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Senate Committee on State Affairs

Examine possible reforms designed to increase citizens' ability to know what data is being collected about them by governmental and commercial entities and with whom that data is being shared, including an analysis of consumer informed consent. Examine related measures proposed or passed in other states.

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 widespread storage and sale of criminal record information.

SMARTER STRATEGIES WILL STRENGTHEN OUR WORKFORCE AND SUPPORT FAMILIES

After certain local, state, and federal agencies make criminal histories public, private entities 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.

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. Not only do these individuals suffer as a result of current policies that regulate the storage and sale of criminal records, but our workforce and families suffer as well.

The widespread commercial publication of criminal records before a disposition is entered, as well as the long-term nature of data housed online, effectively prevents thousands of individuals from obtaining or keeping jobs and housing. **Several reforms are needed in Texas to encourage individuals to give back to their communities and families in ways that keep our communities safe.**

KEY FINDINGS

- **In Texas, nearly 12 million individuals are included in the state criminal history records.**¹ 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 and demonstrated that they are rehabilitated, 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.² In other words, **nearly 1 in 5 of all Texas criminal records do not include final dispositions.** This can result in individuals being denied employment or 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,³ creating additional challenges for system-involved individuals seeking employment and housing.

- Various public agencies across Texas jurisdictions participate in selling criminal records to private entities. These include, but may not be limited to:
 - » County and District Courts (Clerk’s Office)
 - » Texas Department of Public Safety (DPS)
 - » Criminal Justice Assistance Division (CJAD), a division of the Texas Department of Criminal Justice

In order to compel transparency and accountability in the process of selling criminal records, these agencies should be asked to publish their policies and procedures related to criminal record sales, how much money is made from such sales, and how the funds are spent.

- **The dissemination of outdated and incorrect information results from an inadequate update process.** The above agencies sell criminal records to private entities. While county and district courts must submit updates on orders of nondisclosure and expunctions to DPS, DPS is the only agency that provides updates to private entities to which it sells records. Consequently, private entities that purchase criminal records – 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

- **Restrict the sale of criminal history record information to private entities until a final case disposition is entered.** In Texas, criminal records are sold 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 this record is being sold 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 sale of criminal history record information to *private entities*, 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 sold to private entities. Limiting the sale of 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 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 sale of criminal records, allowing individuals “practical obscurity” protections.

- **Prohibit the bulk sale of criminal history record information and mug shots.** Texas does not have uniform policies or procedures for selling criminal records. Many entities, including county and district courts and

even the Texas Department of Criminal Justice, sell criminal records in bulk but are not required to provide updates to reflect orders of nondisclosure or expunction, or even whether a case was dismissed. This inconsistent compilation of data hurts the individuals whose identities are disparaged based upon criminal charges that may never have even resulted in a conviction, or who have been allowed a second chance by our courts.

- **Alternatively, allow the Texas Department of Public Safety (DPS) to be the only clearinghouse for the sale of criminal records, which will ensure uniformity of all record sales and compliance with updates to records (e.g., orders of nondisclosure and expunction).** Currently, multiple agencies and jurisdictions sell criminal records to private entities. However, there are no standardized systems or procedures for selling or providing updates to criminal records. In order to better steward the sensitive information that impacts millions of lives, DPS should be the only entity authorized to sell criminal records, and it should proactively ensure that private entities comply with updates to criminal records (e.g., orders of nondisclosure and expunction).
- **Reform the qualifications and procedures related to orders of nondisclosure, which limit access to (vs. completely expunge) criminal records.**
 - » **Expand the eligibility criteria for nonviolent offenses and reduce waiting times before being permitted to petition for orders of nondisclosure.** In order to be eligible to petition for an order of nondisclosure, an individual must have successfully completed deferred adjudication and waited a designated period of time, during which he or she may not commit any additional crimes. However, individuals who receive convictions, rather than deferred adjudication, may not petition for nondisclosure, thus reducing their incentive to remain law-abiding after they complete a term of probation. The eligibility criteria to petition for orders of nondisclosure should be expanded to include convictions for nonviolent offenses, and the waiting times required prior to petitioning should be reduced in order to provide real relief for people attempting to make a new start.
 - » **Reform the e-filing system to allow for a streamlined web-based petition process that allows individuals to petition without an attorney.** Texas' 83rd Legislature provided for the electronic filing of petitions for orders of nondisclosure, specifically requiring that an electronic form be available and accessible. However, individuals eligible to petition for an order of nondisclosure must still navigate the complex and confusing process of filing the petition; most must solicit the services of an attorney. A streamlined web-based petition should be made available to allow reasonable access for all those eligible to petition for orders of nondisclosure and minimize the financial burden of doing so.
 - » **Prohibit the forfeiture of the right to nondisclosure in plea agreements.** In certain counties across Texas, district attorneys include a waiver of one's right to nondisclosure as a term of a plea bargain. These agreements exploit the vulnerable position of individuals charged with a crime and should be strictly prohibited.
 - » **Prohibit third parties from asking individuals to request records that are subject to an order of nondisclosure.** Orders of nondisclosure are intended to provide a way for individuals to make a new start without a criminal history hindering their attempts to secure employment and housing. Some employers and landlords, however, require applicants to request their own criminal record so that the employer or landlord can have access to records under orders of nondisclosure. This practice circumvents the spirit of the law and should be prohibited.

- **Reform the qualifications and procedures related to expunction.**
 - » **Expand eligibility criteria required to expunge criminal records.** Expunctions, which completely erase a criminal offense from one’s record, including relevant arrest and court records, are only available in limited instances: for acquittals, pardons, dismissals, and no-bills; when a district attorney and judge grant a discretionary expunction; and for cases of identity theft. In granting expunctions for dismissals, only dismissals granted after deferred adjudication for Class C misdemeanors are eligible. In order to expand this benefit to others who deserve a second chance, the eligibility criteria should apply to those with nonviolent Class C convictions.
 - » **Provide automatic expunctions of arrest records for cases that do not result in a conviction.** Petitions for expunction are currently required to be handled in a proceeding separate from the original case. However, in order to provide swift relief for those who have been found not guilty or for who charges are not pursued, expunctions of arrest records should be automatic for cases that do not result in a conviction.
 - » **Allow judges to automatically expunge records for those who successfully complete specialty court programs.** Similarly, judges should be granted the ability to provide automatic expunctions for individuals who successfully complete a specialty court program.
 - » **Require filing attorneys to be served with notice by anyone who files an answer to a petition for expunction.** Currently, any agency that holds criminal records and files an answer to a petition for expunction is not required to serve notice to the petitioner. Not only is this poor procedure and potentially has due process implications, but it harms the petitioner and should be reformed to require service.
 - » **Require the Texas Department of Public Safety (DPS) to certify compliance with orders of expunction.** Although DPS is required to provide updated information regarding orders of nondisclosure and expunction to entities to which it sells criminal records, it is not required to certify compliance. Similarly, while the Attorney General has the authority to collect a civil penalty from entities that do not comply with timely information updates, it is not required to do so. Even when a company is found to have criminal records subject to orders of nondisclosure or expunction, prosecution is nearly impossible because many companies buy criminal records from multiple sources. DPS should be required to ensure that entities comply with orders of nondisclosure and expunction.

Citations

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- ¹ 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.
- ² 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.
- ³ 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>.