

State of California - Department of Justice
FINAL STATEMENT OF REASONS

SUPPRESSION OF INCOMPLETE CRIMINAL HISTORY INFORMATION

Public Hearings: The public hearings were held on March 28, 2005, in Sacramento and March 30, 2005 in Los Angeles.

Sections Affected - The Department of Justice (Department/DOJ) proposes to add Article 2, Sections 720 through 724, to Chapter 7, Division 1, Title II, of the California Code of Regulations.

Updated Information - There have been no changes in applicable laws or to the effect of the proposed regulations described in the Initial Statement of Reasons and the Notice of Proposed Regulatory Action.

Local Mandate - A mandate is not imposed on local agencies or school districts.

Business Impact - These proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses.

Consideration of Alternatives - No reasonable alternative was considered or otherwise identified and brought to the attention of the Department that would be either more effective in carrying out the purpose for which the action is proposed or as effective and less burdensome to affected private persons than the proposed regulations.

Comments Received During Comment Period Ending - The comments received in response to the Proposed Regulations are listed first, with the Department's response in bold. A list of the correspondence is included at the end of this section.

- A. A few school districts' personnel, and others (Letters 1, 2, 3, 5 and 11), wrote to express their concern that the regulations would impact the agency's receipt of subsequent arrest information regarding employees. In addition, the school district staff asked for some regulatory language to assure that Department will continue to provide notice of recent arrests.

The proposed regulations only affect arrests that occurred prior to an individual being fingerprinted on behalf of an agency. The regulations will impact neither the subsequent arrest information, nor the serious and violent offenses for which schools receive a "Prohibited Offense" letter.

- B. One Chief Administrative Officer from a school district (Letter 4) thought the district would receive less information and the current information received was the minimum acceptable standard with which they could work.

The regulations will allow the districts to receive more information than they presently receive. Currently the Department withholds an applicant's entire criminal history

information when the Department is unable to obtain a disposition for one arrest, even if there are multiple arrests for which the Department has dispositions. In the future when these regulations are implemented, Department of Justice will release all the arrest information for which there is a disposition, withholding only the arrest(s) without a disposition.

C. Staffs from several agencies (Letters 4, 6, 7 and 11) were unsure whether the agency would receive information regarding cases that are “pending” adjudication.

The release of such information is allowed by statute. The subsections in Penal Code section 11105, pertaining to the various applicant types, provide the authority to release information on arrests awaiting trial, “whether the applicant is incarcerated or has been released on bail or on his or her own recognizance pending trial.”

D. Beth Wrightson (Letter 8) asked if the Department cannot find information on a specific arrest at one point in time, does this mean there never will be more information on that arrest? A related question (Letters 6, 9, 10 and 11) was, if disposition information is received after the arrest information was withheld, will an agency then receive the “subsequent disposition?”

Yes, any additional information received on the arrest will be added to the individual’s criminal history record. The record will be available for responding to future criminal history record checks. Agencies do not automatically receive subsequent disposition information. Presently there is no mechanism that allows the Automated Criminal History System to identify the “pending” information released through the Applicant Processor. For arrests where the disposition is stated as “pending,” it will be incumbent on the applicant agency to work with the individual to obtain the final disposition.

E. Some agencies (Letters 4, 8 and 11) asked for a time frame regarding how long the record checks will take before the agency receives an answer.

The Department is unable to set a specific time frame for responding to the criminal history record checks because it is impossible to establish the amount of time it will take to receive the information requested. The Department’s staff place calls to the various agencies; messages are left. The other agencies’ staffs look for the information (and may have prescribed times for responding to Department requests), and eventually the other agencies’ staffs return the calls to Department. The disposition, or “no disposition information available” response, needs to be entered into the Automated Criminal History System. Only then can a response be sent to the applicant agency.

F. Gary Duke from the Department of Consumer Affairs (Letter 11) asked, pursuant to Section 722(b)(1), which applicable agency or other “criminal justice agencies” will the Department contact to obtain missing arrest disposition information and does the Department in fact contact all agencies?

The agencies contacted by the Department always depends upon the nature of the arrest and the age of the person at the time of arrest. The regulations state the Department will query “the arresting agency, the prosecuting agency, and the court or local probation agency as applicable.” This means the Department first will contact the arresting agency. If the arresting agency does not have the disposition, Department will contact the prosecuting agency. If the prosecuting agency does not have the disposition, Department will contact the court or, depending on the county and the age of the person at the time of arrest, the Department may contact the probation agency. Accordingly, the Department does contact all necessary agencies when it does a search. However, it is impractical to list the name of every agency that might be contacted because Department will contact only those agencies that relate to a specific arrest. “Other criminal justice agencies” would include any agency associated with the arrest, including a federal or state task force, the Immigration and Naturalization Service, the Border Patrol, or the military police.

G. Beth Wrightson (Letter 8) also asked, when Department has conducted a Section 722 search, deemed the disposition unavailable, and is not required to repeat the search, does that apply to the specific arrest or the whole record?

Section 723(a) refers to the search for a specific arrest. If an individual applies for another position that requires fingerprinting and the Department previously has attempted, unsuccessfully, to obtain the disposition(s) for an arrest, the Department will not repeat its efforts to obtain disposition information for that arrest.

H. Regarding Section 723, the Department of Consumer Affairs (DCA) (Letter 11) expressed concern that “DOJ will automatically suppress all arrest information . . .” despite the fact that the court’s finding in the *Central Valley* case “does not prevent DOJ from releasing open arrest information in all circumstances. The court simply requires DOJ to make a 'genuine effort' to obtain the disposition information prior to disseminating any report of an arrest.”

The decision in *Central Valley* authorizes DOJ to provide information on an arrest or detention only after DOJ has made a genuine effort to obtain the disposition related to that arrest or detention, and then only to "exempt" agencies, i.e., those specifically exempted from the prohibitions in Labor Code section 432.7. Penal Code section 11105 provides considerable detail, incorporated from *Central Valley* and other statutory schemes, as to what criminal history information may be provided on an applicant for a given type of licensure or employment.

Unless DCA is an exempt agency within the meaning of Labor Code section 432.7, DOJ has no authority to provide to DCA information on an arrest for which no information is available, other than subsequent arrest information. Since DCA is authorized under Labor Code section 432.7 to ask an applicant for licensure about an arrest pending trial, DCA is presumably authorized to delay decisions on licensure until the resolution of the arrest charge. While DOJ is statutorily required to provide subsequent arrest information, it is not required to provide, nor is there any mechanism in place enabling DOJ to provide, subsequent disposition information.

- I. The comments from Department of Corporations (Letter 14) stated, “Rather than suppressing an arrest record for which there is no corresponding disposition, we recommend you maintain a practice of sharing the arrest record, on a confidential basis, with a licensing agency including the Department of Corporations.” In addition the Department of Corporations stated that the *Central Valley* cases indicate the right of privacy may be outweighed by a compelling state interest in obtaining criminal information. The Department of Corporations asks that DOJ “consider the compelling state interest of giving the licensing agency . . . the opportunity to investigate arrest records with incomplete criminal information.”

The court in *Central Valley v Younger* (1989) 214 Cal.App 3d 145, concluded that “dissemination of information regarding arrests not resulting in convictions to nonexempt employers and licensing agencies for employment, licensing, and certification purposes is not justified by a compelling state interest.” Pursuant to court decisions in the *Central Valley* cases, when the Department provides an applicant’s state summary criminal history information to an authorized entity, that information may include only those arrests that resulted in a conviction unless the Department is able to verify that the arrest is pending adjudication or unless otherwise authorized by statute, i.e., a peace officer, a criminal justice agency employee, applicant for employment at a health facility, and on prospective concessionaires for a city, county or district.

LIST OF CORRESPONDENCE

1. CO Unified School District, Linda Hall, dated February 22, 2005
2. Huntington Beach Union High School District, Classified Personnel, Patricia A. Landau, Ed.D., dated March 16, 2005
3. Orange County Department of Education, Legal Services, Bianca Zimmerman/Val Fadely, dated March 18, 2005
4. San Francisco Unified School District, Human Resources, Linda Marini for Michele Modena, dated March 8, 2005
5. Santa Monica-Malibu Unified School District, Personnel, Dick Ide, dated February 25, 2005
6. City of Santa Cruz, Human Resources Department, Maria Schwartz, dated February 16, 2005
7. San Francisco Police Department, Lt. Brad Dahl, dated February 10, 2005
8. Adopt a Special Kid, Beth Wrightson, dated March 1, 2005
9. Department of Consumer Affairs, California Acupuncture Board, Kerry Keupper, dated February 8, 2005

10. Department of Health Services, Professional Certification Branch, Linda Heisler, dated February 10, 2005
11. Department of Consumer Affairs, Legal Affairs, Gary W. Duke, dated March 28, 2005
12. Department of Consumer Affairs, California Board of Occupational Therapy, Gretchen Kjose, dated March 2, 2005
13. Art Main, dated February 25, 2005
14. Department of Corporations, Office of Law and Legislation, Timothy L. LeBas, dated April 19, 2005