



Michigan Supreme Court

State Court Administrative Office

Family Services

Friend of the Court Bureau

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Steven D. Capps
Director

MEMORANDUM

DATE: February 26, 2009

TO: Friends of the Court
cc Chief Circuit Judges
Presiding Family Division Judges
Circuit Court Administrators
Family Division Administrators

FROM: Steven D. Capps

RE: SCAO Administrative Memorandum 2009-01
Criminal History Background Checks for Prospective and Existing Friend of the Court (FOC) Employees
Replaces Administrative Memorandum 2008-07

Effective October 1, 2008, all Cooperative Reimbursement Program contracts (CRP) between the Department of Human Services, the county, and the circuit court relating to FOC services require courts to conduct a criminal history background check (CHBC) on new FOC employees funded in whole or in part by the CRP. Conducting CHBCs on new and existing FOC employees will help FOC offices provide a safe environment for FOC employees and users.

Additionally, under the new contracts, all courts **must** submit a plan to the Office of Child Support (OCS) by September 30, 2009, that outlines how the court will conduct CHBCs on existing employees (including subcontractors, subcontractor employees, and volunteers) funded in whole or in part by the CRP. FOC offices must use the outline provided in this Administrative Memorandum to create a policy that implements background checks for all existing staff. In addition, Appendix B to this Administrative Memorandum provides a model plan courts may modify and use to submit to OCS in compliance with this contract requirement.

Finally, Public Act 374 of 2008 (codified at MCL 722.627j) was signed into law with immediate effect on December 30, 2008. This public act allows employers, with authorization and identification from the individual, to request central registry clearance directly from the Department of Human Services (DHS). This Administrative Memorandum replaces Administrative Memorandum 2008-07, originally published before this law was effective.

For questions, clarifications, or additional information, please call 517-373-5975, or contact either Daniel Bauer at bauerd@courts.mi.gov or Tim Cole at colet@courts.mi.gov.

Criminal Background Check for FOC Employees

Appendix A is a model policy courts may adopt for conducting CHBCs for employees hired on or after October 1, 2008. The model satisfies CRP requirements¹ for new employees. This policy also provides minimum standards for a creation of a plan to conduct CHBCs on existing employees.²

A. Planning and Preparation for new employees

To comply with the CRP requirements, courts must run CHBCs on all new employees (“prospective employees”³) funded in whole or in part by the CRP who start on or after October 1, 2008. Court employees who are not funded in whole or in part by the CRP are not subject to this policy unless the court so decides. The court must complete the CHBC before hiring the prospective employee.

1. Determination of policy need

Courts should review their hiring policies and modify them as necessary to comply with the terms of the CRP.

The CRP has specific requirements for CHBCs for individuals who work directly with the public (clients, in the contract language) and individuals who work directly with children.⁴ At a minimum, the court must do the following for all prospective FOC employees funded in whole or in part by the CRP:

¹ The language of the contract between DHS, the county, and the circuit court states in paragraph H:

“As a condition of this Agreement, the Contractor certifies that, prior to hiring, the Contractor shall conduct or cause to be conducted:

- a. For each applicant for employment, who works directly with clients under this Agreement, or who has access to client information, an Internet Criminal History Access Tool (ICHAT) check.
- b. For each applicant for employment, who works directly with children under this Agreement, a Central Registry (CR) check.

The Contractor further certifies that the Contractor shall develop and submit a plan to DHS/OCS no later than September 30, 2009, describing a process and timeline for completion of the ICHAT and CR background checks for all existing employees, subcontractors, subcontractor employees, or volunteers. The plan shall include the Contractor’s written policy describing the criteria on which its determinations shall be made upon receipt of a positive ICHAT or CR response record. Contractors may consider the amount of time that has elapsed since the crime and type of crime when making this determination. The plan shall include the Contractor’s plan for implementation of this provision for unionized staff if applicable.”

² The contract requires courts to establish a policy for criminal background checks for existing employees by September 30, 2009, but does not require that the CHBC be completed on existing employees by that date.

³ Throughout this policy, the term “prospective employees” is limited to new direct employees of the FOC office under the CRP; a subcontractor, subcontractor employee, or volunteer is not a direct employee of the FOC office. The term “vendors” will be used to reference what the contract language refers to as “subcontractors, subcontractor employees, or volunteers.” Existing vendors, as well as those who start on or after October 1, 2008, will be included in the term “existing employees.”

⁴ A court may determine that all FOC positions under the CRP may work directly with children, as any court employee may come into direct contact with children. If a court determines that not all positions work directly with children, the court policy must identify specifically which positions do work directly with children.

- Run a criminal history check through the Michigan State Police's (MSP's) Internet Criminal History Access Tool (ICHAT), if the court determines that the position being filled would have direct contact with the public; and
- Require a prospective employee (if the court determines the employee in that position would have direct contact with children) either to
 - 1) Obtain a statement from DHS indicating that the prospective employee is not listed on the DHS Central Registry (CR),⁵ or
 - 2) Provide appropriate authorization and identification for the FOC to obtain a statement from DHS indicating that the prospective employee is not listed on the CR.

Because the ICHAT check will only provide information on the public record regarding criminal offenses that occurred in Michigan, the court should consider requiring potential employees who have not lived in Michigan for each of the past ten years to sign a statement that they are not currently charged with, nor have they ever been convicted of, a felony.

2. **Developing or Updating Forms**

Court staff should review all existing hiring forms, and modify or develop new forms, as necessary, to comply with this policy.

a. **Notification**

The court should consider whether it will inform prospective employees in job postings and on applications that a CHBC will be made.⁶

b. **Authorization**

The search required by the CRP is of public records, so no authorization is required. However, the court should consider whether it will obtain authorization from the prospective employee to run the CHBC. (A court may choose to obtain authorization so that, if a positive response record is received, the prospective employee received advanced notice that such a check would be conducted.) If the court chooses to obtain an authorization, the authorization should request the prospective employee to provide the information required to run an ICHAT check, including the following identifiers:⁷

⁵ State law limits who has access to the DHS Central Registry. MCL 722.627j allows an individual to request a central registry clearance on themselves, or allows an employer to request a central registry clearance for an employee, with appropriate authorization and identification from the employee. DHS will send a negative response (indicating the individual is not on the CR) to any requestor, but will only send a positive response to the individual listed on the CR.

⁶ The benefits of notifying prospective employees of the CHBC include the time saved by the office not reviewing those applicants with a criminal history who will be deterred from applying for a position with the court, and that the individual's subsequent application provides an implied permission to run such a check. The drawbacks of notifying prospective employees include the need to modify forms and application materials to include the notification.

⁷ Appendix C to this Administrative Memorandum is a model form courts may use that incorporates all of these elements. DHS is modifying the DHS-194 (a form for individuals to request a central registry clearance report on

- 1) First name;
- 2) Last name;
- 3) Sex (gender);
- 4) Month of birth;
- 5) Day of birth; and
- 6) Year of birth⁸

3. Arrangements to make ICHAT and CR checks

ICHAT:

ICHAT is an internet tool that provides access to Michigan's public records (arrests, charges, and judicial disposition) of all felonies and serious misdemeanors that are punishable by over 93 days incarceration. ICHAT is free for government agencies, but the court must obtain an agency code at cjicaccthelp@michigan.gov to use ICHAT without charge. After obtaining an agency code, the court may register to use ICHAT on the internet at <http://apps.michigan.gov/ICHAT/Register.aspx>. Instructions for using ICHAT can be found on various links from that page.

Central Registry (CR):

A positive response record on the CR indicates that a preponderance of evidence exists that the individual has abused or neglected a child and the future risk to the child is high or intensive. State law limits access to and use of information from the CR. Because DHS will send a positive response from a CR request to the individual only (no positive responses directly to the employer or prospective employer), a court that receives a copy of the CR clearance from the employee may question its validity. To avoid the possibility of receiving altered copies, SCAO recommends that the court's policy require the prospective employee to request that DHS send the clearance directly to the court. The court may decide to establish a time limit within which the court must receive the authorization and identification from the prospective employee.

themselves) and creating a new DHS-640 (a form employers can use to obtain authorization and identification to obtain a CR clearance report.) Because these forms are not finalized as of the publication date of this memorandum, courts may use the form created in Appendix C.

⁸ The Michigan Elliot Larsen Civil Rights Act (ELCRA), codified in MCL 37.2201 *et. seq.*, prohibits discrimination based on age, and has been interpreted to prevent an employer from asking the age of an individual as a prerequisite to hire. However, an employer also is required to conduct a pre-employment ICHAT check for a position funded in whole or in part by the CRP, and ICHAT requires the use of a person's birth year to verify the individual's identity. To avoid a claim that the court has violated the ELCRA, the court should make a provisional offer of employment, to the preferred candidate only, conditioned on the successful completion of a CHBC. Only at this point should the court request the prospective employee's date of birth.

4. Develop Policy

Appendix A is a model CHBC policy. A court may modify this model at its discretion, but any modifications must comply with the minimum standards established both by SCAO and OCS which comply with the CRP.⁹ A court policy may require more source checks than ICHAT and CR. If the court chooses to implement its own policy, the policy must include the elements listed below.

a. Required Elements

A court policy *must* include the following elements, which are either specifically required by the contract, or are natural extensions of the contract requirements:

- 1) A criminal background check through ICHAT and the CR (as necessary);
- 2) Elements to consider when a court receives a positive response record;¹⁰
- 3) Whether the prospective employee will have the option to refute or otherwise explain the positive response;
- 4) Which job positions are deemed to work directly with children (or a statement that all FOC employees may potentially work directly with children);
- 5) Notice that the justification for hiring a prospective employee with a positive response record will be placed in the employee's personnel file for auditing purposes; and
- 6) Notice that the CHBC documents are retained in the employee's personnel file for the duration of the employee's tenure with the office.

b. Optional Elements

A court policy *may* address the following issues:

- 1) Whether the court will provide notice to prospective employees of the need to conduct a criminal background check prior to employment;
- 2) Whether the court will require a signed authorization from the prospective employee to conduct the criminal background check;
- 3) Whether the court will require employees to notify the office director and their immediate supervisor if, while employed by the FOC, they are *charged* with a criminal offense;
- 4) Whether the court will require employees to notify the office director and their immediate supervisor if, while employed by the FOC, they are *convicted* of any crime; and

⁹ OCS has determined that the model policy complies with the terms of the CRP.

¹⁰ While the contract requires that a CHBC and a central registry clearance check be run on prospective employees, the contract does not prohibit the FOC office from hiring an individual with a positive response record. SCAO recommends that any policy allow for discretion regarding the hiring of prospective employees with positive response records. Absolute rules that don't allow for discretion may create unjust results for individuals with distant criminal histories that have no bearing on the individual's responsibilities as a prospective employee with the FOC office. Sections B.3. and B.4., respectively, address positive response options.

- 5) Whether the court will document the impact of the CHBC on the decision not to hire a prospective employee, and whether the prospective employee will have access to that documentation.

B. Minimum standards for consideration in developing a plan to conduct a CHBC for existing employees

1. General Requirements

The CRP requires the court to submit a plan to OCS by October 1, 2009, that details how existing employees under the CRP as of October 1, 2008, will be subject to a CHBC. The plan must:

- Describe both the process and the timeline for completing the ICHAT and CR check for all existing employees (including newly-hired vendors);
- Include a written policy describing how it will address a positive response record. The FOC or the chief circuit court judge may consider the amount of time that has elapsed since the crime and the type of crime when making this determination; and
- Address union contract issues, as appropriate.

Appendix B to this policy is a model plan that courts may use to submit to DHS as required by the contract. SCAO recommends that courts begin to conduct background checks on existing employees as quickly as possible to ensure the safety of families.

2. Plan considerations

A court is not required to use the model plan developed by SCAO and attached to this policy. The court must consider the following issues when developing its own plan. The plan need not incorporate every element below, but the court must consider each of the following points when it develops a plan:

- Establish whether an existing employee's pre-hire criminal background check meets the terms of the CRP. (The court plan may exempt employees who have had a CHBC upon original hire.)
- Establish the timeline for conducting CHBCs on all existing FOC employees and vendors under the CRP.
 - 1) Determine if vendors will conduct their own CHBCs for subcontracted employees, or if the FOC office will conduct it on behalf of the subcontractor.
 - 2) Determine if vendors will be required to stop providing services until the CHBC has been completed.
- Determine how the court will obtain permission for CHBCs:
 - 1) From an employee or a vendor.
 - 2) From the association/union/collective bargaining unit (if applicable).
 - a) Plan to modify any existing contract, as necessary.

- b) OCS agrees that any existing contract need not be modified solely because of the new CRP requirement; the modifications can be made during the regular renewal of the contract. However, if the contract is being modified for any reason before its regular renewal, the CHBC requirement must be addressed then.
- Conduct CHBCs through ICHAT and CR (if appropriate)
 - 1) Establish the timeline for obtaining permission and completing the checks.
 - 2) Establish a policy for re-hired employees (following lay-off, voluntary separation, or retirement)
- 3. Additional factors to consider if a positive response record is returned**

The plan may dictate the response based on a particular crime,¹¹ or may allow for judicial discretion based on a number of factors to determine the appropriate action for any positive response record. SCAO recommends that a court decide on a case-by-case basis with the assistance of a union representative, if the employee is represented, or a labor relations staff member in the area of human resources.¹² The case-by-case decision should be made after considering the following factors:

- Is the employee able to refute or otherwise explain the positive response record? If so, the employee can be presumed not to have a criminal history for the purposes of this policy. If not, further analysis of the employee's criminal history is warranted.
- Did the employee disclose this information during the application process (if asked)? Or did the employee hide or otherwise fail to disclose this information?
- Does the reported violation relate to a substantial aspect of the employee's work? What is the nature of the crime?
- How long ago did the reported offense occur, and has the employee had subsequent offenses that may indicate a pattern?
- Did the employee commit the offense against a co-worker, supervisor, subordinate, or customer that the employee had a duty to serve in some capacity?
- Would retaining the employee diminish public trust in the judicial branch?
- Did the crime occur while the individual was employed by the court?

The plan should include a statement regarding how long it will take for the court to make a decision after the CHBC has been completed.

¹¹ Courts should be aware that some courts, in the context of civil rights cases, have found the use of a "bright line test" (an absolute standard by which, if the "bright line" is crossed, the hiring decision is automatically made) when using a CHBC as a qualification for new or continued employment to be a discriminatory hiring practice. See *El v. SEPTA*, 479 F3d 232 (3rd Cir 2007), holding that a bright-line test raises a question of fact for a jury to determine if there has been a civil rights violation.

¹² OCS recommends that the plan include a provision that requires that any individual with a positive CR response be removed from any position that deals directly with children, either by moving them to a job that doesn't deal directly with children or terminating the individual's employment with the FOC. This language is not included in the model plan, but a court must still submit to OCS a plan with any discretion the court feels is appropriate.

4. Potential actions the plan may include on a positive response record

The court must include in its plan a provision that indicates how it will respond if a positive response record is returned. The action the court takes may be limited by terms of any union contract or collective bargaining agreement. The court must determine whether the offense increases the risk of safety to a party, child, or court employee, and if it finds the offense does not cause concern about the individual's employment fitness, the court can take action commensurate with the nature of the offense, including:

- Offer the individual counseling or referrals to counseling, if the positive response records indicate an untreated substance abuse problem;
- Issue a verbal warning that repeated arrests or convictions may result in further action;
- Issue a written warning that repeated arrests or convictions may result in further action;
- Take other disciplinary action, including imposition of a reduction in pay, or paid or unpaid leave;
- Provide for increased supervision of the employee;
- Transfer the employee to a position that does not provide an opportunity for the employee to repeat the offense;
- Suspend the employee for a specific period of time (with or without pay); or
- Terminate the employee.

Appendices:

Appendix A: Model policy for Criminal Background Checks for Prospective FOC Employees

Appendix B: Model plan for Criminal Background Checks for existing FOC employees and vendors

Appendix C: Release form for CHBCs and CR clearance checks, modified with this policy.

Appendix D: CR clearance response, ref: <http://www.mfia.state.mi.us/olmweb/ex/rff/1910.pdf> .

SCAO Administrative Memorandum 2009-01
FOC Prospective and Existing Employee Criminal History Background Checks
Appendix C: Criminal History Background Check Release Model Form

[Place following text on local letterhead, including mailing address of FOC.]

Criminal history background check (CHBC) release

I authorize the Friend of the Court (FOC) office to conduct a CHBC by name and identifiers to determine the existence of any criminal history through the Internet Criminal History Access Tool (ICHAT).

- The position I am applying for will require that I work directly with children. Therefore, I give permission for the FOC office to conduct a Central Registry (CR) clearance report through the local Michigan Department of Human Services office. My authorization and identification information, as required by MCL 722j(3), is below.

I understand that this is a condition of working at the FOC office, and failure to sign this form and comply with the terms above will prevent the FOC office from hiring me for any position.

Name (printed): _____

Signed: _____

Dated: _____

Date of Birth (MM/DD/CCYY): _____

Gender (circle one): Male / Female

DHS: Return the Central Registry clearance form to the address listed in the letterhead above, Attention: _____.

Copy of Driver's License, State ID, or other photo identification of individual to be searched:

SCAO Administrative Memorandum 2009-01
FOC Prospective and Existing Employee Criminal History Background Checks
Appendix D: DHS CR Clearance Response form



JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF HUMAN SERVICES
LANSING



ISMAEL AHMED
DIRECTOR

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Dear _____

This letter is in response to your request for a Child Abuse/Neglect Central Registry (CA/NR) clearance to be performed.

This clearance has been performed by the Michigan Department of Human Services concerning _____ . The results of this clearance indicate that as of _____ , the following results should be noted: (Check only one box).

There is no record of _____ as being identified as a perpetrator of child abuse and/or neglect on the Child Abuse/Neglect Central Registry system as of the date of the inquiry.

A clearance performed on the Child Abuse/Neglect Central Registry system indicates _____ is listed as a perpetrator of child abuse and/or neglect. This listing originated in _____ County on (date) _____

To request amendment or removal of your name from the Child Abuse/Neglect Central Registry system you must make a request in writing to the county that originated the listing. If you have further questions regarding your case, please contact the local DHS office that originated the listing at _____ .

This information is confidential as described in the Michigan Child Protection Law and may not be shared or made public.

Sincerely

Printed Name: _____
Phone Number: _____
Fax Number: _____

Department of Human Services (DHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, sexual orientation, political beliefs or disability. If you need help with reading, writing, hearing, etc., under the Americans with Disabilities Act, you are invited to make your needs known to a DHS office in your area.