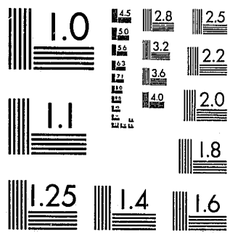

CRIMINAL JUSTICE INFORMATION POLICY IN THE SEVENTIES . . .

Is the Balance Shifting, Toward Privacy or Openness?

SEARCH GROUP Inc.
The National Consortium for Justice Information and Statistics

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CRIMINAL JUSTICE INFORMATION POLICY IN THE SEVENTIES . . .

IS THE BALANCE SHIFTING TOWARD PRIVACY OR OPENNESS?

A Report of a Round-Table Conference

held
September 15, 1978

in
The U.S. Capitol Building
Washington, D.C.

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CRIMINAL JUSTICE INFORMATION POLICY IN THE SEVENTIES . . . IS THE BALANCE SHIFTING TOWARD PRIVACY OR OPENNESS?

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I. INTRODUCTION

PURPOSE OF THE CONFERENCE

On September 15, 1978, SGI brought together approximately thirty-five federal, state and local officials to discuss developments in criminal justice information policy. Appropriately, the meeting was held in the same room in the United States Capitol Building in which the Privacy Protection Study Commission held its first meeting.

As the 70's draw to a close, many observers of the development of criminal justice information* policy are increasingly perplexed about the direction of the policymaking process. There continue to be signs that some policymakers will impose strict confidentiality and other privacy safeguards upon the use of criminal justice records. By contrast, it is equally apparent that other policymakers are increasingly apt to treat criminal justice information as open records in which the public or at least selected groups are entitled to obtain access.

The purpose of the privacy round-table discussion was to facilitate the exchange of views among federal, state, and local officials. The one day conference sought to bring together key officials to assess the trends in criminal justice information policy; share experiences regarding this policymaking process gained over the last decade; and begin to build agreement on the proper direction of this process.

CONTENT OF THE REPORT

This report is in two parts. The first part presents, in a slightly edited form, the briefing paper that was distributed to round table participants in advance of the meeting. The briefing paper was prepared to assist participants in drawing conclusions about trends in criminal justice information policy. It reviews important criminal justice information developments in the last decade in three areas: federal legislation and regulations; state legislation and regulations; and state and federal case law. The briefing paper is included in this report because its information and analysis should prove useful to the readers and provides the needed background for the second part of this report. The second part summarizes the presentations and discussions that took place at the Round Table. Specifically the conference summary consists of a description of the remarks made by a panel of federal officials; the remarks made by a panel of state officials, and the "round-table" discussions that followed these prepared presentations.

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* For a definition of criminal justice information, see Appendix.

II. REVIEW OF FEDERAL AND STATE CRIMINAL JUSTICE INFORMATION LAW AND POLICY

FEDERAL CRIMINAL JUSTICE INFORMATION POLICY

Federal Statutes

During the first half of the 70's, Congressional committees considered but rejected a number of comprehensive bills that would have regulated both federal and state criminal justice information policy. As a consequence, the federal government's approach to criminal justice information policy only covers federally held criminal justice information* and continues to be expressed on a piecemeal basis in several statutes and regulations.

The two most important statutes are the Freedom of Information Act (FOIA) and the Privacy Act. The Freedom of Information Act was enacted in 1966 to promote public access to federal information. In 1974 the FOIA was substantially amended to further accomplish this end. The FOIA makes all written information in the possession of federal agencies available upon request to any member of the public unless the request can be denied under one of the FOIA's nine exemptions.

Two of the FOIA's exemptions are likely sources of authority for denying access to criminal justice information: subsection (b)(6) if the disclosure would constitute a clearly unwarranted invasion of the subject's privacy; and subsection (b)(7) if the information is investigatory records compiled for law enforcement purposes and the disclosure would —

A. interfere with enforcement proceedings,

B. deprive a person of a right to a fair trial or an impartial adjudication,

C. constitute an unwarranted invasion of personal privacy,

D. disclose the identity of a confidential source, and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

E. disclose investigative techniques and procedures, or

F. endanger the life or physical safety of law enforcement personnel.

The Privacy Act of 1974 sets collection, subject access, record management, and confidentiality standards for federal agency handling of personal information.** However, federal criminal justice agencies can exempt themselves from the subject access provisions and most of the collection and record management standards. Indeed, the legislative history of the Privacy Act indicates that the Congress intended to address these aspects of criminal justice information policy in separate legislation.***

However, a criminal justice agency cannot exempt itself from the confidentiality provisions of the Privacy Act. These provisions prohibit an agency from disclosing information to a third party unless the subject has consented to the disclosure or the disclosure can be made pursuant to one of the Act's eleven exemptions. The exemptions permit, among other things, disclosures that are compelled under the FOIA; disclosures to law

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* With the exception of regulations promulgated by LEAA, 28 CFR part 20, subpart B and discussed later in this paper.

** Provided that the information is maintained in a "system of records" from which information can be retrieved by name or other identifying characteristic.

*** H.R. Rep. No. 93-1416, 93rd Cong., 2d Sess. at p. 18 (1974).

enforcement agencies if specified conditions are met; disclosures to any third party for purposes compatible with the purpose for which the information was collected; and disclosures to persons within the record keeping organization on a "need to know" basis. Most observers believe that as a practical matter the Privacy Act has very little effect upon disclosure practices.

Perhaps the most visible impact of the amended FOIA and the Privacy Act upon federal criminal justice information practices has been the tremendous increase in the number of requests from subjects made to the Department of Justice and other federal law enforcement agencies for access to their criminal justice records. At one point the FBI's backlog ran as high as 8,400 requests and created processing delays of up to nine months.*

Federal Regulations

In 1976, the Department of Justice issued a set of regulations that have a significant impact on the handling of criminal history records by state and local criminal justice agencies and, at the federal level, by the Department of Justice.** The regulations were issued pursuant to the single privacy standard that the Congress adopted during the 70's dealing with criminal justice information. Section 3771(b) of the Crime Control Act of 1973 (which amended the Omnibus Crime Control and Safe Streets Act of 1968) directs the executive branch to assure that the privacy of all criminal history information is adequately provided for, and further directs that such information, "only be used for law enforcement and criminal justice and other lawful purposes."*** The specific implications of this admonition have not been considered in any detail by the courts.

The portion of the regulations that deals with federally held information sets record management, third party disclosure, and subject access standards that apply to the Department of Justice's criminal history record information systems used by federal, state, and local criminal justice agencies.° The regulations give the Federal Bureau of Investigation responsibility to operate the National Crime Information Center, including the computerized criminal history file--a federal, state program for the interchange of criminal record information. Under these regulations, the Department of Justice and participating criminal justice agencies can disclose criminal history information to criminal justice agencies; and to federal and state non-criminal justice agencies for employment determinations and other purposes set by law; and to the public where the information will be helpful to the apprehension of a wanted person. The regulations also permit disclosure of criminal justice information including arrest and conviction information that is "reasonably contemporaneous" with the event to which it relates. Other disclosures are prohibited.

The regulations give record subjects a right to review their criminal history records and request correction of any entries that they believe are incorrect or incomplete. Finally, the federal regulations require all criminal justice agencies contributing criminal history records to Justice Department record systems to assure that the record is kept complete, accurate, and current. The Justice

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* FOIA Annual Report 1976.

** 28 CFR Part 20, Subparts A-C.

*** 42 U.S.C. Sec. 3701 et seq. PL 93-83.

° 28 CFR Sec. 20.30 et seq. (Subpart C). Part B of this chapter includes a discussion of Subpart B of these regulations authored by LEAA which apply to state held information.

Department defines current as meaning that all dispositions must be entered into the system within 120 days of their occurrence.

The Computerized Criminal History (CCH) program in the FBI's National Crime Information Center (NCIC) authorized in the Justice Department regulations also operates pursuant to a supplemental policy statement dated October 20, 1976. That policy statement indicates that, if and when the CCH program is fully developed, it would create an automated national system operated by the FBI for the interstate exchange of criminal history information. Criminal history records of federal and multistate offenders would be left at the state level; however, an index of these records, including an abbreviated criminal history record would be maintained in the national file. Inquiries from participating criminal justice agencies would be answered by retrieval of information from the national file or by an automated switching capability that would retrieve the information from the appropriate state.

This plan has generated considerable controversy, much of it couched in terms of "Big Brotherism" and invasion of privacy. Some critics charge that a national system for the exchange of criminal histories will not lead to more effective law enforcement but will increase the harassment of citizens and exacerbate privacy problems.* In a different vein, others question the practicability of such a national system.**

Within the criminal justice community there is general agreement that some type of system should exist for the interstate exchange of criminal histories. However, there is considerable disagreement about the nature of this system. For example, criminal justice officials disagree about whether the system should have a message switching capability or merely an indexing or pointer capability. A message switching capability permits automatic retrieval of information. A pointer system merely tells one state that it should contact a second state for information about the subject of their request. There is further disagreement as to whether this message switching or pointer capability should belong to a federal agency such as the FBI or to a non-federal agency. Finally, criminal justice officials continue to disagree about the privacy and security safeguards that ought to be built into any interstate exchange system.

Federal Bills

Given the absence of a comprehensive national policy for criminal justice information, there has been significant support in the Congress and among executive agencies--including the Department of Justice--for enactment of a comprehensive criminal justice information statute.

The first important criminal records bill was introduced in 1971 by Senator Roman Hruska (R-Neb.). S. 2462 included a detailed treatment of record security, including a requirement that telecommunications services used to transmit criminal histories be "dedicated" exclusively to that purpose. It also gave subjects a right to see their criminal history files. The bill died in Committee.

In early 1973, H.R. 188 and H.R. 9783 were introduced. These bills contained confidentiality provisions, including sealing and purging standards, for arrest records. In late 1973, the first comprehensive criminal justice information system bills were introduced (H.R. 12574/S. 2964; H.R. 12575/S. 2963 and S. 4252). For the first time the Congress had before it comprehensive legislation that included subject access provisions, third party disclosure limitations, and record management standards. Both sets of

* See the ACLU Privacy Report, Volume V, No. 9, April 1978.

** See a report of the Scientists' Institute for Public Information (1977).

bills also contained provisions establishing the right of the individual to access to his own record for purposes of challenge. Although earlier bills addressed only criminal history information, this set of bills also covered intelligence and investigative information.

The bills underwent hearings throughout 1974 and attracted considerable attention. Nevertheless, they were not reported out of Committee during the 93rd Congress. Congressman Don Edwards (D-Cal.) and Senator John Tunney (D-Cal.) reintroduced the bills in the first session of the 94th Congress as H.R. 61/S. 1428 and H.R. 62/S. 1427. Within a few months the sponsors amended and combined the bills into a single bill, introduced in the House as H.R. 8227 and in the Senate as S. 2008. In the summer of 1974, both the House and the Senate held extensive hearings.

Despite Congressional interest, the bills died in Committee. Media opposition to what the press perceived as an undesirable tightening of restrictions on public access to criminal justice information is widely blamed for the bills' failure. The bills were also opposed by some criminal justice agencies that believed that the bills would unduly restrict their record management and disclosure practices.

Four years have passed since the Congress has given serious consideration to comprehensive justice information legislation. During that time the Congress' attention has focused instead on one particular aspect of criminal justice information policy--collection of personal information by government agencies, including criminal justice agencies. Until this session of the Congress, most of that attention centered on H.R. 214 (S. 1888), the Bill of Rights Procedures Act. The bill was originally introduced in the Spring of 1974 by Congressman Mosher (R-Ohio) and Senator Mathias (R-Md.) In its original version the bill, among other things, would have required every federal agency, including criminal justice agencies, to obtain a court order (after a showing of probable cause that a crime had been or was about to be committed) before getting access to personal records of telephone, credit, bank, medical, and other personal transactions. In subsequent sessions, the Congress modified H.R. 214 to include only telephone toll, financial, and credit records. The bill is still before the House Subcommittee on the Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary.

In its current session, the Congress has given more serious consideration to H.R. 9600 (before the House Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the Committee on Banking, Finance and Urban Affairs). As reported out of the House Subcommittee, the financial privacy title of H.R. 9600 requires that, prior to obtaining access to an individual's bank records in any investigation in which the individual is a target or is likely to become publicly implicated, the federal agency seeking the record, including criminal justice agencies, must give the subject of the record notice of the request and opportunity to go to court to block the request.* The bill would permit agencies to obtain bank records without first giving the subject notice in only a few circumstances, most of which require either prior court review or use of a grand jury subpoena. The House bill is based in part on recommendations made by the Privacy Protection Study Commission, a two year independent federal commission created by the Privacy Act.

Most observers think that the House bill has a reasonable chance of enactment

* In its original form the House bill applied to all government agencies, including state and local criminal justice agencies. The present version of the bill applies only to federal agencies.

this session.* If enacted, the approach taken in the bill is considered more likely than the approach in H.R. 214 (automatic prior court review) to be the prototype for future legislative standards for governmental collection of other types of sensitive personal information.

STATE CRIMINAL JUSTICE INFORMATION POLICY

The state experience in the 70's has differed in a few key respects from the federal experience. First, a number of states have adopted comprehensive criminal justice information acts which include record management, subject access, and third party disclosure standards. Second, a number of other states have taken an opposite tack and apply only their open records laws (similar to the federal Freedom of Information Act) to criminal justice records (although all of these states recognize some exceptions). Third, a few states have already enacted government access statutes that place limits on the circumstances under which government agencies, including criminal justice agencies, can obtain personal bank records. Finally, the state legislatures have been extremely active in their consideration of criminal justice information bills. During the past year alone, 34 state legislatures considered bills dealing with the privacy of criminal justice information.

LEAA Regulations

Before reviewing these developments it is important to note that one part of the Department of Justice regulations that implement the Crime Control Act of 1973 also set record management, subject access, and third party disclosure standards for criminal history records maintained in state criminal justice record systems--provided that the state operates the system with funds from LEAA.** The regulations do not affect third party disclosure of conviction information (including arrest information without a disposition where one year from the date of the arrest has not elapsed), investigative and intelligence information and correctional and release information. However, under the regulations state criminal justice agencies cannot disclose non-conviction information (arrests over one year old, various types of dismissals and acquittals) to any non-criminal justice agency unless the disclosure can be made pursuant to a federal or state statute, regulation, administrative order or judicial decree. When fully implemented the LEAA Regulations should have the effect of instituting uniform minimum standards for disclosure of non-conviction information.

The Regulations also give subjects direct access to their criminal history records and an opportunity to request correction of allegedly inaccurate or incompiete entries. In addition, the Regulations contain record management standards, including requirements for completeness and accuracy and detailed security measures.

State Statutes and Regulations

The necessity to comply with the LEAA regulations has undoubtedly contributed to the states' awareness of criminal justice information issues. Perhaps as a consequence, the states have been extremely active over the last few years in enacting criminal justice information legislation.

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* In the closing hours of the 95th Congress, the House and Senate enacted Title XI of H.R. 14279 (the successor to H.R. 9600) as P.L. 95-630, "The Right to Financial Privacy Act of 1978". The new law contains the subpoena requirements and the customer notice and challenge rights found in H.R. 9600. Effective March 10, 1979 all federal agencies will have to comply with these requirements.

** 28 CFR Sec. 20.20 et. seq. (Subpart B).

Another consequence of the LEAA regulations is the establishment or movement toward the establishment of a central state criminal history record repository in virtually every state. Central repositories collect criminal history records from local criminal justice agencies and redisseminate the records to appropriate users.

A comparison of state criminal justice information statutory law in 1974 and 1977 done for LEAA* indicates a substantial increase in the number of states with statutory provisions, particularly third party disclosure and subject access provisions. The LEAA survey found that by 1977 about 80 percent of the states had enacted provisions that place some sort of limitation on third party disclosure of criminal history information. The survey also noted that more than 80 percent of the states have open record laws. However, the extent to which the open record laws apply to criminal justice records and their compatibility with criminal justice confidentiality provisions is a matter of debate and uncertainty in many states. Twenty-four states now have express statutory limits on disclosure of intelligence or investigative information to third parties.

The survey also indicates that the great majority of the states (80 percent) now provide for subject access to their criminal history records. By contrast, most states have not enacted comprehensive standards for record management or collection. The one exception is the adoption in 41 states (three times the number in 1974) of a standard that criminal history information be accurate and complete. (This is also a requirement under the LEAA regulations.)

However, the survey shows that other "traditional" record management standards have not been implemented by statute in most states. For example, less than ten states require that intelligence files be maintained separately from criminal history files; only eleven states require criminal justice agencies to keep disclosure or transaction logs; twenty-six states now have some sort of statutory security provisions (up from twelve in 1974), although only three require the use of "dedicated" computer systems; only eight states require publication of the existence of a criminal history information system; and only eighteen states have adopted training requirements for record management employees.

The LEAA survey found that a major change between 1974 and 1977 is the increase from 15 percent to 80 percent in the number of states that have statutorily designated an agency to oversee or regulate criminal justice information policy. Ten states have entrusted this duty to a "privacy and security council." Other states have entrusted these same concerns to other types of regulatory bodies.

Several states, including Alaska, California, Colorado, Georgia, Iowa, Maryland, Massachusetts and Oregon, now have relatively comprehensive privacy and security statutes or regulations for criminal justice information.**

A review of state statutory and regulatory provisions suggests a few conclusions about the current status of state law. First, there is a large consensus that favors some type of subject access and correction and challenge rights. Secondly, the confidentiality provisions in state law are uniform only in their most general outline—most states

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* See, Privacy and Security of Criminal History Information Compendium of State Legislation, NCJISS, LEAA 1978, a copy of which was distributed to all conference participants.

** In addition 12 states have also enacted comprehensive privacy or fair information practice laws modeled after the Federal Privacy Act that apply to personal information in state files. However, all of these states, with the exception of one (Minnesota), partially or fully exempt criminal justice information systems.

give considerable discretion to information system boards and local criminal justice agencies to set the specifics of their disclosure policy. Finally, there is great variance among the states regarding information policies for record management and collection.

State Bills

As previously noted, the state legislature in 1978 considered 34 bills dealing with information policy for criminal justice records. Of that number, almost half proposed tighter restrictions on disclosure of criminal justice information. At the opposite pole, roughly a half dozen of the bills contained provisions for increased disclosure of criminal justice records, including proposals for greater disclosure to the public, to employers, and, in one case, to state legislators. A few of the bills dealt primarily with record management issues including the creation of central state repositories. A couple of bills provided for increased rights of subject access, including, in one case, a bill to permit subject access to criminal investigative files. The legislative docket for 1978 also included bills that placed limits on criminal justice agency collection of bank records. Finally, a few states considered comprehensive criminal justice information bills.

The disclosure provisions in the bills that dealt with criminal history records can be categorized as:

A. requiring disclosure of criminal history record information to non-criminal justice persons or agencies be made pursuant to a written contract whereby the recipient agrees to abide by applicable laws and regulations (Minn. H 1933; Pa. H 2094; Pa. H 2095; R.I. 1061);

B. requiring that positive fingerprints or other similar identification of the subject be provided as a condition to disclosure of criminal history record information (Ga. S 439; Iowa H 304; Pa. H 2095);

C. restricting disclosure of criminal history information to non-criminal justice agencies except as may be authorized by law or in accordance with state or other more restrictive guidelines (Iowa H 304; Kan. S 406; Md. H 557; Minn. H 1933);

D. limiting disclosure of state summary criminal history records to federal officers, except in situations where (1) there is a compelling need; (2) access is expressly authorized by statute; (3) the record is needed for performance of official duties; and (4) the Attorney General chooses to grant such access (Cal. A 2724);

E. prohibiting an employer requiring an employee or potential employee to exercise his access rights to criminal history files and then turn the files over to the employer (Conn. H 5494; Kan. S 406);

F. limiting non-criminal justice agencies' use of criminal history information obtained from state criminal justice agencies to only those purposes for which information was given, and prohibition against secondary disclosure (Conn. H 5494; Pa. H 2094; Pa. H 2095);

G. permitting federal agencies to obtain conviction data for employment and security clearance purposes only for felony convictions within the last five years (Iowa H 304).

The disclosure provisions regarding arrest and non-conviction data only can be categorized as:

A. prohibiting an employer from asking employees or prospective employees for the latter's arrest-without-conviction history or asking if the employee was ever arrested (Cal. A 3675; Conn. S 229);

B. prohibiting disclosure of non-conviction data, except where required to implement a law or executive order that expressly refers to criminal conduct or as authorized by statute or court order (Conn. S 229; Hawaii H 3034; Hawaii S 2593; Pa. H 2095; Va. S 452);

C. prohibiting disclosure of non-conviction data to non-criminal justice agencies, except as may be authorized by a state council or in accordance with state law (Iowa H 304; Kan. S 406; Md. H 557).

Model Statutes

There are signs that the development of criminal justice information policy, despite the heterogeneity of state statutes, is approaching model law stage. The Department of Justice/LEAA regulations have introduced a degree of uniformity to state and federal policy. In addition, a few model statutes or model legislative standards have received acceptance among state and federal policymakers. For example, the standards published by the National Advisory Commission on Criminal Justice Standards and Goals,* have been widely circulated.

In addition, SGI published a Model Act for Criminal Offender Record Information in May of 1971 that had an influence on the design of policies for state criminal justice information systems. The 25 model standards in SGI's Technical Report 13 substantially update and broaden the scope of the provisions in the Model Act.** At last count, 18 states had enacted one or more statutory provisions that are based upon the legislative standards in Technical Report 13.

Recently a Committee of the National Commission on Uniform State Laws has begun work on a section of their comprehensive model state privacy act that will deal with criminal justice information policy.

FEDERAL AND STATE CASE LAW

The content of criminal justice information case law is naturally a product of the statutory law that the courts are called upon to interpret. Nevertheless, it is worthwhile to review recent decisional law in order to assess the enforcement history of criminal justice information statutes and to gauge common law and Constitutional developments that affect criminal justice information policy. The case law can be most usefully analyzed in terms of the four types of information operations that occur in the criminal justice context: (1) collection of personal information; (2) record management; (3) subject access; and (4) third party disclosure.

Collection of Personal Information

American law has always placed relatively sharp limits on the permissible circumstances and methods that apply to the collection of personal information by government and particularly law enforcement agencies. The Fourth Amendment to the Constitution and, to a lesser extent, other amendments set standards for permissible government investigative activities.

A great body of case law, particularly in the Fourth Amendment area, has struggled with the nature and scope of these standards. The thrust of this case law indicates a concern to protect individuals from unjustified or abusive intrusion upon their persons, homes, and other private areas. With rare exception, this body of law does not address an individual's interest in information privacy--at least when the information is maintained by a third party record keeper such as a bank or insurance company.

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* In Report on Criminal Justice, National Advisory Commission on Criminal Justice Standards and Goals (1973).

** The second edition of Technical Report 13 (1978) was distributed to all conference attendees.

Thus, the courts have generally refused to hold that an individual can assert a privacy interest in his personal records to prevent a bank or any other third party record keeper from disclosing those records to a law enforcement agency.* Only in rare circumstances have courts been willing to impose limitations on criminal justice agency collection of personal records from third party record keepers. In White v. Davis** and People v. Collier*** for example, the courts objected to police investigations for criminal intelligence purposes because the investigation was not sufficiently related to any anticipated wrongdoing and the investigation threatened to chill the exercise of the subject's First Amendment rights.

Record Management

There is relatively little case law concerning the extent to which criminal justice agencies have an obligation to meet record management standards (e.g., adequate security, accuracy, and completeness standards, segregation of records, training of employees, audit and purge standards). Most of the reported record management decisions involve judicial interpretations of statutorily imposed record management standards. However, in several decisions involving the issue of accuracy and completeness of criminal justice records the courts have suggested that Constitutional considerations may apply.

In Tarlton v. Saxbe,° for example, a federal court of Appeals panel considered the extent to which the FBI has a duty under 28 U.S.C. Sec. 534 "to safeguard the accuracy of information in its criminal files which is subject to dissemination." The subject claimed that several of his arrest entries lacked dispositions and asked the Court to order the inclusion of disposition data. The Court of Appeals found that the complaint stated a cause of action in that the FBI may have a duty to take reasonable measures to insure the accuracy of information in its files, notwithstanding that the information was originally received from state sources, and considerations of federalism would place basic responsibility upon the local law enforcement agency. The opinion was in part based on the Court's Constitutional view of the consequences of permitting the maintenance of inaccurate criminal justice data.

> [G]overnment collection and dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy could induce a levelling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment.*

Another recent federal district court opinion, Maney v. Ratcliff,** found potential constitutional violations where criminal justice agencies maintain inaccurate records. The plaintiff was subjected to repeated arrests because a fugitive warrant entry in the FBI's National Crime Information Center had not been updated to indicate that Louisiana officials had declined to pursue extradition.***

In the case of the United States V. Kalish,° involving a motion to expunge an arrest record created by a mistaken arrest, the U.S. District Court granted the motion to expunge the record on the grounds that preservation of such a record constituted an "unwarranted attack upon his character and reputation and violated his right of privacy as well as his dignity as a human being..."

Very few reported decisions deal with record management issues other than completeness and accuracy. In a non-criminal justice context, a New York State Court recently found that computerization of personal medical records in a state's information system did not threaten the security or privacy of the data. The court denied a data bank subject standing to challenge the conversion to automated record keeping.∞

Subject Access

As previously noted, subject access to his criminal history records is assured in federal and most state jurisdictions. Apparently subjects have been satisfied with agency responses to their access requests. In any event, subject actions to enforce statutory access rights to criminal justice information have not been reported.

In the absence of a statute, the courts have rejected arguments that subjects have a right of access to their criminal history files under common law or Constitutional theories.∞∞ In volitional record keeping relationships where the subjects more or less voluntarily initiate the record keeping process, such as those involving medical or employment records, the courts are more willing to interpret the law so that subjects have a right to see their records. At least a couple of state courts have declared that patients have a common law right to see their medical records.+

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* See, for example, United States v. Miller, 425 U.S. 435 (1976).

** 120 Cal. Rptr. 94 (1975). Note, however, that California's Constitution contains an express right of privacy provision.

*** 376 NYS 2d 954 (1975) and see, Black v. Sheraton Corp. of America, 371 F.Supp. 97 (D.C.D.C. 1974) wherein the court refused to permit the FBI to withhold records under the FOIA's investigatory records exemption because the intelligence investigation was not related closely enough to an investigation of legitimate law enforcement interest.

° 507 F.2d 1116 (D.C. Cir. 1974)

* Id., at 1124

See also, Shadd v. United States 389 F.Supp. 721 (W.D. Pa. 1975) wherein a federal district court relying upon the decision in Tarlton ordered the FBI to correct the plaintiff's record by clarifying and updating entries concerning certain state charges.

** 399 F.Supp. 760 (E.D. Wisc. 1975).

*** See also, United States v. Mackey 387 F.Supp. 1121 (D. Nev. 1975) and "Constitutional Law - 4th Amendment - Computerized Law Enforcement Records - Where an Individual is Subjected to Repeated Arrests as a Result of NCIC Entry there is a 4th Amendment Violation" Hofstra L. Rev. 4:881-94 (Sept. 1976).

° 271 F.Supp. 968 (D.C.P.R. 1967).

∞ Volkman v. Miller 383 NYS 2d 95 (1976) aff'd 394 NYS 2d 631 (1977).

∞∞ Whittle v. Munshower 221 Md. 258, 155 A2d 670 (1959); cert. den. 362 U.S. 981, + LEd 2d 1016 80 S.Ct. 1069 (1960).

\+ See, for example, Hutching v. Texas Rehabilitation Commission 544 SW2d 802 (1976).

Third Party Disclosure

By far the great majority of criminal justice information case law involves questions about the disclosure of records to third parties. The clash of interests over disclosure decisions is especially sharp. Third parties such as governmental non-criminal justice agencies, private employers, and the media all make strong arguments for access to criminal justice records. At the same time, the subject's interest in protecting his privacy, as well as society's interest in promoting offender rehabilitation, constitute impressive arguments for denying disclosure in at least some circumstances. Identifying those circumstances in a correct and consistent manner has challenged the courts.

Most judicial disclosure decisions turn on the type of criminal justice record sought and thus the following discussion looks at disclosure case law under four headings: disclosure of conviction information; disclosure of non-conviction information (arrest records); disclosure of intelligence and investigation information; and disclosure of correctional and release information.

Conviction Record Information

Disclosure questions about conviction records has generated relatively little judicial controversy. Disclosure policy for conviction records is set by statute in almost all jurisdictions and generally treats the record as public information—at least for a 5 to 7 year period after the conviction. In the absence of a statutory disclosure provision, the courts have been unwilling for the most part to limit the availability of conviction records.*

Arrest Record Information

A large body of reported cases has dealt with the issue of disclosure policy for arrest records. Much of the controversy that surrounds this issue rests on a very basic concern as to whether an arrest record is a reliable or probative indicator of wrongdoing. Support for both points of view can be found in court opinions. For example, the Supreme Court, in reviewing the constitutionality of state action to exclude an applicant from admission to the Bar because of an arrest record, noted that arrest, by itself, is not considered competent evidence at trial to prove that a defendant committed the act in question, and concluded:

> The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.**

A detailed opinion written by a Texas state court makes the "common sense" argument for the utility of arrest records.

> Giving full credit to the presumption of innocence, it would be naive to assume that an individual's arrest history is irrelevant to police activity. We cannot ignore the truth that many guilty men go free and are not even charged in some cases.***

Where the arrest is recent and the charges are still pending, the courts are likely to be more persuaded by disclosure arguments, provided that there is no indication that the arrest was mistaken or improper. Furthermore, a third party's interest in data about a recent arrest is

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* See, for example, State v. Nolan 316 SW 2d 630 (Mo. 1958).

** Schware v. Board of Bar Examiners of the State of New Mexico 353 U.S. 232, 241 (1957).

*** Houston Chronicle Publishing Co. v. City of Houston 531 SW 2d 177, 187 (Tex. Ct. of App. 1975).

greater because the information is current and perhaps newsworthy. For example, a decision interpreting the federal FOIA and Privacy Act, Tennessean Newspaper Inc. v. Levi,* upheld a newspaper's request for current arrest information and biographic and investigative data in part on the ground that recent criminal conduct is not the type of personal activity that the FOIA's (b)(6) privacy exemption should shelter. The court further denied the U.S. Attorney's claim that the Privacy Act narrows the FOIA's (b)(6) standard. The opinion suggests that individuals who engage in wrongful conduct "waive" a right to remain protected by societal privacy rights. The court remarked that individuals who are arrested or indicted:

> become persons in whom the public has a legitimate interest and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest. The lives of these individuals are no longer truly private . . . this right becomes limited and qualified for arrested and indicted individuals who are essentially public personalities.**

When presented with the question of disclosure of arrest records that are not so current, the courts have generally opted for a middle ground. Court opinions recognize that an arrest record is damaging to the subject but courts also recognize that efficient law enforcement and public safety demand that criminal justice agencies retain a broad capability to use and disclose such information.*** The balancing approach dictated by these considerations is reflected in language used by an Ohio state court in discussing the arrest record dilemma.

> It is the opinion of this court that there exists in the individual a fundamental right of privacy, the right to be left alone. The potential economic and personal harm that results if his arrest becomes known to employers, credit agencies or even neighbors may be catastrophic.

But the opinion goes on to point out,

> [A]s a means for identification and apprehension of criminals, an arrest record does serve the police community as a most valuable tool. National, state and citywide crime detection and prevention are based upon a system of information and communication.°

A fear that arrest record information will unfairly penalize subjects if the data leaves the criminal justice community has led several courts to interpret statutory provisions so that the result is to curtail disclosures to private parties. For example, in Houston Chronicle Publishing Co. v. City of Houston,∞ the court upheld the validity of provisions in Texas' Open Records Act that discontinued public disclosure of criminal history information. The opinion acknowledged that both the press and the public have a "constitutional right of access to information concerning crime in the community." However, in the court's opinion this constitutional right must be balanced against other com-

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* 403 F.Supp. 1318 (M.D. Tenn. 1975).

** See also, Christy v. U.S. 58 F.R.D. 375 (N.D. Tex. 1975) and Columbia Packing Co., Inc. v. U.S. Dept. of Agriculture 417 F.Supp. 651 (D.C. Mo. 1976).

*** See, for example, United States v. Kelley, 55 F.2d 67 (2nd Cir. 1932); Herschel v. Dyra 365 F.2d 17 (7th Cir. 1966) cert. denied 385 U.S. 973 (1966); Fowler v. Alexander 340 F.Supp. 168 (M.D.N.C. 1972).

° State v. Pinkney 290 NE 2d 923, 924 (C.D. Ohio 1972).

∞ 532 SW 2d 177 (Tex. Ct. of Apps. 1975).

peting interests such as the states' legitimate interest in preserving the secrecy of their records from the eyes of the defendants and in protecting those defendants from excess publicity. The court denied access to the personal arrest record, remarking that "many persons arrested are wholly innocent." Furthermore, misleading and erroneous entries are often included. The court concluded that weighing the need for background information against individual privacy compelled the conclusion that disclosure should not be permitted.

The U.S. Court of Appeals for the District of Columbia has also recognized deficiencies in arrest records that make their disclosure outside the criminal justice community dangerous. Morrow v. District of Columbia* affirmed an order of the federal district court prohibiting general dissemination of an individual's arrest record. The order was fashioned to comply with the recommendations of a federal report which had suggested that such information not be disseminated to employers but that distribution to law enforcement agencies be permitted. The basis for the ruling was the fact that employers cannot or will not distinguish between arrests resulting in convictions and those which do not. Underlying the rationale was the feeling that tremendous harm can be caused to an individual by the unfettered distribution of criminal history information.

Particularly where an arrest is shown to be arbitrary or where the adjudication is not expeditious, courts are inclined to interpret statutes so that disclosure of the arrest record is prohibited or curtailed. The policy basis for such rulings is identical to expungement orders for maintenance of inaccurate or incomplete criminal justice information—an individual should not be the victim of the maintenance or disclosure of unreliable information.

For instance, in Menard v. Mitchell** the plaintiff sued the FBI to expunge his fingerprint and arrest record. The arrest had not led to prosecution. Menard had been taken into custody and held for two days in California. After that time the police determined that they did not have sufficient grounds for the charge against Menard, and he was released. Under a California statute, the arrest was classified as "detention only". The District Court denied Menard's motion, but the Court of Appeals reversed that holding and said that in view of possible adverse effects on the plaintiff, including possible dissemination of records, such an arrest does not justify maintenance of the information in the FBI's files.

A recent Supreme Court decision, Paul v. Davis,*** may cause lower courts to be less inclined to limit disclosure of arrest records. In Davis the Court held that a police chief's action in distributing a flyer of "active shoplifters" which included the plaintiff's name and photograph did not deprive the plaintiff of his constitutional rights of liberty and due process and thus did not give rise to a cause of action under 42 U.S.C. Sec. 1983 for deprivation of Constitutional rights. The plaintiff had been arrested for shoplifting, but 17 months later when the flyer was distributed, he had still not been prosecuted. The Supreme Court's decision characterized the plaintiff's claim in part as resting on an assertion that "the state

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* See, for example, Hughes v. Rizzo 282 F.Supp. 881 (E.D. Pa. 1968) and Sullivan v. Murphy 478 F.2d 938 (D.C. Cir. 1973) cert. denied 414 U.S. 880 in which the courts ordered expungement of records of arrests that were made for purposes of political harrassment and without use of proper arrest procedures.

** Menard v. Mitchell 430 F.2d 486 (U.S. App. D.C. 1970) on remand 328 F.Supp. 718 (D.C.D.C. 1971).

*** 424 U.S. 693.

may not publicize a record of an official act such as an arrest." The opinion concluded:

> None of our substantive privacy decisions hold this or anything like this and we decline to enlarge them in this manner.*

The court's decision is limited to instances where distribution is not made pursuant to an explicit statutory command and where the plaintiff's only alleged injury from the distribution is defamation. Nevertheless, the decision may well be read by lower courts as a sign in support of more liberal rules for disclosure of arrest record information.

Intelligence and Investigative Information

A sizeable body of decisional law has interpreted federal and state statutory provisions in a manner that enhances agency ability to shelter investigative and intelligence files from disclosure requests. Indeed, the principal judicial dispute concerning investigative files has not concerned the issue of whether disclosure can be denied but for how long. Prior to the 1974 amendment of the investigative exemption in the federal FOIA, one group of federal decisions held that investigatory files must be released once enforcement proceedings were no longer contemplated. Another conflicting group of decisions held that investigatory files were exempt permanently from disclosure on the ground that the purpose of the exemption was to keep confidential the process by which an investigation is conducted.

The Supreme Court alluded to this split of authority in NLRB v. Sears Roebuck & Co.** However, the Court felt that it was unnecessary to resolve the split because the statutory amendment repudiated the line of cases that held that once withheld, always withheld. Investigative information connected with pending or contemplated proceedings will ordinarily remain secret because disclosure would interfere with enforcement proceedings. However, under present federal law investigative data not connected with pending federal proceedings will be secret only if the government can establish that disclosure would produce one of the other five types of harm identified in the exemption.

State courts have relied heavily upon analysis in federal decisions in interpreting analogous investigative and intelligence exemptions in their own open record laws. In Jensen v. Schiffman,*** for example, the court interpreted Oregon's open record law in light of the line of federal decisions that holds that the termination of an investigation makes disclosure of investigative files more likely.

Correctional and Release Information

Very few reported decisions have considered the disclosure issues associated with correctional and release information. The few reported decisions indicate a concern for the need for confidentiality in order to insure candor and subjectivity in correctional reports. For example, in Turner v. Reed,° the court upheld an Oregon Parole Board's decision not to disclose certain correctional and release

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* 424 U.S. 714.

** 421 U.S. 132 (1975).

*** 544 P2d 1048 (Ore. Ct. App. 1976).

° 538 P2d 373 (Ore. Ct. App. 1975).

records. The court found that Oregon's law permits withholding if the interest in confidentiality outweighs the interest in disclosure. The statute permits withholding of:

> [I]nformation or records of the Corrections Division, including the State Board of Parole and Probation, to the extent that disclosure thereof would interfere with the rehabilitation of a person in custody of the division or substantially prejudice or prevent the carrying out of the functions of the division, if the public interest in confidentiality clearly outweighs the public interest in disclosure.*

The court held that correctional, psychiatric reports containing the literal findings expressed in the professional's own words should not be disclosed in view of the potential "chilling effect" on the candor of the reports. Similarly, the subjective evaluations and recommendations of the Parole Board must be candid and consequently could be protected from public scrutiny. The interest of the public in monitoring such transactions is not sufficient to overcome the negative effects of disclosure. The court also upheld the denial of the disclosure of personal information about the individual's family. However, the court ordered the disclosure of internal memoranda that could be interpreted to indicate overzealous monitoring of the subject's activities while he was on parole. The court felt that citizens were entitled to know the government's shortcomings as well as its successes and concluded that governmental embarrassment was not a justification for confidentiality.

CONCLUSIONS

This review of recent legislative, regulatory, and judicial developments affecting criminal justice information policy suggests several trends.

First, over the last four years the Congress has not been an especially active participant in this policy making process. Federal criminal justice information activities have centered upon the Department of Justice, and particularly LEAA.

By contrast, state legislatures have been actively involved in the criminal justice information policy process. Recent state statutes exhibit the following pattern: (1) a consensus in support of subject access to their criminal history records; (2) the vesting of considerable discretion in administrative agencies for third party disclosure decisions; (3) little outward attention to record management and collection issues.

Judicial activity in recent years is more difficult to characterize. The federal district courts and the courts of appeal have been generally receptive to privacy arguments. The Supreme Court by contrast has not been receptive to most types of information privacy claims, including claims made in the criminal justice information context. Finally, the state courts for the most part continue to take a middle ground. Although the state courts have not been especially aggressive in providing privacy relief, most decisions do recognize the importance of the subject's privacy interest.

Basic questions about the policies for the collection of personal information by criminal justice agencies, the standards for the management and use of information and the disclosure of this information remain unanswered and to some extent unaddressed. These issues comprise the agenda of the criminal justice information policy making process.

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* Oregon Laws, 1973 Ch. 794 Sec. 192 500(a)(d).

III. PRESENTATIONS AND DISCUSSION

The Round-Table program was comprised of four parts. In part one, Gary McAlvey, Chairman of SEARCH Group, Inc., and Congressman Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, made opening remarks. Their remarks described the purposes of the conference and highlighted federal and Congressional criminal justice information policy developments over the last decade. In part two, four officials presented the federal government's view of criminal justice information policy from the standpoint of the White House, the Department of Justice and the Law Enforcement Assistance Administration. In part three, five state officials representing Minnesota, Oregon, New York, California and Massachusetts made presentations. Their remarks described their states' experience in implementing privacy and security standards and identified significant unresolved policy issues. Finally, Elmer R. Oettinger, Assistant Director and Professor of the Institute of Government at the University of North Carolina, led conference participants in an informal discussion of the information policy issues raised by the presentations.

Including the presenters, the Round-Table participants consisted of a broad cross section of approximately forty federal and state officials.* The participants included representatives from Congressional staffs; from the White House; from federal criminal justice agencies; from federal non-criminal justice agencies; from state legislatures; from state Governors' offices; from state attorneys' general offices; from state criminal justice agencies; and from state non-criminal justice agencies.

OPENING REMARKS

In his opening remarks, Chairman McAlvey told participants that the primary purpose of the conference was to identify the direction and the underlying principles of criminal justice information policy in the United States. Mr. McAlvey noted that in many states disclosure policies have recently taken opposing directions. Some states have enacted restrictive, privacy oriented disclosure policies. Other states have recently adopted policies that promote disclosure. Mr. McAlvey also pointed out that the standards governing the government's collection of personal information, such as bank records and medical records, are currently undergoing extensive review. Mr. McAlvey asked conference participants to focus upon both disclosure and collection issues.

Congressman Don Edwards reviewed his subcommittee's extensive involvement in the criminal justice information issue. The Congressman noted that leadership was needed to develop consistent, comprehensive information policy and pledged that the Congress would provide that leadership. In particular, he indicated that his subcommittee would actively deal with criminal justice information policy issues in the year ahead. He also noted that in an environment of rapidly developing policy, federal and state communication was essential, and he therefore welcomed the sort of exchange prompted by the Round Table.

FEDERAL PANEL

The federal panel was comprised of Richard M. Neustadt, Assistant Director, Domestic Policy Staff, the White House; Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal

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* Officials are identified in the Participants roster found in the front of the report.

Counsel, U.S. Department of Justice; Carol Kaplan, Director, Privacy and Security Staff, National Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration; and Thomas Madden, General Counsel, Law Enforcement Assistance Administration.

Richard Neustadt urged the participants to continue to develop and support privacy oriented information policies. He emphasized that the Carter Administration is committed to a serious review of the recommendations of the Privacy Protection Study Commission. At its termination in July of 1977, the Commission, which was a two year independent federal study group, sent over 150 legislative recommendations to the Congress. In particular, the Administration supports the placing of certain restrictions on federal agency (including criminal justice agency) access to customer bank records maintained by financial institutions. Legislation under consideration by the Congress in September of 1978* requires federal agencies to use a subpoena or other written mechanism to obtain bank records and further requires the agency to give the customer notice of the request and a chance to go to court to block the disclosure.

Mr. Neustadt said that he expects that this legislation (the Right to Financial Privacy Act of 1978), if enacted, will serve as a model for access standards for governmental acquisition of other types of sensitive personal records. Medical records are likely to be the next target for the imposition of access restrictions. He concluded by saying that he felt that fair information practice and privacy principles are here to stay. He believes that the federal government and the executive branch will provide leadership in the further development and implementation of these principles.

Mary Lawton, a Deputy Assistant Secretary in the Department of Justice, expressed deep concern about the development of criminal justice information policy. She suggested that existing policies, at both the state and the federal levels, are in chaos. Ms. Lawton said that the Department has several studies and review processes under way that are likely to have an impact upon criminal justice information policy. First, the Department of Justice is continuing to assess the affects of the Freedom of Information Act. She indicated that one clear effect of requests for access to criminal records by members of the public has been the compromising of investigations and particularly the use of informants and confidential sources.

The Department of Justice is also involved in work on a bill to give the Federal Bureau of Investigation a legislative charter. Ms. Lawton reported that the charter legislation may include provisions dealing with the FBI collection of personal information and its handling and dissemination of criminal history record information.

Ms. Lawton also noted that the Department of Justice is reviewing its policy regarding release of conviction information to non-criminal justice requestors. The review was sparked by a FOIA request from CBS News for access to the conviction records of convicted Watergate conspirator, John Erlichman. Pursuant to its regulations at 28 CFR Sec. 20.30, the Department refused to release this data. Their denial provoked a storm of protest from the news media. She readily admitted that the arguments for access to criminal history data by non-criminal justice requestors were strongest in respect to access to conviction data.

Carol Kaplan, the Director of LEAA's Privacy and Security Staff, reviewed the history and implementation status of LEAA's state and local criminal history information systems regulations (28 CFR Sections 20.20-20.25). As of late 1978, fourteen states are in basic compliance with the regulations. By the end of 1980, LEAA expects another twenty states to

* Subsequently enacted in October of 1978.

be in compliance. According to Ms. Kaplan, a recent study of state implementation of the regulations done for LEAA by an outside contractor found a wide variation in the degree of state compliance efforts. The study's findings also permit the conclusion that the nature of state disclosure policy varies depending upon the state's location. States in the Western part of the country tend to adopt policies that permit greater openness or disclosure of criminal history data. States in the Eastern part of the country tend to adopt policies that restrict access to or disclosure of criminal history records.

Ms. Kaplan felt that, in general, state experience in implementing the regulations has been positive. The implementation task has not been as onerous as many state officials feared. In part, this positive experience is due to the extremely small numbers of access requests that have been made by record subjects. The LEAA regulations require states to permit subjects to have access to their criminal history data. Many state officials originally feared that their systems would be deluged by access requests.

Thomas Madden, LEAA's General Counsel, described the legal history of the LEAA regulations and highlighted specific issues that continue to pose jurisprudential and conceptual problems. Mr. Madden said that the LEAA regulations were spawned by three lines in the 1973 amendment to the Omnibus Crime Control Act. The amendment requires the Department of Justice to insure that states using federal monies to operate criminal justice information systems safeguard the privacy and security of the criminal history data and permit subject access. LEAA's detailed and comprehensive regulations are a response to that mandate.

Mr. Madden emphasized that in formulating and implementing the regulations LEAA has taken every reasonable step to guarantee that the needs of affected state parties are met. In this regard, he noted that the regulations were subjected to an exhaustive review and hearing process and, after hearings on the first version of the proposed regulations, were substantially redrafted in reaction to state concerns.

At the close of 1978, the regulations and the underlying issue of the use and disclosure of criminal history data are subject to several difficult conceptual and legal questions. For example, significant policy questions remain regarding the nature and extent of press access to criminal history data. Questions also remain about the application and use of sealing and purging techniques. The status of juvenile records and their relationship to adult criminal history records continues to plague theorists and lawmakers. The status of court records and their relationship to criminal history data maintained by other types of criminal justice agencies is a subject of growing controversy in the courts and legislatures. The role of the computer and the operation and content of automated criminal history exchange systems continue to resist easy answers. Mr. Madden observed that this agenda of criminal justice information issues will continue to be addressed by each state and by the federal government. That process will benefit from continued and frequent exchange of views among the states and between the states and the federal government.

At the close of the federal panel's prepared presentations, Round-Table participants had a brief opportunity for questions and discussion. The discussion session was highlighted by a spirited exchange between executive branch officials and Congressional staff over the question of responsibility for the Congress' failure to enact comprehensive criminal justice information legislation. Congressional staff expressed their disappointment that the Carter Administration had not as yet sent a comprehensive bill to the Congress. Executive branch officials reminded the participants that prior administrations had sponsored and worked for such legislation without result. One official blamed the Congress for bowing to pressure

from the media. Another official said that it was possible that the Administration would support a comprehensive criminal justice information bill if and when such a bill was introduced.

STATE PANEL

Five state officials made presentations. The panel was comprised of Robert J. Tennesson, a member of the Minnesota State Senate and former Commissioner of the Privacy Protection Study Commission; Judge Lee Johnson, Oregon Court of Appeals; Henry Dogin, First Deputy Commissioner, New York State Division of Criminal Justice Services; Michael Franchetti, Deputy Attorney General, California Department of Justice; and Daniel Jaffee, Assistant Attorney General, Massachusetts Department of the Attorney General.

Senator Robert Tennesson began by giving participants a brief sketch of the Minnesota Fair Information Practices Law. The law is patterned after the federal Privacy Act.

Senator Tennesson said that in his view the major criminal justice information policy issue now before state and federal lawmakers is the development of standards for the collection of sensitive personal data such as financial and medical records. The Senator asserted that individuals normally have an expectation of confidentiality in these types of records. The federal bank privacy legislation is welcome because it recognizes this expectation and he expects similar legislation to be introduced for medical records.

Senator Tennesson stated however, that by contrast, criminal history information ought to be thought of as a record of a public event. Subjects of these types of records have little or no expectation of confidentiality. Furthermore, what little expectation exists is outweighed by the extent of the public's interest in seeing these records. In the Senator's view, this sort of thinking forms the conceptual basis for the trend in the states toward open records. He indicated that the states should be allowed to develop this trend without assistance from federal legislation.

Judge Lee Johnson began his presentation by describing Oregon's experience with criminal justice information legislation. Judge Johnson told the participants that in 1976 Oregon enacted extremely restrictive, privacy oriented and, as it turned out, ill advised criminal justice information legislation. Oregon, which the Judge described as a model state for many types of legislation, provides an example of "what not to do" when it comes to adopting privacy legislation. The Oregon legislation, due to an unintentionally broad definition of "criminal history information", made all arrest and conviction data, including original records of entry, confidential. As a consequence, the statute prohibited police from informing relatives or others that an individual had been arrested. After two days of chaos, the Legislature repealed the statute.

The most significant policy debate in Oregon over the last few years has been whether criminal histories should be secret or public. Judge Johnson expressed his own view that criminal history data should be public. When this type of record is given public status it provides, in many respects, a protection for the record subject. The public availability of the information eliminates the possibility of incommunicado arrests and star chamber proceedings. At the same time, open record policies permit the public to better monitor the performance of the police. As an example, Judge Johnson noted that a record of a history of frequent arrests without prosecution may indicate that the subject is a victim of police harrassment. He concluded by stating that he believes that the trend toward greater openness in criminal history records will continue.

Henry Dogin of the New York State Division of Criminal Justice Services (DCJS) began by explaining the functions of his office. The DCJS serves as New York's central state repository. The DCJS disclosure policy is to release criminal history record information to

criminal justice agencies without restriction. However, the DCJS releases criminal history records to non-criminal justice agencies only pursuant to a specific legal authority (state statute or local ordinance). At present, all authorized disclosures to non-criminal justice agencies are for either licensing or employment purposes.

After describing DCJS functions, Mr. Dogin focused upon two problems. First, policies for the handling of parole records and other types of correctional and release information are often not given careful thought. Greater attention must be given to developing disclosure policies for these types of records. Second, Mr. Dogin emphasized that the development of standards to insure completeness and accuracy of the information in criminal history records continues to be a problem. The LEAA regulations require states to insure that their criminal history record information is complete and accurate. In New York the Governor has created a panel to review appeals from record subjects who contest the accuracy or completeness of their criminal history records.

Michael Franchetti from the California Attorney General's office described California's criminal justice information system with particular emphasis on California's regulations and policies. Mr. Franchetti stated that California has also been moving toward open record policies.

Mr. Franchetti made two important points. First, the implementation of privacy safeguards and other types of information controls is extremely expensive. Too often, in Mr. Franchetti's view, federal and state policy has been formed without regard to the cost component. Second, federal policy in this area is frequently made without cognizance of the operational impact at the state and local level. Mr. Franchetti asserted that states and localities should be given wide discretion to formulate their own information policies without federal intervention or control.

Daniel Jaffee from the Massachusetts Attorney General's office made the final presentation. Mr. Jaffee explained that Massachusetts originally placed paramount importance upon insuring the privacy of its criminal history data. Recently Massachusetts' policy has shifted somewhat to balance the privacy goal with two other goals: first, meeting the public's need for access to criminal history data; and second, insuring that criminal justice agencies operate in an efficient and effective manner. As a consequence, Massachusetts' disclosure policy has moved in the direction of open access. Conviction data can now be disseminated to non-criminal justice users. In addition, non-conviction data can be made available to non-criminal justice users on a case by case basis after consideration by the state's criminal records council.

Mr. Jaffee said that Massachusetts officials have identified four key policy issues that remain unresolved. First, the definition of court records and their relationship to summary criminal history data continues to be troublesome. Second, there has been considerable controversy in Massachusetts over the definition of criminal offendor record information. Third, a related problem has been the effect of overly restrictive definitions of criminal offendor record information on access by legitimate users of data, especially social welfare agencies that deal with children. Finally, Mr. Jaffee explained that Massachusetts has had a problem developing a viable management structure for its criminal justice information system.

ROUND-TABLE DISCUSSION

Elmer Oettinger served as facilitator for the informal participant discussion that marked the final part of the one day conference. The participants discussed two key policy issues: first, the disclosure of criminal history records—openness vs. privacy; and second, the collection of sensitive personal information by criminal justice and other governmental agencies.

Most of the participants agreed that as the seventies draw to a close there appears to be a trend—particularly at the

state level—toward increased disclosure of criminal history records. The participants questioned whether this trend would eventually lead to the demise of the principle that criminal justice agencies should have greater access to criminal history information than non-criminal justice agencies. Some conference participants noted that this principle has been largely responsible for restrictive policies that limit disclosures to the private sector.

Round-Table participants discussed two rationales that support this principle. First, it is argued that the extent of criminal justice agency need for criminal justice data is greater than the need of non-criminal justice requestors in the government or the private sector. Second, some participants said that the government can be held more accountable for its use of this data. Most conference participants were critical of the first rationale. These participants asserted that the private sector's need for criminal justice records is just as compelling as the need in the criminal justice community.

In the same vein, representatives of a few federal non-criminal justice agencies pointed out that they are often denied access to state criminal justice data that they need in order to make employment or security clearance determinations. These officials emphasized that their agency's need for the data is compelling and their accountability and responsibility is assured.

As one element of disclosure policy, conference participants also discussed the problems involved in the automated exchange of computerized criminal histories. One participant asked that if the distinction between criminal justice and non-criminal justice access to records is disappearing, what effect would this development have upon access to and use of such systems by non-criminal justice organizations?

Conference participants discussed in some detail the elements of the pending Right to Financial Privacy Act and similar schemes that place limits upon the government's collection of sensitive personal data. One of the issues that provoked the greatest discussion was the extent to which government agencies should be permitted to use informal, non-compulsory access request methods. The federal legislation, for example, permits agencies that do not have subpoena power to use a simple written request. A copy of this request is served upon the customer at the time that it is sent to the financial institution, and the customer can challenge the request in court. Notwithstanding the outcome of the customer's challenge, the financial institution has complete freedom to decide whether or not to comply with such requests. Many participants felt that informal governmental access requests would result in over broad collection of data. Other discussants, particularly non-criminal justice agency officials, felt that government agencies must have the ability to make informal requests for personal data. Without this ability, these officials feel that government agencies that do not have subpoena power will be fatally disadvantaged in discharging their investigatory functions.

Conference participants also discussed other difficult collection issues including: the types of personal records that should be covered by access limitations; the precise nature of the limitations; and the circumstances under which there should be exceptions to the limitations.

Mr. Oettinger, in summing up the presentations and discussion, noted two fundamental points that had emerged. First, there appears to be a growing consensus that criminal history records should be more widely available. Second, the focus of the criminal justice information policy debate may be shifting toward those issues that concern access to personal data by governmental and criminal justice agencies for investigative purposes.

APPENDIX

CRIMINAL JUSTICE INFORMATION DEFINITIONS

Criminal Justice Information is defined to include the types of records enumerated below. This breakdown is taken from the Second Edition of SGI's Technical Report No. 13.

> "identification record information," includes fingerprint classifications, voice prints, photographs, and other physical descriptive data concerning an individual that does not include any indication or suggestion that the individual has at any time been suspected of or charged with a criminal offense;
>
> "arrest record information," concerns the arrest, detention, indictment or other formal filing of criminal charges against an individual, which does not include a disposition;
>
> "criminal record information," concerns the arrest, detention, indictment or other formal filing of criminal charges against an individual, together with one or more dispositions relating thereto;
>
> "disposition," defined as information disclosing that a decision has been made not to bring criminal charges or that criminal proceedings have been concluded, abandoned or indefinitely postponed, or information relating to sentencing, correctional supervision, release from correctional supervision, the outcome of appellate review of criminal proceedings, or executive clemency;
>
> "correctional and release information," includes information or reports on individuals compiled in connection with bail, pretrial or post-trial release proceedings, presentence investigations, proceedings to determine physical or mental condition, participation by inmates in correctional or rehabilitative programs, or probation or parole proceedings;

"criminal intelligence information," includes information on identifiable individuals compiled in an effort to anticipate, prevent or monitor possible criminal activity;

"criminal investigative information," defined as information on identifiable individuals compiled in the course of the investigation of specific criminal acts; and

"wanted persons information," is identification record information on an individual against whom there is an outstanding arrest warrant, including the charge for which the warrant was issued, and information relevant to the individual's danger to the community and any other information that would facilitate the apprehension of the individual.

END