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INTERIM TESTIMONY 2014

Senate Committee on Open Government

Charge #1: Review the Texas Public Information Act to ensure that access to public records and information by the public remains fully transparent, but that governmental entities have the authority to protect the privacy interests of citizens, including primary and higher education students, from improper public disclosure.

Dear Members of the Committee,

My name is Sarah Pahl. I am a Policy Attorney for Texas Criminal Justice Coalition (TCJC). Thank you for allowing me this opportunity to present testimony on effective strategies for addressing the dissemination of criminal records, most commonly released through requests made under the Texas Public Information Act.¹

DISSEMINATION OF CRIMINAL RECORDS

After local, state, and federal agencies make criminal records public, private commercial businesses profit from the sale and posting of mug shots and other criminal history information online. Open access to criminal records through government repositories and commercial vendors, combined with the rise of the Internet and the emergence of electronic databases, has enabled more than 40 million criminal background checks to be performed annually for non-criminal justice purposes.²

As a result of this online expansion, individuals across our state are frequently denied employment and housing based on criminal records that have been sold and published online—some of which never resulted in a conviction, and some of which are completely inaccurate and unfairly punish those who never committed a crime. Not only do these individuals suffer as a result of inadequate policies that regulate the storage and dissemination of criminal records, but our workforce and families suffer as well.

S.B. 1289, passed in Texas' 83rd Legislative Session, sought to address the many problems that plague individuals whose criminal records have been released to private commercial businesses. While the provisions included in S.B. 1289 seem to take our state in the right direction—protecting freedoms of information, speech, and privacy—they do not go far enough to offer true protection to those who are rehabilitated or to those who were wrongly accused. Some examples of the current statutory deficiencies are listed below.

- Chapter 109 of the Business and Commerce Code, created by S.B. 1289 to regulate certain business entities engaged in the publication of mug shots and other information regarding the involvement of an individual in the criminal justice system, only applies to business entities that require payment of a fee to remove, correct, or modify criminal record information.³ This means that a business that refuses to accept payment to update records is not bound by this law. For example, see the inserted screenshot on the next page from PublicData.com; this business states that it is “**not responsible for any inaccuracies in any database**” and that it “**will NOT modify records in any database upon notification of inaccuracies.**”⁴ Because PublicData.com does not accept payment to update records, it has no obligation under Texas law to ensure records are accurate.

How do I change data in a PublicData database?

A very frequently asked question. PublicData is a public records disseminator and is not responsible for any inaccuracies in any database. PublicData will NOT modify records in any database upon notification of inaccuracies. Those wishing to have inaccurate data corrected must contact the reporting/supplying government agency and negotiate changes. Once changes are in place with the government agency, PublicData will reflect the modification(s) in the regular update cycle of that database. In the event that PublicData's regular update cycle is inconvenient, customers may request an earlier database update. PublicData will accommodate this request if it has available programmers and/or database administrators and the agency reporting/supplying the data is reasonably able to accommodate the request.

Please do not send *expungement orders*. PublicData has received so many counterfeit expungement documents that our current established policy is to rely solely on complete database updates from the recording government entity.

<http://www.publicdata.com/faq.html>

- Under Chapter 109, criminal record information is considered “accurate” if the information (1) reflects the most recent information received by the entity from the Department of Public Safety in accordance with statute, or (2) was obtained by the entity from any governmental agency or entity within the 60-day period preceding the date of publication.⁵ This means that a record may still be considered accurate even if an update has been made to the record, such as an order of nondisclosure or expunction.
- Finally, although Chapter 109 provides a procedure by which an individual may dispute the completeness or accuracy of criminal history information (as well as providing a civil penalty for noncompliance), it is practically impossible to enforce. As mentioned above, this Chapter only applies to businesses that charge a fee to remove, correct, or modify information, leaving those that do not accept payment to change information free to operate as they desire. Additionally, because private business entities that sell access to criminal records typically receive criminal record information from multiple sources (PublicData.com states that it is “continuously adding new databases as they become available and are prepared for use”⁶), it is an impracticable endeavor to attempt to verify that the business received updated information. The Department of Public Safety is the only governmental entity required by statute to provide updates (e.g., notification of orders of nondisclosure and expunction) to the private entities it releases records to; any other agency that does so provides notification on its own accord.

The widespread commercial publication of criminal records before a disposition is entered, as well as the long-lasting nature of data housed online, effectively prevents thousands of individuals from obtaining or keeping jobs and housing. **In order to allow individuals to give back to their communities and families in ways that enhance public safety, Texas must reform its laws related to the dissemination of criminal records.**

KEY FINDINGS

- **In Texas, nearly 12 million individuals are included in the state criminal history records.**⁷ These criminal history records are made up of arrests and subsequent dispositions, including those who were arrested but not convicted, those who have completed their sentences, those who have shown stability and established themselves in their communities, and those who are desperately trying to support themselves and their families while facing the many obstacles that automatically accompany any kind of criminal record.

- **Employers and housing providers often rely on inaccurate or incomplete criminal records.** The Texas Department of Public Safety reported in January 2013 that only 81% of Texas adult arrests in 2011 had a reported disposition.⁸ In other words, **nearly 1 in 5 of all Texas criminal records do not include final dispositions.** The inaccuracies that can result from disseminating records without final dispositions have allowed individuals to be denied employment and housing even without a criminal conviction. Additionally, even if certain records are ordered sealed or expunged, there is no guarantee that third-party commercial vendors will purge the information from their systems or that the event will be erased from media archives,⁹ creating additional challenges for system-involved individuals seeking employment and housing.
- **Multiple public agencies across Texas jurisdictions participate in disseminating criminal records to private entities in response to public information requests.** These include, but may not be limited to:
 - » County and District Clerks
 - » Law enforcement agencies
 - » Texas Department of Public Safety (DPS)
 - » Community Justice Assistance Division (CJAD), a division of the Texas Department of Criminal Justice (TDCJ)
- **The dissemination of outdated and incorrect information results from an inadequate update process.** The above agencies release criminal records to private entities in response to public information requests. While county and district clerks must submit updates on orders of nondisclosure and expunctions to DPS, DPS is the only agency that provides updates to the private entities to which it releases records. Consequently, private entities that request criminal records from any agency other than DPS—whether from county and district courts, TDCJ, or elsewhere—are not routinely notified of updates reflecting orders of nondisclosure, expunction, or even final dispositions. **Countless individuals are adversely affected by this practice that encourages the widespread dissemination of outdated and incorrect criminal records.**

COST-SAVING AND PUBLIC SAFETY-DRIVEN SOLUTIONS

- **Government agencies that disseminate criminal record information should be asked to publish their policies and procedures related to the release of criminal records, how much money is made from such public information requests, and how the funds are spent** in order to compel transparency and accountability in the process of disseminating criminal records.
- **Allow the Texas Department of Public Safety (DPS) to be the only clearinghouse for the bulk dissemination of criminal records, which will ensure uniformity in record dissemination and compliance with updates to records (e.g., final dispositions and orders of nondisclosure and expunction).** Currently, multiple agencies and jurisdictions disseminate criminal records to private entities. However, there are no standardized systems or procedures for releasing or providing updates to criminal records. In order to better steward the sensitive information that impacts millions of lives, Texas should authorize DPS to be the sole agency that can disseminate criminal records in bulk, and require DPS to proactively ensure that private entities comply with updates to criminal records.
- **Restrict the bulk dissemination of criminal history record information to private entities until a final case disposition is entered.** In Texas, criminal records are released to private entities once an arrest is made; these records are not always updated to reflect the case disposition. In some cases, individuals have an arrest on their record for a crime they were never convicted of—and possibly ones for which there was no probable cause for their arrest—yet these records are released to companies across the country. **The widespread**

commercial publication of criminal records before a disposition is entered potentially prevents thousands of individuals from obtaining or keeping jobs and housing.

The bulk release of criminal history record information to *private entities that profit from the sale of access to such information*, as opposed to state law enforcement and licensing agencies, should be restricted until a disposition is entered in one's record. When the disposition is dismissal or acquittal, or the charge has not resulted in a final conviction and there was no court-ordered community supervision, the criminal history record information should not be released to private entities. Limiting the dissemination of criminal records prior to disposition will help address inaccuracies in the criminal records available to the public without compromising public safety; government and law enforcement officials will continue to have access to these records. In fact, at least one jurisdiction is already taking this approach: the Travis County District Court does not sell any criminal records until a disposition has been entered, and it will not sell records that have the potential to be expunged or subject to an order of nondisclosure.

Please note that this recommendation does not restrict access to public information—any person or entity may request information that is considered public, including criminal records. This recommendation only restricts the bulk dissemination of criminal records, allowing individuals “practical obscurity” protections.

Citations

¹ National Institute of Justice and the American Bar Association, “National Inventory of the Collateral Consequences of Conviction,” (2012), accessed on October 1, 2014, available at <http://www.abacollateralconsequences.org/>.

² Helen Gaebler, “Criminal Records in the Digital Age: A Review of Current Practices and Recommendations for Reform in Texas,” (William Wayne Justice Center for Public Interest Law, The University of Texas School of Law, 2013): 2.

³ [Tex. Bus. and Comm. Code, § 109.002\(2\)](#).

⁴ PublicData.com, “Frequently Asked Questions,” accessed on October 3, 2014, available at <http://www.publicdata.com/faq.html#00700>.

⁵ [Tex. Bus. and Comm. Code, § 109.003\(2\)](#).

⁶ PublicData.com, “Frequently Asked Questions,” accessed on October 3, 2014, available at <http://www.publicdata.com/faq.html#01000>.

⁷ Dennis A. DeBacco & Owen M. Greenspan, “Survey of State Criminal History Information Systems, 2012,” (Bureau of Justice Statistics, U.S. Department of Justice, 2014): Table 1, accessed on September 10, 2014, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. The number of individual offenders in the state criminal history file was 11,824,200.

⁸ Texas Department of Public Safety, “Eleventh Report Examining Reporting Compliance to the Texas Computerized Criminal History System,” (January 2013): 3, accessed on September 11, 2014, available at http://www.txdps.state.tx.us/administration/crime_records/pages/complianceRpt11.pdf.

⁹ SEARCH, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2010): 83, accessed on April 21, 2014, available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.