



Commonwealth of Kentucky
Office of the Attorney General

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- Subject:* Whether federal agencies have authority to require Kentucky agencies to disclose criminal history information for background checks and national security review procedures.
- Requested by:* David J. Hicks, Chief Law Enforcement Liaison
Defense Counterintelligence and Security Agency
- Written by:* Rachel Wright
Assistant Attorney General
- Syllabus:* Subject to consent by the individual being investigated and a request by a covered federal agency, Kentucky criminal justice agencies shall provide criminal history information for purposes of background checks and national security review procedures.

Opinion of the Attorney General

The Defense Counterintelligence and Security Agency has asked the Office of the Attorney General to clarify whether criminal justice agencies in Kentucky are authorized and required to release criminal history record information to covered federal agencies under 5 U.S.C. § 9101. For the reasons that follow, it is the opinion of this Office that criminal justice agencies in Kentucky are required to provide criminal history background information upon request to a covered federal agency insofar as the individual under investigation has consented.

The Defense Counterintelligence and Security Agency is a federal security agency housed within the Department of Defense.¹ One of the agency's primary functions is personnel vetting, which includes conducting background investigations and continuous screening for the federal and contractor workforce.² The agency performs background investigations for several reasons, including to determine an individual's eligibility for government employment and whether an individual may serve in a national security sensitive position, have access classified information, and perform work under certain government contracts.³

Congress passed 5 U.S.C. § 9101 to ensure that all states participated in this important information-sharing duty.⁴ Prior to its passage, while many states and localities provided requested information voluntarily, a significant number did not, hindering the ability of covered federal agencies to conduct effective investigations.⁵ To eliminate this ambiguity, 5 U.S.C. § 9101(b)(1) mandates that criminal history record information be provided to covered federal agencies upon request.

In relevant part, this statute requires that “[u]pon request by a covered agency, criminal justice agencies shall make available all criminal history information regarding individuals under investigation by that covered agency.”⁶ Such requests are allowed for purposes enumerated in the statute, including but not limited to, determining eligibility, conducting suitability or fitness assessments for Federal or contractor employees, and Federal Aviation Administration checks.⁷

Thus, pursuant to this statute, covered federal agencies are entitled to receive criminal history record information from state and local criminal justice agencies

¹ Def. Counterintelligence & Sec. Agency, *Frequently Asked Questions*, <https://www.dcsa.mil/about/faq/> (last visited Jan. 3, 2023).

² Def. Counterintelligence & Sec. Agency, *About Us*, <https://www.dcsa.mil/About/> (last visited Jan. 3, 2023).

³ 5 U.S.C. §9101(b)(1)(A)(i)-(iv), Def. Counterintelligence & Sec. Agency, *Background Investigations*, <https://www.dcsa.mil/mc/pv/investigations/> (last visited Jan. 3, 2023).

⁴ H.R. Conf. Rep. No. 99-373, at 24, 25 (1985) (“[W]hile many states and localities have cooperated voluntarily in providing criminal history record information to DOD, OPM, and CIA for the purpose of determining eligibility for access to classified information or assignment to or retention in sensitive national security duties, a significant number of states and localities because of their laws or policies have not done so, which has limited the ability of DOD, OPM and CIA to conduct effective investigations.”).

⁵ *Id.*

⁶ 5 U.S.C. § 9101(b)(1).

⁷ *Id.* Under 5 U.S.C. § 9101(a)(6), the term “covered federal agencies” includes any of the following: the Department of Defense, the Department of State, the Department of Transportation, the Office of Personnel Management, the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Homeland Security, and Office of the Director of National Intelligence, and “[a]n executive agency that [] is authorized to conduct background investigations under a Federal statute.”

once the federal agency requests it.⁸ The requesting covered federal agencies include, among others, the Department of Defense.⁹ Since the Defense Counterintelligence and Security Agency is an agency within the Department of Defense, it is a covered agency that may make such a request.

After the request is made, “criminal justice agencies” are required to comply.¹⁰ This includes state and local courts, agencies, and their subunits that “perform[] the administration of criminal justice . . . and allocate[] a substantial part of [their] annual budget to the administration of criminal justice.”¹¹ To demonstrate the importance of this requirement, 5 U.S.C. § 9101(b)(4) provides that it will preempt any state or local laws.¹²

There is, however, one requirement that must be satisfied before a “criminal justice agency” must release the requested information: consent. A criminal history record information must be provided over to a requesting federal agency only after the individual under investigation provides written consent.¹³ Once an agency has the individual’s consent, it must provide the criminal history record information requested.

Conclusion. For these reasons, it is the opinion of this Office that criminal justice agencies in Kentucky must comply with federal requests for criminal history record information so long as the following prerequisites are met: (1) the federal agency that makes the request is a “covered agency” under 5 U.S.C. § 9101(a)(6); and (2) the individual under investigation has consented to the investigation. When these conditions are satisfied, a Kentucky criminal justice agency must provide the requested information pursuant to federal law.

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⁸ 5 U.S.C. § 9101(b)(1) (1985).

⁹ 5 U.S.C. § 9101(a)(6).

¹⁰ 5 U.S.C. § 9101(b)(1) (“...criminal justice agencies *shall* make available all criminal history record information regarding individuals under investigation by that covered agency[.]”).

¹¹ 5 U.S.C. § 9101(a)(1).

¹² 5 U.S.C. § 9101(b)(4) (“This subsection shall apply notwithstanding any other provision of law or regulation of any State or of any locality within a State, or any other law of the United States.”)

¹³ 5 U.S.C. § 9101(c).