after receipt of the notice in person or by other verifiable means of delivery on a business day. The section should make clear that the notice is NOT effective upon mailing from a post office box. The period also should be increased to 48 hours or more to ensure

[4] While youthful offender hearings and the court file in the Clerk's office at the courthouse are open to the public under G.L. c. 119, § 60A, this does not mean the case becomes part of CORI disseminated by DCJIS. As illustrated by Commonwealth v. Boe, 456 Mass. 337, 340 n. 5 (2010), there are different categories of data--the probation file, the clerk's file at the courthouse, and data of the board (now known as DCJIS). The Massachusetts Commission Against Discrimination, for example, warns employers on its web site (http://www.mass.gov/mcad/) that they may not inquire about juvenile cases unless the person was tried as an adult.

the CORI subject receives actual notice.

If the employer intends to send for a second CORI within a year, the employer should disclose that in the authorization forms used to obtain the original CORI report.

CORRECTING INACCURATE CORI

Section 2.25 is limited to two sentences which state that: (1) DCJIS will provide a process for investigating and correcting inaccurate CORI; and (2) DCJIS will provide details of its policies to correct inaccurate CORI data "upon request."

Section 175 of Chapter 6 provides that the Commissioner "shall publish and furnish, upon request, guidelines for individuals on how to correct inaccurate or incomplete information." G. L. c. 6, § 175, as amended by St. 2010, c. 256, § 35. We request that the Commissioner publish and furnish the details of the actual process in the regulations and on the DCJIS website.

Many individuals who are CORI subjects are unemployed, underemployed and lack funds to hire counsel. Publicizing the process will ensure that indigent parties and others without counsel can easily learn about and use the process.

The regulations should contain information that includes, but is not limited to how to remove and correct the most common errors such as incorrect dates of birth, misspelled or incorrect names, aliases listed in error, and correction of case related data.

DATE OF COMMENCEMENT OF CORI

As the MLRI and other legal services' housing attorneys and advocates noted in their comments, the definition of "initiation of a criminal proceeding" in proposed Section 2.0 is confusing and overly broad.

The proposed regulations should be revised to reflect the status quo which is to not include information about charges that were dismissed prior to arraignment. Massachusetts has no expungement statute. Changing current record keeping practices would only increase the number of innocent people who end up with life time criminal records because of clerical mistakes, misidentification, or other errors.

Even assuming that the innocent person can seal an erroneous case, this only limits access to the CORI by certain employers and agencies. It does not eliminate the criminal record or create a clean slate. Commonwealth v. Roberts, 39 Mass. App. Ct.

Municipal Court of Dorchester Dist., 374 Mass. 640, 659 (1978). If the person is racially profiled or stopped by the police, the police have access to the sealed record. G.L. c. 276, § 100C; G.L. c. 6, § 172. State agencies also have access to the contents of sealed records if a person tries to become a foster or adoptive parent, or tries to work in certain jobs related to children. See e.g. G.L. c. 6, § 172F (Department of Early Education and Care has access to "sealed record data"); G.L. c. 6, § 172B (Department of Children and Families as well as the Department of Youth Services have access to "sealed record data"). Absent expungement of a record, CORI lasts a life time. Thus, when and how CORI is created is very important to the public and, in particular, to communities of color.

CONSUMER REPORTING AGENCIES AND RECORD KEEPING

The Union of Minority Neighborhoods shares the concerns outlined in the comments submitted by Representative Liz Malia, New England Law, and the MLRI and other legal services advocates pertaining to consumer reporting agencies (CRA's) as well as use and storage of data. In the interest of brevity, we refer you to their comments.

CRIMINAL RECORDS REVIEW BOARD AND COMMUNITY INPUT

We suggest that DCJIS include a person who has a CORI on its board as suggested by New England Law in reference to Section 2.27(4)(a). We also suggest that DCJIS take advantage of the expertise of legal services programs and the National Consumer Law Center on housing, CRA's, and the day to day impact of CORI on people's lives.

FURTHER CONTACT

Your time and effort in reviewing these comments are greatly appreciated. Thank you also for the courtesy and tremendous attentiveness you and others from DCJIS gave to participants at the recent public hearing. I can be reached directly at 617-603-1554 if you have any questions.

Sincerely,

Pauline Quirion

cc:

Horace Small, Executive Director
Union of Minority Neighborhoods