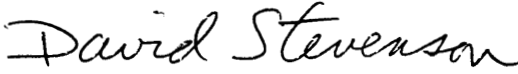


**Office of the County Attorney
Montgomery County, Maryland**

MEMORANDUM

October 30, 1998

TO: Marilyn Mitchell, ASC
Department of Information Systems & Telecommunications

FROM: David E. Stevenson 
Assistant County Attorney
Counsel to the Office of Human Resources

RE: Criminal Background Record Checks on Non-Probationary Employees

You have asked several questions about a new proposal under which a group of DIST computer programmers is being asked by the Sheriff to consent to, and participate in, criminal background record checks as a prerequisite to their working with certain computerized data bases serving the Sheriff's Office. You have indicated that none of the programmers who have been asked to consent to background checks are currently in positions that now require background checks as a basic element of job qualification.

Your first question is: "Does the County, as employer, have the authority to require that employees participate in a criminal background record check as a condition of their continued employment?"

First, the County has the general authority to obtain criminal record information on current employees, without obtaining their consent, to the extent that the law allows employers or members of the public to obtain certain criminal record information without the subjects' prior consent. The detailed records checks proposed in this case, however, apparently require the consent, and voluntary participation, of the employees involved.

The County has the general authority to enact laws or regulations that require applicants or employees to consent to detailed criminal background record checks as a condition of initial or continued employment, as long as there is a reasonable relationship between such information and the qualifications or duties of the positions in question. Section 33-7 (b) of the County Code authorizes the County Executive to adopt personnel regulations to provide a framework of minimum qualifications for merit system positions, methods for determining qualifications, and methods of selection or promotion to positions. An example of such a

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regulation is Section 5-5 of the Personnel Regulations, titled References and Investigations, which reads:

The Chief Administrative Officer may establish reference and investigation requirements deemed necessary to verify the relevant prior work performance, experience and job-related personal characteristics of each applicant. All applicants must comply with established reference and investigatory requirements in order to be considered for a vacancy.

This regulation authorizes the conduct of criminal background record checks on applicants (non-employees) for County merit system positions, when the jobs applied for are deemed sufficiently sensitive in nature to warrant background checks. Personnel Regulation 5-4 states that applicants may be disqualified from further consideration if they fail to comply with reference and investigatory requirements, or if evidence of a job-related factor is discovered that would hinder or prohibit satisfactory performance of the duties and responsibilities assigned to a position. Since Regulation 6-4 (a) says that each person appointed to a merit system position must serve a probationary period as a continuation of the examination process, Regulation 5-5 authorizes the checking of applicants' backgrounds up through the point when they complete their probationary periods.

Additionally, under Personnel Regulation 7-2 (d), the CAO may include, or add, specific qualification requirements to the formal Class Specification of an occupational class of positions. Thus, it is appropriate for the class specification of a particular job class to state, as an element of qualification, that the incumbent of a particular position must have and maintain a clean criminal record, or a record free of certain types of criminal convictions. This is especially the case if federal or State law imposes a "conviction free background" requirement. Such a requirement, which reasonably contemplates the conduct of periodic criminal record checks, may be added, as needed, to a class specification during a review of an occupational class by the Director of Human Resources. In 63 Opinions of the Attorney General 197 (1978), the Attorney General said that the State Secretary of Personnel may, under such circumstances, add a background check element to a State job class specification.

Therefore, the CAO does have the authority to adopt regulations, or class specifications, that require incumbent merit system employees to participate in criminal background record checks, even if the employees were not required to consent to such checks when they were hired. If an employee does not consent to participate in background checking

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mandated by a regulation or class specification, the employee can be transferred, or disciplined or terminated for not meeting the amended minimum qualifications of the position.

Another scenario may also arise. If the County finds that a federal or State law or regulation requires an employer to conduct criminal background record checks of persons who perform certain types of jobs, then the County is legally bound by higher authority to ask the affected employees to consent to background checking as a condition of their continued employment in those particular jobs. If federal or State law requires a specific type of background investigation of incumbent employees, then the County must impose the mandated requirement even in the absence of a pertinent County regulation or class specification. In these cases, the background checking is directly authorized by federal or State law, which takes precedence over County regulations. If the incumbent of a covered job refuses to cooperate, the employee cannot be allowed to continue working in that position.

Your second question is: "Are there personnel regulations or County Attorney opinions that require incumbent merit system employees to consent to criminal background record checks even though the employees were not required to undergo background checks when they were hired?"

If a federal or State law or regulation requires that the incumbent of a particular type of job be free of certain kinds of criminal convictions, or requires the conduct of a criminal background record check as a prerequisite to employees performing certain jobs, then (as long as the federal or state provisions are not expressly limited to newly hired employees) incumbent employees are required to consent to background checks in order to continue working in the covered jobs. Since the County must conform to federal or State mandates, background checks may be required in these circumstances even if there is no County personnel regulation that independently requires them.

As previously noted, for job classes not covered by federal or State requirements, Personnel Regulation 5-5 authorizes the CAO to establish reference and investigation requirements that are deemed necessary to verify the job-related personal characteristics of each applicant for County employment. Under this authorization, investigation requirements (that include criminal background record checks) have been established for non-employee job applicants. Neither the CAO, nor the Director of Human Resources has, however, established investigation requirements (including provisions for background checks) for incumbent merit system employees, other than those with Commercial Driver's Licenses. Although the CAO has the authority to adopt regulations requiring incumbent employees to participate in criminal background record checks, the only current procedures authorizing background checks of

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incumbent merit system employees are those authorizing motor vehicle records checks of employees who operate buses or other large commercial vehicles. Having run the indices of County Attorney Opinions, I have found no opinions addressing criminal background record checks of County employees.

As discussed earlier, the Director of Human Resources is also authorized to include a criminal background record check as a required element of the class specification for a particular class of positions. This requirement has not yet been added, however, to the class specifications of the several classes of DIST computer programmers.

Therefore, if a federal or State statute or regulation requires that computer programmers who provide technical support to CJIS users must undergo criminal background record checks, then the affected DIST programmers must consent to record checks in order to continue working with CJIS data bases. This is the case, even though the programmers were not subjected to background checks when they were hired by the County.

In the absence of a federal or State mandate, however, incumbent DIST programmers cannot be ordered to participate in background checks until a personnel regulation or a class specification is adopted that authorizes criminal background record checks of employees in the computer programming classes. On the other hand, if DIST managers believe that a programmer's refusal to participate in background checking adversely affects the operational efficiency of the section that supports the County's CJIS users, supervisors may, under Personnel Regulation 22-2, transfer the programmer to another position that does not require CJIS access.

The federal regulation governing the security of CJIS information, 28 CFR § 20.2, says that the states must have laws or regulations that "provide that direct access to criminal history record information shall be available only to authorized officers or employees of a criminal justice agency and, as necessary, other authorized personnel essential to the proper operation of the criminal history record information system." DIST programmers fall into the latter category of support personnel. 28 CFR § 20.1 says that "direct access means having the authority to access the criminal history record data base, whether by manual or automated means." When performing their computer system support duties (processing and preservation of data) on a CJIS data base, DIST programmers have "direct access" to criminal history record information. As noted above, 28 CFR § 20.2 specifies that only authorized support personnel may be granted direct access to CJIS data bases. Another section of 28 CFR § 20.2 says that state law must provide that the criminal justice agency controlling the CJIS data base "will screen

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[conduct a record check] and have the right to reject for employment, based on good cause, all personnel to be authorized to have direct access to criminal history record information."

The Maryland Department of Public Safety and Correctional Services has promulgated CJIS system security regulations, COMAR 12.15.01, in conformity with the mandate of federal law. These Maryland CJIS regulations apply to all local criminal justice agencies, including the Sheriff and the County Police. The State CJIS regulations were promulgated under the authority of Article 27, § 746 of the Maryland Annotated Code, which requires the Secretary of Public Safety and Correctional Services to adopt regulations "necessary to insure the security of the criminal justice information system and all criminal history record information reported and collected from it." At COMAR 12.15.01.15, the State CJIS regulation expressly incorporates by reference the specific federal regulations regarding security, the same regulations discussed in the preceding paragraph. And COMAR 12.15.01.03 includes the personnel [including support programmers] used in the processing and preservation of criminal history information within the definition of "Criminal justice information system." Therefore, the content of the federal regulation that requires a criminal justice agency that controls a CJIS data base to "screen [conduct a record check] and have the right to reject for employment, based on good cause, all personnel to be authorized to have direct access to criminal history record information" has been adopted into a State regulation governing all local law enforcement agencies. In 63 Opinions of the Attorney General 197 (1978), the Maryland Attorney General stated that these security regulations give a law enforcement agency that controls a CJIS computer system the authority to screen computer programmers who are employed by other government agencies to support the data base.

In our context, this means that the State CJIS regulation gives the Montgomery County Sheriff the authority to insist that any DIST programmer who has direct access to a CJIS data base controlled by the Sheriff must successfully undergo a criminal background record check before engaging in computer support work on the CJIS data base. In this regard, it will be necessary to determine which computer data bases are under the authority and control of the Sheriff, and whether access to a Sheriff-controlled data base involves "direct access" to a criminal history record data base. A data base that contains some criminal history information indirectly obtained from a CJIS data base is not necessarily a CJIS data base covered by CJIS security regulations.

Although the State regulation says that the Sheriff may refuse to allow unscreened DIST programmers access to a CJIS data base operated by the Sheriff, the State regulation does not authorize the CAO to require DIST programmers to consent to criminal background record checks as a general condition of continued employment. Unless and until the CAO adopts a

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regulation or class specification requiring background checks of certain programmers, if a DIST programmer declines to participate in Sheriff's Office screening, the programmer simply cannot be assigned to work in a Sheriff-controlled CJIS data base.

Your third question is: "What can happen to an employee who consents to a records check that reveals a criminal conviction or arrest?"

If a DIST computer programmer consents to the conduct of a criminal background record check, then the County is authorized to make use of any information about convictions or arrests (if arrest as well as conviction data is reported under the protocol) that is reported. The County's standard employment application asks applicants whether they, as adults, have been convicted of a crime. If an employee who consents to a record check answered this employment application question in the negative at the time of hiring, and the current record check reveals an adult conviction for a crime, the employee may be disciplined under Personnel Regulation 28-2 (d) for "material falsification of information provided on [an] application for employment or promotion." Bear in mind, however, that neither a mere arrest nor a grant of probation before judgment qualifies as a "conviction." Nor does a conviction that has been subsequently expunged or pardoned serve as a "conviction." Additionally, a department head has discretion to refrain from initiating disciplinary action unless, as stated in Regulation 28-1, "it is evident that the action is necessary to maintain an orderly and productive work environment."

A County employee can also be subjected to disciplinary action if a criminal record check reveals a "conviction for a criminal offense" that occurred after the employee was hired. Personnel Regulation 28-2 (o) states that a conviction may be cause for disciplinary action "if such violation is related to County employment." Once again, however, a department head may exercise discretion in deciding whether to initiate discipline unless it is evident that discipline is necessary to maintain an orderly and productive work environment.

Although County procedures require certain public safety employees (police and correctional officers) and certain holders of Commercial Driver's Licenses to immediately report all arrests, convictions, and traffic violations to their superiors, DIST programmers are not bound by any of these affirmative requirements to report such occurrences. Therefore, a DIST employee would not be subject to discipline simply for failing to report the occurrence of a post-hiring arrest, or conviction.

If a criminal background record check reveals an arrest or conviction that a federal or State statute or regulation deems disqualifying, then the County cannot allow the DIST programmer to continue working with CJIS systems. In other words, if a programmer's record

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includes past arrests or convictions that federal or State CJIS security regulations expressly identify as disqualifying for someone working in a programming support role, then the programmer cannot receive security clearance to work with CJIS systems. It will be necessary to transfer the programmer to a job assignment that does not require CJIS security clearance, if such a job assignment or position is available. If DIST does not have an available placement for the programmer outside of CJIS work, it may be necessary to find a placement, by transfer or demotion, outside of DIST. If no alternative placement can be found, the employee could be subject to termination under Section 25 of the Personnel Regulations.

I hope that this memorandum answers the recent questions that have arisen regarding criminal background record checks. Please let me know if you need further advice concerning this matter. My direct telephone number is 217-2961.

DES

cc: Marc Hansen, Chief, Division of General Counsel ✓
James Torgesen, Labor Relations Manager, OHR
Major Bruce Sherman, Sheriff's Office

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