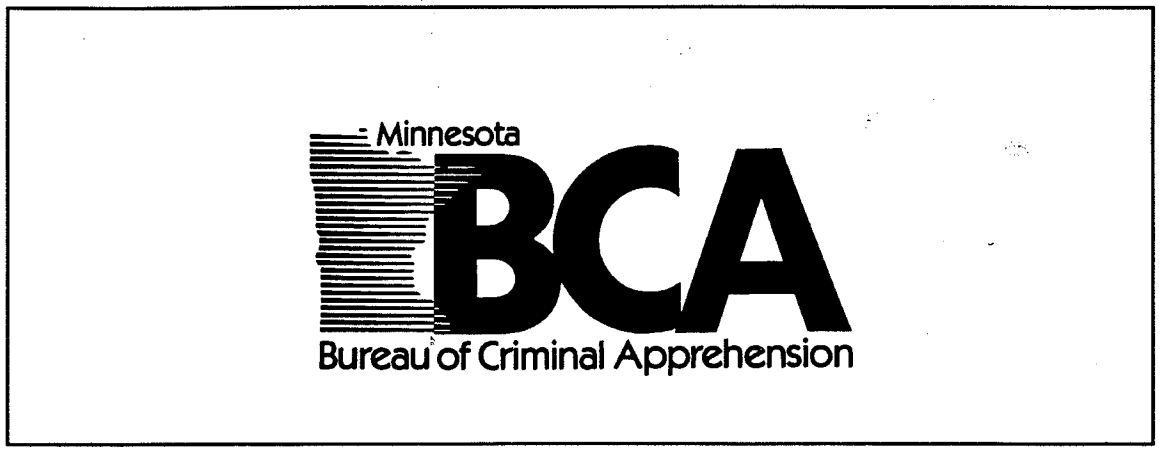
970133



REPORT TO THE LEGISLATURE

AS REQUIRED BY:

The Laws of Minnesota 1996
Chapter 408, Article 1, Section 4, Subdivision 3

DEPARTMENT OF PUBLIC SAFETY
BUREAU OF CRIMINAL APPREHENSION
1246 UNIVERSITY AVENUE
ST. PAUL, MN 55104
(612) 642-0600

December, 1996

Per M.S. 3.197 cost of this report was approximately $ 10,000.00

Pursuant to 1996 Minn. Laws Chap. 408 Art. 1 Sec. 4 Subd. 3

CONTENTS

RECEIVED
FEB 26 1997
LEGISLATIVE REFERENCE LIBRARY
STATE OFFICE BUILDING
ST. PAUL, MN 55155

SUMMARY OF RECOMMENDATIONS

- **Defense attorneys should be granted access to conviction information as provided by the Rules of Criminal Procedure & the BCA should be encouraged to facilitate remote electronic access to public criminal history information so that defense can have direct access similar to that provided to prosecutors**

- **Juvenile criminal history information should be shared with the criminal justice communities in other states**

- **BCA should share adult court disposition data that is not in the criminal history system with the criminal justice community**

- **BCA should retain criminal history information until the subject reaches age 99**

- **When an arrest of a juvenile does not result in the filing of a petition or adjudication, the arrest and court disposition data should be purged after 6 months**

- **If a juvenile is placed on diversion at any level within the criminal justice process, the data should be retained until the juvenile reaches age 21 years**

- **If a juvenile is dismissed or acquitted by the court, the arrest data and the court data are purged soon as information is received**

- **If a juvenile case is continued for dismissal, the data is purged at age 21 years**

- **When an arrest of a juvenile results in an adjudication or continuance without adjudication, the arrest and court disposition data should be purged at age 28**

- **If prior to the date the juvenile data is to be purged, a juvenile is subsequently convicted of a felony as an adult, the juvenile arrest and corresponding court disposition data will be retained as long as adult felony records**

- **The most serious event in a juvenile record determines the retention schedule of the entire record**

- **Non-adjudicated data (arrest & court disposition) should not be shared outside the criminal justice community**

- **There should be provisions in law specifically addressing the sealing and expunging of juvenile records**

- **The courts should declare and report the level of conviction**

INTRODUCTION

Chapter 408, Article 1, Section 4, Subdivision 3 (1996 Omnibus Crime Bill) contains the following language:

> *The superintendent of the bureau of criminal apprehension shall convene a workgroup to study and make recommendations on criminal justice information access and retention issues including processes on expungement, correction of inaccurate records, destruction of records, and other matters relating to the privacy interests of individuals. The workgroup shall also address noncriminal justice agency access to records.*
>
> *The workgroup shall include representatives of the criminal and juvenile justice information policy group and task force, the supreme court and racial fairness, the department of administration, law enforcement, prosecuting authorities, public defenders, one member of each caucus in each house, and interest and advocacy groups.*
>
> *The workgroup shall report to the committee on crime prevention in the senate and the committees on judiciary and judiciary finance in the house of representatives by January 15, 1997.*

BACKGROUND

Many changes have occurred in recent years that affect what is collected in statewide criminal history record repositories and how those records are used. For example, we will now be collecting and maintaining juvenile gross misdemeanor and felony criminal records and certain adult misdemeanor records. In addition, new laws are enacted every year expanding the use of criminal history records for licensing and employment background checks. With these changes and expansion of records, numerous policy issues arise that must be resolved. The purpose of this work group is to study these policy issues and make recommendations to the 1997 Legislature.

PROCESS

Attachment A lists the individuals invited to participate in the workgroup. The Criminal Justice Data Group attempted to frame the issues for presentation to the work group. While framing the issues, it became apparent that the non-criminal background checks would have to be addressed with another work group. There are numerous complex

issues to resolve surrounding background checks for licensing and employment that would take more time to address. In addition, the membership in that group would need to include different representation than that necessary to address the criminal justice policy issues. For that reason, this group addressed only the issues relating to the criminal justice community. However, work group attendees were invited to raise other issues during the meeting or submit issues in writing.

ISSUES

ACCESS

- **DEFENSE ATTORNEY ACCESS TO PRIVATE DATA**

A good portion of the criminal history data maintained by the BCA is private data. These data are accessible electronically to the "criminal justice community" throughout the state and the nation. Prosecutors routinely check for criminal history data on the defendant and the witnesses. Defense attorneys have access to these data through the discovery process. However, if the prosecution did not obtain certain data, the defense is not able to access it. Public Defenders have expressed a need to access criminal history records in a timely manner and to have access to data on witnesses not obtained by the prosecutor.

Discussion

A majority felt that defense attorneys should have access to criminal history records in much the same manner as the prosecution as in most cases they eventually obtain the data anyway. It was pointed out that they get it now, but experience delays in the process. It was also felt that this access should include private defense attorneys as well as public defenders. The defense is, by Rule, afforded access to conviction information and that data is public at the source, however, defense would have to either check with all 87 district courts or go to the public access terminal located at the BCA. Discussion on assuring accountability ensued.

Concern was raised about the defense limiting access to criminal cases and the potential for abuse of the information. The criminal justice community is audited periodically to assure that access is for proper purposes and that illegal access/use is not occurring. There are, in fact, consequences for not abiding by the rules and regulations. Some method of providing those same safe guards was suggested. While defense attorneys may not be subject to mandates of the Data Practices Act, they are subject to codes of conduct by the Bar, however. Discussion then centered on easier access to the conviction information that the

defense should have access to.

Recommendation

Defense attorneys should be granted access to conviction information as provided by the Rules of Criminal Procedure & the BCA should be encouraged to facilitate remote electronic access to public criminal history information so that defense can have direct access similar to that provided to prosecutors

- **ACCESS TO JUVENILE RECORDS**

For many years the law has provided for the forwarding of fingerprints on juveniles arrested for felony level crimes. However, these data were not compiled at the state level until 1993 when the BCA was mandated to maintain data on juveniles adjudicated for felony level criminal sexual conduct. The state is now implementing an expansion of the juvenile criminal history record to include all gross misdemeanor and felony crimes. While the law clearly provides for dissemination of the data to the criminal justice community within the state, it is not clear whether the juvenile data can be shared with the criminal justice community in other states.

Discussion

Once there was clear consensus on the retention of juvenile records, the majority felt that this data should be shared with the criminal justice community in other states, especially given the mobility of the juvenile criminal population. *Some* in the group, however, felt that there should be policies or limitations on this dissemination such as limiting it to serious crime. Since Minnesota has restrictions for use, there was concern that those same restrictions would be followed once disseminated to other states. This can be accomplished by limiting the access for criminal justice purposes only. The group also felt other states should share juvenile data with Minnesota.

Recommendation

Juvenile criminal history information should be shared with the criminal justice communities in other states

- **ACCESS TO UNMATCHED COURT RECORDS**

The BCA collects and retains all court disposition data. Because of the requirement for positive identification (fingerprints) for all records maintained in the criminal history system, some of these data do not reside in the criminal history record but are maintained in an index file. While the information in the index file is not matched positively by fingerprint to an individual, it can still be valuable information for the criminal justice community. The information can serve as a pointer to the local records which can then be checked to determine the accuracy of the indexed information. This data is not currently disseminated and the issue was whether it should be.

Discussion

The majority felt that this information should be shared with the criminal justice community with a caveat that the data are not supported by fingerprint identification. This kind of information is currently gathered by "phoning around" at the local level. There would be much value to being able to access this data at a central repository. The recipients of the information should be responsible for checking and verifying identity. In addition, if prints could be obtained on the subject, every attempt to submit those to the BCA should be made. This would then move the data from the "index" and into the live criminal history data base. It was decided that inclusion of juvenile disposition in this index would take further study.

Recommendation

BCA should share adult court disposition data that is not in the criminal history system with the criminal justice community

RETENTION

- **CONSISTENCY**

The law requires government agencies to keep data unless given the authority to

dispose of it. Much of the data in the criminal history file are controlled by retention mandates in law. For example, juvenile adjudication data is retained until age 28 years and adult diversion data must be retained for 20 years. Criminal history data, as a whole, is currently maintained until the subject is 80 years of age, unless there are open cases on the record, at which time it is retained until the subject is discharged. After experiencing many situations where older persons are committing crimes, the FBI recently changed their record retention to age 99. As the BCA, and the other 37 states participating in the national index of crimes, biannually synchronize records with those maintained by the FBI, they are proposing to increase their retention to age 99, as well. Local agency record retention schedules vary, but are generally much shorter than the criminal history file. Since "targeted" misdemeanors will soon be maintained in the criminal history file, the issue of length of retention of those records was also discussed.

Discussion

All felt that there was no need to create greater consistency in the retention of different types of criminal history records merely for the sake of consistency. It was also felt that the current "targeted" misdemeanor records should be retained as long as the other offenses, but if the offenses included in "targeted" misdemeanors are expanded, this issue should be re-examined. There was discussion, however, that the length of time that misdemeanor convictions would be held against an individual for licensing/employment reasons should be examined during the workgroup convened to consider those issues. Workgroup members also agreed that problems can arise from the much shorter retention of records at the local level. While they agreed this should be looked into, they recognized the potential fiscal impact on those agencies.

Recommendation

BCA should retain criminal history information until the subject reaches age 99

- **RETENTION OF JUVENILE ARREST DATA**

Current law specifies that when information is received from the court indicating that the juvenile was not adjudicated, the data relating to the petition must be destroyed. However, the law does not mandate that the arrest information be destroyed and the law does not specify what should be done with juvenile arrest data that does not result in a petition. Consequently, in cases where a juvenile was not found to have committed a crime, the criminal history record will continue to reflect an arrest for a crime. To

further confuse, these arrest records will not display information that will inform the criminal justice community as to the disposition of the incident because current law will cause the disposition information to be purged.

Discussion

The group agreed that there needs to be stated retention for all juvenile arrest data and corresponding court disposition data and that the retention period should be longer in those cases where there is an adjudication. It was felt that this information, even when there is no adjudication, may be important to the criminal justice community in order to positively identify the subject, detect patterns of behavior and to make decisions concerning the best course of action for the juvenile. The major concern was to assure that juveniles subjected to "shakedown" arrests not be harmed by that information being maintained in a central repository. At the same time, however, it was recognized that information on arrests with probable cause that were handled in other ways than referral to court, could be pertinent to subsequent activity so that a different course of action could be taken. They discussed the fact that juvenile arrests are frequently handled in different ways such as referring juveniles to diversionary programs by local law enforcement. Domestic violence cases perpetrated by juveniles are often handled at the police level by referral to family programs and may not result in petitions or adjudication. The group felt strongly, however, that the data that does not result in adjudication must not be shared outside the criminal justice community.

To clearly resolve the issue of retention, the group looked at all the different outcomes that could occur as a result of an arrest. It was recognized that there are many courses of action that may be taken based on the circumstances of each individual arrest. Attachment B demonstrates those and the specific recommendations of the group for retention based on the different courses of action. The group did recommend that the most serious event would determine the retention schedule of the entire record.

Recommendations

When an arrest of a juvenile does not result in the filing of a petition or adjudication, the arrest and court disposition data should be purged after 6 months

If a juvenile is placed on diversion at any level within the criminal justice process, the data should be retained until the juvenile reaches age 21 years

If a juvenile is dismissed or acquitted by the court, the arrest data and the court data are purged as soon as the information is received

If a juvenile case is continued for dismissal, the data is purged at age 21 years

When an arrest of a juvenile does result in an adjudication or continuance without adjudication, the arrest and court disposition data should be purged at age 28

If prior to the date the juvenile data is to be purged, a juvenile is subsequently convicted of a felony as an adult, the juvenile arrest and corresponding court disposition data will be retained as long as adult felony record

The most serious event in a juvenile record determines the retention schedule of the entire record

Non-adjudicated data (arrest & court disposition) should not be shared outside the criminal justice community

EXPUNGEMENT

The 1996 Legislature addressed the issue of when to seal or limit access to records by expungement and the new law took effect May 1, 1996. While this law gives clarification to the effect on records and creates consistency in the process, there are still questions and concerns.

Discussion

The group felt that 609A does not apply to juvenile records and statutory provisions were needed to create a process for sealing or expunging juvenile data. The juvenile provisions should be different from the adult in that the process should be easier and should include more opportunity for destruction of records. In addition, it should address all segments of the criminal justice community where the data may reside. It was further discussed that an informational pamphlet should be developed to inform offenders of their rights to petition to have records sealed or expunged and to describe the consequences of having a criminal record. Given that 609A states that granting these requests is an "extraordinary remedy", concern was raised about the impact on prosecution and courts which would have to review and act on the petitions.

Recommendation

There should be provisions in law specifically addressing the sealing and expunging of juvenile records

DATA ACCURACY

- **LEVEL OF CONVICTION**

It is important for many purposes to record the level of the conviction offense to indicate whether it represents a felony, gross misdemeanor, or misdemeanor crime. This information is important in determining whether someone should be given a permit to carry or own a firearm, whether the crime is governed by the Minnesota Sentencing Guidelines, whether the prior offense enhances the level of the current offense, and whether an employer should hire a prospective candidate.

Minnesota law is extremely complicated with respect to its definition of crime level. While each law does provide for a maximum penalty which represents either a felony, gross misdemeanor, or misdemeanor, ultimately, the level of the crime is defined by the actual sentence. For example, someone could be convicted of a felony level crime but be given a sentence that represents a misdemeanor, Under Minnesota law, such a crime would be considered a misdemeanor. This is further complicated with the use of "stays of imposition" where the sentence is not actually pronounced. With "stays of imposition", the level of the crime can only be determined initially by the level of the conviction offense.

Discussion

The group felt that since the court adjudicates guilt, they are the ones that must communicate the level of the conviction (currently, the level of conviction is determined by a computer program that analyses the sentence). What was particularly compelling, however, was the fact that the defendant does not know the level of the crime of which he/she has been convicted. The BCA cited the numerous calls they get from individuals completing job applications that ask the question "Have you ever been convicted of a felony?". While these individuals know they were in court, and convicted of a crime, they have no idea of the level of that offense. The group felt it should be made clear in court.

Recommendation

The court should declare and report the level of conviction

ATTACHMENT A

LIST OF INDIVIDUALS INVITED TO PARTICIPATE

Ken Backhus
Senate Counsel
Rm G-17 Capitol
St. Paul, MN 55155

Tom Bailey
Minnesota Attorney General's Office
Suite 1400, NCL Tower
444 Cedar Street
St. Paul, MN 55101

Lurline Baker-Kent
Assistant Commissioner
Department of Corrections
1450 Energy Park Drive, Suite 200
St. Paul, MN 55108

Roger Battreall
Public Defenders Office
317 2nd Avenue So.
Suite 200
Minneapolis, Mn 55401

G. Paul Beaumaster
Assistant Isanti Co. Attorney
555-18th Avenue S.W.
Cambridge, MN 55008

The Honorable Tanya Bransford
12-C Government Center
300 S. Sixth Street
Minneapolis, MN 55487

Karen Buskey
System Services Manager
Supreme Court Information Systems
25 Constitution Avenue
St. Paul, MN 55155

Manuel J. Cervantes
City Hall
Suite 700
15 West Kellogg Blvd.
St. Paul, MN 55102

Roger Clarke
SBSI
2020 1st Avenue South
Minneapolis, MN 55404

Lester R. Collins
Executive Director
Council on Black Minnesotans
426 Wright Building
2233 University Avenue
St. Paul, MN 55114

Deb Dailey
Director
Sentencing Guidelines Commission
205 Aurora Avenue
St. Paul, MN 55104

Superintendent Freddie L. Davis
Juvenile Detention Center
Department of Corrections
510 Park Avenue
Minneapolis, MN 55415

Joseph B. Day
Executive Director
Indian Affairs Council
1450 Energy Park Drive
St. Paul, MN 55108

Michael Dees
120 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Bob Ellingson
Board of Public Defense
100 Washington Square #748
Minneapolis, MN 55401

Dale Good
Director, Supreme Court Info. Systems
25 Constitution Avenue
St. Paul, MN 55155

Susan S. Greenwell
Court Administrator
Renville County Courthouse
500 E. DePue
Olivia, MN 56277

Tim Johnson
Eight Judicial Dist. Chief Public Defender
432 West Litchfield Avenue
Willmar, MN 56201

Dave Johnson
Chief of Police
9150 Central Avenue N.E.
Blaine, MN 55434-3421

Michael Jones
Council on Black Minnesotans
426 Wright Building
2233 University Avenue
St. Paul, MN 55114

Nathaniel Khaliq
St. Paul NAACP
1060 Central Avenue West
St. Paul, MN 55104

Gene Larimore
Director, Information & Analysis
Department of Corrections
1450 Energy Park Drive, Suite 200
St. Paul, MN 55108

The Honorable Roberta K. Levy
4th Judicial District
12 C Government Center
300 S. Sixth Street
Minneapolis, MN 55487

Janet Marshal
120 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Karen McDonald
Director, CJIS
DPS-Bureau of Criminal Apprehension
1246 University Avenue
St. Paul, MN 55104

Deb McKnight
House Research
600 State Office Bldg.
St. Paul, MN 55155

Joan Minczski
Ramsey Co. Community Corrections
650 Ramsey Co. Govt. Ctr., West
50 W. Kellogg Blvd.
St. Paul, MN 55102

Richard Neumeister
345 Wabasha Avenue
St. Paul, MN 55102

Senator Tom Neuville
Minnesota Senate
123 State Office Building
St. Paul, MN 55155

Lorayne Norgren
Sherburne Co. Government Center
13880 Highway 10
P.O. Box 318
Elk River, MN 55330-0318

Lt. Joe Polski
Police Department
100 E. 11th Street
St. Paul, MN 55101

Ms. Kathy Pontius
Senate Counsel
Rm G-17 Capitol
St. Paul, MN 55155

Ray Schmitz
Olmsted County Attorney
Olmsted County Courthouse
151 4th Street S.E.
Rochester, MN 55902

Paul Scoggin
Hennepin Co. Atty's Office
300 S. Sixth Street, #C-2000
Minneapolis, MN 55487

Patricia Seleen
Ombudsman for Corrections
1885 University Avenue West
St. Paul, MN 55104

Dr. James Shelton
Department of Corrections
1450 Energy Park Drive
St. Paul, MN 55108

Representative Wesley Skoglund
Minnesota House of Representatives
477 State Office
St. Paul, MN 55155

Dan Storkamp
Minnesota Planning
3rd Floor, Centennial Office Bldg.
658 Cedar Street
St. Paul, MN 55155

Representative Doug Swenson
Minnesota House of Representatives
255 State Office Building
St. Paul, MN 55155

Robert Sykora
Ramsey Co. Public Defender
1808 First Star Center
101 E. 5th Street
St. Paul, MN 55101

Tom Tran
Executive Director
Council on Asian Pacific Minnesotans
10 River Park Plaza
St. Paul, MN 55146

Lt. Ron Whitehead
Bloomington Police Department
2215 W. Old Shakopee Road
Bloomington, MN 55431

Margarita Zalamea
Director
Chicano Latino Affairs Council
G4 Administration Avenue
50 Sherburne Avenue
St. Paul, MN 55155

ATTACHMENT B

JUVENILE RECORD RETENTION

WORKGROUP RECOMMENDATION FOR: Retention of Juvenile Information in the Criminal History Record Felony and Gross Misdemeanor Cases	
Process/Event	**Retention** ** (includes arrest and court data)
Arrest - No further action	Purge after 180 days; retain aggregate data for statistical purposes
Diversion	Purge at age 21
Referred to Prosecution	Base retention on subsequent event
No Prosecution	Purge after 180 days; retain aggregate data for statistical purposes
Diversion	Purge at age 21
Petition Filed	Base retention on subsequent event
Diversion	Purge at age 21
Dismissal (includes acquittals)	Purge as soon as info. received
Continuance for Dismissal (Before child admits or is found guilty)	Purge at age 21
Continuance w/out Adjudication (After child admits or is found guilty)	Purge at age 28
Adjudicated Delinquent	Purge at age 28

**** The most serious event determines the retention schedule of the entire record.**

CORRESPONDENCE

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

LAW ENFORCEMENT SECTION
SUITE 1400
445 MINNESOTA STREET
ST. PAUL, MN 55101-2131
TELEPHONE: (612) 296-7575

October 8, 1996

Karen McDonald
Director, CJIS
Minnesota Bureau of Criminal Apprehension
1246 University Avenue
St. Paul, MN 55104

RE: Defense Attorney Access to Private Criminal History Data

Dear Karen:

I am writing in response to the preliminary conclusion of the Criminal Justice Information Work Group that defense attorneys be allowed free access to private criminal history data. I believe such access is clearly contrary to the intent of the Data Practices Act, and is wholly unnecessary in light of the discovery rules controlling criminal matters. For these reasons, I strongly recommend that the Work Group reconsider presenting any proposal in this regard.

To begin, the criminal history data in question is not the data regarding a person's criminal convictions within the last 15 years; that data is public and available to defense attorneys or any other member of the public. Minn. Stat. § 13.87, subd. 2 (1994). Rather, the data relevant here is nonconviction data (arrest data, prosecution data, criminal court data, etc.), that is centrally stored by the BCA for law enforcement purposes and classified as "private," "not public" data. Id. This data, as everyone who spoke about it commented, is generally embarrassing to its subject and therefore has the potential to be misused to the subject's detriment. The interests of the subject of such data are therefore clearly protected by the "private data" classification, and removing the protection of that classification is no light matter.

For instance, one prosecutor noted that in the hands of an unscrupulous defendant, information about a complainant's arrest or prosecution records, or those of the complainant's family and friends, could be used to harass the complainant for proceeding with a prosecution. In fact, the prosecutor knew of a recent instance where this occurred. Such occurrences not

only have an immediate impact on the prosecutions in question, but have a chilling effect on those persons contemplating stepping forward to aid law enforcement in other prosecutions of criminal offenses. While it was suggested that this problem could be avoided by prohibiting attorneys from disclosing the contents of the criminal history record to their clients, such a rule would be virtually unenforceable. Indeed, defense counsel may well be ethically obligated to discuss this information with their clients, and such a disclosure would be protected by the attorney-client privilege. See Minn. R. Prof. Conduct 1.4 and cmt. (1994); Minn. Stat. § 595.02, subd. 1(b) (1994). There is therefore a real potential for harm to the law enforcement function if nongovernment actors who are not subject to the controls and sanctions provided for under the Data Practices Act are given wholesale direct access to private criminal history data.

Against this background, it is hard to understand why criminal defense attorneys should be given direct access to this hitherto private data. One argument forwarded was that defense attorneys would inevitably get this information on anyone they wanted to through discovery, so why not allow them to gather it on their own outside of that process. Quite to the contrary, the criminal rules only provide that the criminal history of the defendant and trial witnesses be disclosed by the prosecution to the defense. Minn. R. Crim. P. 9.01, subds. 1(a), (5) (1994). If a person is not identified by either the state or the defense as a witness at trial, such information about a person is simply not subject to disclosure. Specifically, the rules provide that the prosecution disclose the names, addresses, and prior conviction record "of persons intended to be called as witnesses at the trial," but need only disclose the names and addresses "of persons having information relating to the case." Compare Minn. R. Crim. P. 9.01, subd. 1(a) with subd. 1(d). Thus, criminal defense attorneys may not obtain the criminal history of just anyone related to the case; the person must be identified as having relevant testimony intended to be used at trial before such information is presumptively disclosable.

Furthermore, the criminal history disclosure requirement is limited to conviction history. Minn. R. Crim. P. 9.01, subds. 1(a), (5); 9.02, subd. 1(3)(a), (d) (1994). And that data is public. Other private criminal history information would not be discoverable absent the trial court conducting an in camera review and determining that the data was material to the defendant's ability to present a defense. Minn. R. Crim. P 9.01, subd. 2(3) (relevant material not subject to automatic disclosure without court order may be ordered disclosed provided it is

shown the information relates to the guilt or innocence of the defendant, or negates the guilt or reduces the culpability of the defendant); State v. Hopperstad, 367 N.W.2d 546 (Minn. Ct. App. 1985) (when faced with claim that protected nonpublic data under the Data Practices Act may contain material relevant to a criminal defense, the trial court is under a duty to conduct an in camera review of the data to determine if it contains material which tends to negate the defendant's guilt). Past efforts by defendants to bypass trial court review in gaining access to nonpublic data have been firmly rejected. In State v. Paradee, 403 N.W.2d 640 (Minn. 1987), the Minnesota Supreme Court was faced with a criminal sexual conduct case in which the trial court issued an order allowing the defendant, through defense counsel, to review confidential county welfare records for possibly relevant material. The Court reversed the order, finding that an in camera review by the trial court for possibly relevant material in the confidential county welfare records was a better approach than "an approach which in effect allows defense counsel easy access to various types of privileged and confidential records simply by asserting that the records might contain material relevant to the defense." Id. at 642. Thus, the criminal discovery rules and case law are consistent with the Data Practices Act in that they recognize that private, not public data need not be disclosed absent some judicial determination that such disclosure is relevant and necessary to the defense.

The other argument forwarded in support of giving defense attorneys direct access to private criminal history data was that defense attorneys should have the same access to this information as prosecutors have, because this would be only fair. But defense attorneys are not charged with the duty of properly collecting, storing, and disseminating the data in question for the purpose of effectively managing law enforcement for the public, as prosecutors and law enforcement officials are. Indeed, rather than being government actors charged with representing the public interest, defense attorneys are private actors representing the interests of a private individual. In this role they have no stake in protecting the classification of certain government data as required under the Data Practices Act, and in fact the interests of their client may be directly adverse to that. Moreover, as just discussed, the criminal discovery rules and case law provide unambiguous direction on when and how nonpublic data may be obtained by defense counsel. It is certainly clear from the cases that there is no need to expand access to private criminal history data under the Data Practices Act in order to allow criminal defense counsel to properly provide representation to their clients.

In the end, direct access by defense counsel of private criminal history data is not consistent with the privacy interests the Data Practices Act is aiming to protect, and is wholly unnecessary in light of the law governing discovery in criminal matters. Such access also carries the real risk that persons involved in criminal prosecutions may be harassed by the use of private criminal data despite good faith efforts by defense counsel to handle such information properly. For these reasons I ask that the Work Group reconsider its preliminary recommendation in this area.

Very truly yours,

Thomas Erik Bailey
Assistant Attorney General
Criminal Division

cc: Pat Moen, Director of Criminal Justice and Law Enforcement Services for the Attorney General

COUNTY OF Olmsted

RAYMOND F. SCHMITZ
COUNTY ATTORNEY
151 4TH STREET SE
ROCHESTER MN 55904-3710
507/285-8138 FAX 507/281-6054

CRIMINAL DIVISION
JAMES S. MARTINSON
SENIOR ASSISTANT
GARY A. GITTUS
DAVID S. VOIGT
RICHARD W. JACKSON, JR

CIVIL DIVISION
ROBERT W. MCINTOSH
SENIOR ASSISTANT
SUSAN J. MUNDAHL
KATHLEEN A. NEEDHAM
THOMAS P. KELLY

1 November 1996

Karen McDonald
Director CJIS
Minnesota Bureau of Criminal Apprehension
1246 University Ave
St. Paul MN 55104

Re: Work Group Meeting 7 November 1996

Currently my schedule has a conflict for the period of this meeting, I am trying to resolve the other matter but I want to communicate my feelings about the draft proposal if I cannot attend.

Generally, I support the recommendations they seem to reflect appropriate safeguards of information balanced with the need to have information available to appropriate individuals.

I am concerned and agree with Mr.Bailey regarding the issue of access to information by defense counsel. The chilling effect on a victim or witness of the defendant having the kinds of information that may be in the system cannot be overemphasized. In many cases it is not the information but the fact that the defendant will have it that is of concern. In a sexual assault case the invasion of privacy that is involved in the crime is sufficient to deter prosecution, when the victim learns that the individual who assaulted her will not have access to her history beyond that which is otherwise public it is just further victimization. As he points out the ability to limit dissemination to the defense attorney is doubtful and frankly the victim does not really discriminate among the attorney and client. The fairness issue needs to be addressed also; my responsibility as prosecutor is vastly different from the defense attorney. I must determine not only that there is a factual basis to support a charge but that the overall prosecution is in the interests of justice, to do that may require that I have information that is beyond the issues of the incident, the defense does not have that responsibility and thus does not have need for the information.

I would appreciate you communicating my thoughts to the work group.

Respectfully:

Raymond F. Schmitz
Olmsted County Attorney

recycled paper
recyclable

AN EQUAL OPPORTUNITY/AFFIRMATIVE ACTION EMPLOYER

STATE OF MINNESOTA
OFFICE OF THE STATE PUBLIC DEFENDER

Minnesota State Public Defender
John M. Stuart
Telephone: (612) 627-6980

Attorneys:
Lawrence Hammerling
Deputy State Public Defender
Mark F. Anderson
Susan K. Maki
Marie L. Wolf
Susan J. Andrews
Cathryn Middlebrook
Scott G. Swanson
Lyonel Norris
Charlann E. Winking
Evan W. Jones
Bradford S. Delapena
Rochelle R. Winn
Sharon Jacks
Ann McCaughan

In Cooperation with L.A.M.P.
(Legal Assistance to Minnesota Prisoners) in Civil Legal Matters
Telephone: (612) 625-6336
Attorneys:
James R. Peterson, *Director*
Philip Marron, *Director*
In Cooperation with L.A.P.
(Legal Advocacy Project)
In Prison Disciplinary Matters
Telephone: (612) 627-5416
FAX: (612) 627-5419
Attorneys:
Ronald H. Ortlip, *Managing Attorney*
Margaret Wolframsdorf Millington
F. Richard Gallo, Jr.
Ruth M. Goldthwaite
Jenneane Jansen
Benjamin Brieschke

November 1, 1996

Ms. Janet K. Marshall
Supreme Court Research and Planning
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

RE: Criminal Justice Information

Dear Janet:

Thank you for the chance to comment. Regarding juvenile arrest data, I share the concerns raised by Judge Bransford in her letter last spring.

We know that youth of color suffer more than their share of arrests that aren't based on probable cause.

If the juvenile, post-arrest, is not adjudicated or even petitioned, the arrest data ought to be deleted.

I see that the group thought this data would help "detect patterns of behavior and to make decision [sic] concerning the best course of action for the juvenile . . ." (p.6.)

However, if the case was not petitioned or adjudicated, then:

(1) there is no pattern of behavior established, and

(2) there is no government interest in making decisions on the best course of action for the juvenile.

Let the juvenile and the juvenile's family decide the "best course of action" for this individual!

I hope we don't have the kind of government that is making decisions for people's lives based on arrests that didn't lead to any legal actions in the court system. And this hope becomes more urgent in light of the demonstrated fact that people of color face more groundless arrests than the other people who live in Minnesota.

Thank you for the opportunity to re-state this concern.

Sincerely,

John M. Stuart
Minnesota State Public Defender

JMS/pmw

cc: Hon. Tanya Bransford
Mr. Tim Johnson
Mr. Roger Battreall
Mr. Bob Ellingson
Ms. Sue Dosal

THE MINNESOTA

COUNTY ATTORNEYS

ASSOCIATION

Hamline Park Plaza
570 Asbury Street
Suite 203
St. Paul, MN 55104-1849

612/641-1600

Child Support Collections
612/641-1658

FAX
612/641-1666

November 5, 1996

Karen McDonald
Director CJIS
Minnesota Bureau of Criminal Apprehension
1246 University Avenue
St. Paul, MN 55104

RE: Defense Attorney Access to Private Criminal History Data

Dear Karen:

I am writing on behalf of the Executive Committee of the Minnesota County Attorneys Association to respond to the preliminary conclusions of the Criminal Justice Information Work Group that defense attorneys be allowed unfettered access to private criminal history data. Our Board has not met since we were made aware of this issue, but it is the Executive Committee's opinion that this change is unwarranted, and we strongly suggest that the Work Group not present any proposal in this regard.

We have not had the opportunity to review the other recommendations of the Work Group, so we decline to comment on those at this time. It is important to note, however, that County Attorneys and the Attorney General's Office are united in opposition to the proposed changes related to defense attorney access to this private data.

Assistant Attorney General Bailey has done a good job explaining these concerns in a letter dated October 8th, so I will simply highlight the issues as we see them.

Chilling Effect on Witness and Victim Willingness to Proceed to Trial.

This information can be used to harass victims and witnesses, and will result in fewer citizens willing to come forward to aid law enforcement. As I mentioned in my letter to you on November 1, the chilling effect cannot be overemphasized. In sexual assault cases, the invasion of the victim's privacy that has already occurred is often sufficient to make prosecution more difficult. Giving further information to the defendant beyond that which is already public only serves to further victimize the victim. Another area where this change would impact the ability to prosecute is in gang crime situations.

Currently it is difficult to proceed to trial when an organized gang is involved, because they use every piece of information to threaten witnesses into silence. Making more information available to the defendant will only serve to magnify this problem.

No Practical Ability to Limit Use of this Information.

We agree with the analysis on this topic presented by Mr. Bailey in his letter of October 8th.

Opposition to the argument that it is only fair to give the defense the same information as the prosecution.

Our understanding of this argument revolves around parity. For parity to be an argument, both parties have to have the same responsibilities. That is not the case in this situation. The responsibility of the prosecutor is vastly different from that of the defense. The prosecutor must determine not only that there is a factual basis to support a charge but that the overall prosecution is in the interests of justice. To determine the interests of justice may require information that is beyond the issues of the incident. The defense does not have that responsibility and thus does not have the need for unfettered access to that information.

Sincerely,

Raymond Schmitz /RT.

Raymond Schmitz
MCAA President

TURNING POINT
1015 Olson Memorial Highway, Minneapolis, Minnesota 55405-1334
612.374.2272
FAX 374-3811

November 8, 1996

Karen McDonald
Director CJIS
Minnesota Bureau of Criminal Apprehension
1246 University Avenue
St. Paul, MN 55104

Dear Ms. McDonald,

Judge Bransford raised some concerns last Spring regarding juvenile arrest data, and I would like to take this opportunity agree with her on them.

Specifically, I believe that arrest data should be deleted for juveniles whose arrests do not result in the filing of a petition or adjudication. Many juvenile arrests, particularly in communities of color, are not based on probable cause and therefore do not show a true criminal behavioral pattern for the juvenile.

It is essential to the civil rights of each individual that arrests be made fairly upon probable cause, and if they are not, that no records of such arrests are kept.

Sincerely,

Peter Hayden
President

ADDITIONAL ISSUES RAISED BY GROUP MEMBERS

RETENTION OF JUVENILE RECORDS

Should juvenile arrest data that does not result in adjudication be kept and for how long?

Is there a difference between serious and non-serious offenses information? How long should information be kept?

Should all juvenile adjudications information be kept until age 28?

CRIMINAL JUSTICE COMMUNITY ACCESS TO JUVENILE RECORDS

Who should have access to juvenile diversion data?

Will juvenile information be part of the index file and available to the C.J. community?

Under what condition should juvenile first offender data be disseminated and to whom?

Should arrest data or juvenile first offender data be made available to all law enforcement agencies on the data network?

EXPUNGEMENT

Are all criminal justice agencies' records affected by expungement orders if served on them?

Should there be a notice given to offenders of their rights to expungement and should records automatically be expunged after the statute of limitations expires to prosecute a charge, or when a charge has been dismissed for any reason?

Should there be a process for expungement and sealing of juvenile court records? Should we examine other states' process and procedure in this area?

REGULATION OF ACCESS TO JUVENILE RECORDS

How is there going to be governance and accountability as to who has access to juvenile records and their dissemination?

Are current procedures adequate?

Should there be specific passwords for all individuals who have access to information on the data network?

What does the contractual agreement with the BCA, law enforcement, and CJIS contain?

How will secondary dissemination of adult and juvenile data be regulated?

Should penalties be assessed for misuse of criminal records? If so, should there be employment and/or criminal sanctions?

DIVERSION DATA

Should information in which the subject was not charged but agreed to go through a diversion process be kept upon completion of that process, and for how long?

If so, who has access to this information and for what may it be used?

When and under what circumstances may it be destroyed when no conviction resulted?

Will the person be told who is offender a diversion process the full implications of this decision?

NON-CRIMINAL JUSTICE ACCESS TO JUVENILE RECORDS

In current law a number of entities, i.e., people and agencies have access to juvenile records for a purpose of background checks. Does this include arrest and/or diversion data?

Should a person know if a criminal or juvenile record was used to deny employment, housing, or credit?