

Agenda Item 7.6
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Meeting Date: April 17 & 18, 2008

**Consideration and Adoption of Criminal Background Check Policy as it Relates to
Licensees, Applicants for Licensure, and Employees of the Agency**

The General Appropriations Act (80th Legislature), Article IX, Section 19.68 required “all state agencies currently conducting background checks [to] submit...a report on their background check procedures by November 1, 2007” to the State Auditor’s Office (SAO) and other governmental entities. The SAO was to review each agency to determine any deficiencies in the procedures.

The SAO submitted their report and the Board of Nursing was found to lack certain policies in certain areas of its developed procedures. The attached policy on criminal background checks is for the purpose of consolidating all the Board’s written policies into one document and addressing all remaining needed policies required by the SAO, the Department of Public Safety, and the Federal Bureau of Investigations.

Staff Recommendation: The Board vote to adopt the attached criminal background check policy as it relates to licensees, applicants for licensure, and employees of the agency.

The Texas Board of Nursing’s Criminal Background Check Policies and Procedures as it Relates to Licensees, Applicants for Licensure, and Agency Employees

Effective September 2003, the Board of Nursing (BON) was granted the authority to require criminal background checks (CBC) for all existing licensees and all applicants for licensure. This legislation was enacted for the purpose of protecting the public from potentially unsafe practitioners; therefore, all applicants for licensure must submit to a CBC when applying for licensure. The BON is also requiring all current licensees to submit fingerprints for a CBC prior to renewal; however, this process is being spread out over a ten year period. Due to the sensitivity of this data, the BON is required to have policies that govern its procedures for handling this information. This policy is for the purpose of outlining these processes and consolidating the BON’s CBC policies into one document. The BON will conduct CBCs on licensees, applicants for licensure, and all employees who handle or have access to this information.

Licensees and Applicants for Licensure

The BON requires all licensees¹ and applicants for licensure² to submit fingerprints for a Federal Bureau of Investigations and Texas Department of Public Safety³ criminal background check. The BON utilizes this process to fulfill its mission of protecting and promoting “the welfare of the people of Texas by ensuring that each person holding a license as a nurse in this state is competent to practice safely.”⁴

¹Tex. Occ. Code Ann. § 301.3011. CRIMINAL HISTORY RECORD INFORMATION REQUIREMENT FOR RENEWAL.

(a) The board may require that an applicant for renewal of an unexpired license submit to the board, in addition to satisfying any other requirements for license renewal, a complete and legible set of fingerprints, on a form prescribed by the board, for the purpose of obtaining criminal history record information from the Department of Public Safety and the Federal Bureau of Investigation.

(b) The board may refuse to renew the license of a person who does not comply with the requirement of Subsection (a). Renewal of a license by the board is conditioned on the board obtaining the person's criminal history record information under this section.

²Tex. Occ. Code Ann. § 301.2511. CRIMINAL HISTORY RECORD INFORMATION FOR LICENSE APPLICANTS. (a) An applicant for a registered nurse license must submit to the board, in addition to satisfying the other requirements of this subchapter, a complete and legible set of fingerprints, on a form prescribed by the board, for the purpose of obtaining criminal history record information from the Department of Public Safety and the Federal Bureau of Investigation.

(b) The board may deny a license to an applicant who does not comply with the requirement of Subsection (a). Issuance of a license by the board is conditioned on the board obtaining the applicant's criminal history record information under this section.

(c) The board by rule may develop a system for initiating the process of obtaining criminal history record information for applicants for a license under this chapter by requiring persons who enroll or plan to enroll in an educational program that prepares a person for a license as a registered nurse to submit to the board a set of fingerprints that meets the requirements of Subsection (a). The board may require payment of a fee by a person who is required to submit a set of fingerprints under this subsection.

³Tex. Gov’t Code § 411.125. ACCESS TO CRIMINAL HISTORY RECORD INFORMATION: TEXAS BOARD OF NURSING. The Texas Board of Nursing is entitled to obtain from the department criminal history record information maintained by the department that relates to a person who:

- (1) is an applicant for or the holder of a license issued by the board;
- (2) has requested a determination of eligibility for a license from the board; or
- (3) is subject to investigation by the board in connection with a complaint or formal charge against the person.

⁴The Texas Board of Nursing’s Agency Mission statement.

Each individual required to submit to a criminal background check must provide the BON with their full name, date of birth, sex, Texas driver's license number or personal identification certificate number, social security number, a recent electronic digital image photograph of the person,⁵ a legible set of fingerprints on a form prescribed by the BON and the appropriate fee by personal check, cashier's check, or money order.⁶ A social security number is not required; however, receipt of the FBI criminal history report will take longer for individuals who do not have this identifying information.

Fingerprinting should be conducted by a person who is appropriately trained to collect them.⁷ All individuals have a right to obtain a copy of their criminal background report directly from the provider of the report, i.e. Department of Public Safety⁸, but the BON considers this information privileged and does not disclose this information.⁹ An individual also has the right to challenge its accuracy and completeness, and request corrections.¹⁰ All individuals required to submit to a criminal background check (CBC) may refuse to pay for the CBC¹¹ or to give their consent (refuse

⁵Tex. Gov't Code § 411.0845(e) states that the BON "must provide [DPS] with the following information regarding the person who is the subject of the criminal history record information requested: (1) the person's full name, date of birth, sex, Texas driver's license number or personal identification certificate number, and social security number; (2) a recent electronic digital image photograph of the person and a complete set of the person's fingerprints as required by the department; and (3) any other information required by the department.

⁶22 Tex. Admin. Code §§ 217.2 (Licensure by Examination for Graduates of Nursing Education Programs Within the United States, its Territories, or Possessions), 217.4 (Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdictions), and 217.5 (Temporary License and Endorsement).

⁷The BON accepts fingerprints in two ways. In Texas, fingerprinting may be done by L-1 Identity Solutions, www.l1id.com/fingerprinting (formerly known as Identix). Individuals using L-1 Identity Solutions must present photo I.D., and will have their fingerprints and a photo submitted electronically. If outside the State of Texas, a set of fingerprints cards must be requested from the BON at <http://www.bon.state.tx.us/olv/web-requests.asp>. The fingerprint card must be completed and mailed to the BON. Local law enforcement agencies should require photo I.D. and should be willing to assist with completing the fingerprint card.

On occasion when an individual's fingerprint cards are refused by DPS due to "quality of characteristics too low to be used," the individual will be required to submit a second set of prints. If the second set of fingerprints is refused, then a name search request will be conducted by DPS.

⁸Tex. Gov't Code § 411.083(b)(3)(DPS) and 28 CFR § 16.32 (FBI information).

⁹Tex. Occ. Code § 301.1615(b) (exceptions to disclosure are a court order or another nursing board that is a member of the Compact).

¹⁰28 CFR § 50.12(b)(FBI information) and U.S. Equal Employment Opportunity Comm'n Compliance Manual, Section 15, April 19, 2006. For incorrect or incomplete information, contact Department of Public Safety at Error Resolution Unit, PO Box 4143, Austin, Texas, 78765-4143 or ErrorResolution@txdps.state.tx.us or contact the Federal Bureau of Investigation (FBI) at the Special Correspondence Bureau of the FBI at 304-625-3878. *See also* 28 CFR § 16.34 (procedures for obtaining change, correction, or updating of FBI information).

¹¹22 Tex. Admin. Code § 223.1(a)(22) (fees for criminal background check); 22 TAC §§ 217.2 (Licensure by Examination for Graduates of Nursing Education Programs Within the United States, its Territories, or Possessions); 217.4 (Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdictions); and 217.5 (Temporary License and Endorsement).

to submit fingerprints);¹² however, a license will not be issued or renewed without the submission.¹³

All licensees and potential licensees are expected to be truthful and forthright when submitting applications to the board for initial licensure or renewal and are expected to disclose all criminal history.¹⁴ Failure to disclose prior criminal history will result in disciplinary action on a license and possible denial of licensure.¹⁵ A criminal history report that yields a match for criminal conduct may subject an individual to further investigation and/or review but will not automatically disqualify the individual from licensure. The individual whose background check shows prior criminal activity must provide a certified copy of all court documents and the individual's criminal history will be reviewed on a case-by-case basis.¹⁶ If an arrest is shown on the CBC, but no disposition is specified, the arrest will not be used as grounds for disciplinary action, unless through evidence ascertained through the BON's own investigation, the underlying conduct suggests actions violating the Nursing Practice Act or rules of the Board. The board may consider such evidence as a factor in its deliberations regarding any decision to grant a license, restrict a license, or impose licensure discipline.¹⁷ Once a licensure decision has been made, the CBC will be destroyed by Board staff.¹⁸

The BON has specifically delineated certain criminal offenses it deems to affect the practice of nursing due to the characteristics of the practice, i.e. unfettered access to a vulnerable population, access to controlled substances, etc., and has published its rules and policies in the *Texas Register* and on the Board's web site.¹⁹ Certain offenses, therefore, may prevent an individual from obtaining or maintaining a nursing license.²⁰ If the Board proposes to deny an application for licensure, refuse to renew a license or suspend or revoke a license or temporary permit on the basis of criminal

¹²Individuals must give written consent to have a criminal background check conducted. See Tex. Gov't Code § 411.0845(e)(2)(DPS); 28 CFR § 50.12(b) (Exchange of FBI identification records).

¹³Tex. Occ. Code § 301.2511(b) (Board may deny license to applicant who does not provide fingerprints for CBC); TOC § 301.3011(b) (Board may refuse to renew license for refusal to submit fingerprints).

¹⁴ See Tex. Occ. Code § 301.452(b)(2) & (10)(Grounds for Disciplinary Action); 22 Tex. Admin. Code § 217.10(6)(I)(Unprofessional Conduct); Board's *Disciplinary Sanctions for Lying and Falsification* at <ftp://www.bon.state.tx.us/lying.pdf>.

¹⁵See Board's *Disciplinary Sanctions for Lying and Falsification* at <ftp://www.bon.state.tx.us/lying.pdf>.

¹⁶See Board's *Disciplinary Sanction Policies* and *Disciplinary Guidelines for Criminal Conduct* at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>; Tex. Occ. Code § 53.022 (Factors in Determining Whether Conviction Relates to Occupation); Tex. Occ. Code § 53.023 (Additional Factors for Licensing Authority to Consider); 22 Tex. Admin. Code § 213.33 (Factors Considered for Imposition of Penalties/Sanctions and/or Fines).

¹⁷22 Tex. Admin. Code § 213.28(h)(Licensure of Persons with Criminal Offenses).

¹⁸Tex. Gov't Code § 411.0845 (Criminal History Clearinghouse)(Once individual is in CBC data bank, BON notified by DPS of subsequent arrest)

¹⁹22 Tex. Admin. Code § 213.28 (Licensure of Persons with Criminal Offenses); See Tex. Occ. Code § 53.025 (Guidelines) and Board's *Disciplinary Sanction Policies* and *Disciplinary Guidelines for Criminal Conduct* at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>.

²⁰Tex. Occ. Code § 301.4535 (Required Suspension, Revocation, or Refusal of License for Certain Offenses); Tex. Occ. Code § 53.021 (Authority to Revoke, Suspend, or Deny License).

history record information, the individual is entitled to a hearing at the State Office of Administrative Hearings.²¹

Agency Employees

All BON employees, temporary employees, or potential employees will be required to submit to a CBC. All BON staff have “access to information resources or information resources technologies,²² other than a desktop computer or telephone station assigned to that person”; therefore, all BON employees will be subjected to a criminal background check.²³ Employees

²¹Tex. Occ. Code § 301.1615(c)(right to hearing under TOC § 301.454).

²²Tex. Gov’t Code § 2054.003(7) and (8) defines “information resources” and “information resources technologies” as follows:

(7) "Information resources" means the procedures, equipment, and software that are employed, designed, built, operated, and maintained to collect, record, process, store, retrieve, display, and transmit information, and associated personnel including consultants and contractors.

(8) "Information resources technologies" means data processing and telecommunications hardware, software, services, supplies, personnel, facility resources, maintenance, and training.

²³Tex. Gov’t Code § 411.1405. ACCESS TO CRIMINAL HISTORY RECORD INFORMATION: STATE AGENCIES; INFORMATION TECHNOLOGY EMPLOYEES.

(a) In this section:

(1) "Information resources" and "information resources technologies" have the meanings assigned by Section 2054.003.

(2) "State agency" means a department, commission, board, office, council, authority, or other agency in the executive, legislative, or judicial branch of state government that is created by the constitution or a statute of this state, including a university system or institution of higher education as defined by Section 61.003, Education Code.

(b) To the extent consistent with Subsection (e), a state agency is entitled to obtain from the department the criminal history record information maintained by the department that relates to a person who:

(1) is an employee, applicant for employment, contractor, subcontractor, or intern or other volunteer with the state agency or with a contractor or subcontractor for the state agency; and

(2) has access to information resources or information resources technologies, other than a desktop computer or telephone station assigned to that person.

(c) A state agency that obtains criminal history record information under this section may not release or disclose the information or any documents or other records derived from the information except:

(1) by court order;

(2) with the consent of the person who is the subject of the information; or

(3) to the affected contractor or subcontractor, unless the information was obtained by the department from the Federal Bureau of Investigation.

(d) A state agency and the affected contractor or subcontractor shall destroy criminal history record information obtained under this section that relates to a person after the information is used to make an employment decision or to take a personnel action relating to the person who is the subject of the information.

(e) A state agency may not obtain criminal history record information under this section unless the state agency first adopts policies and procedures that provide that evidence of a criminal conviction or other relevant information obtained from the criminal history record information does not automatically disqualify an individual from employment. The attorney general shall review the policies and procedures for compliance with due process and other legal requirements before adoption by the state agency. The attorney general may charge the state agency a fee to cover the cost of the review. The policies and procedures adopted under this subsection must provide that the hiring official will determine, on a case-by-case basis, whether the individual is qualified for employment based on factors that include:

(1) the specific duties of the position;

(2) the number of offenses committed by the individual;

(3) the nature and seriousness of each offense;

(4) the length of time between the offense and the employment decision;

(5) the efforts by the individual at rehabilitation; and

(6) the accuracy of the information on the individual's employment application.

(f) A criminal history record information provision in another law that is more specific to a state agency, including Section 411.089, prevails over this section to the extent of any conflict.

consent to a CBC when submitting the State of Texas application for Employment form.²⁴ All individuals have a right to obtain a copy of their criminal background report directly from the provider of the report, i.e. Department of Public Safety,²⁵ but the BON considers this information privileged and does not disclose this information.²⁶ An individual also has the right to challenge its accuracy and completeness, and request corrections.²⁷

A criminal history report that yields a match for criminal conduct may subject an individual to further investigation and/or review but will not automatically disqualify the individual from employment with the Board;²⁸ however, a false statement or relevant omission on the application will. The Board, may choose to limit an employee's duties until a criminal background check is completed and all information acquired. All employment applicants' and employee's criminal history will be submitted to and reviewed by the Director of Enforcement and subsequently submitted to the Director of Operations for employment determination. Each file will be reviewed on a case-by-case basis.²⁹

Once an employment decision has been made, the CBC will be destroyed.³⁰ If necessary to store a CBC for a period of time, the employment applicant's or employee's criminal history information will be stored separately from personnel records due to the confidentiality required of and limited disclosure given to these documents.³¹ The criminal history information of all employees is locked in a file cabinet with limited access permitted.³²

²⁴See "The State of Texas Application for Employment" form at www.twc.state.tx.us/jobs/gvjb/stateapp_er.html.

²⁵Tex. Gov't Code § 411.083(b)(3)(DPS) and 28 CFR § 16.32 (procedure to obtain FBI information record).

²⁶Tex. Occ. Code § 301.1615(b) (exceptions to disclosure are a court order or another nursing board that is a member of the Compact). Although the CBC is confidential, all submitted applications become public record and subject to disclosure.

²⁷28 CFR § 50.12(b)(FBI information) and U.S. Equal Employment Opportunity Comm'n Compliance Manual, Section 15, April 19, 2006. For incorrect or incomplete information, contact Department of Public Safety at Error Resolution Unit, PO Box 4143, Austin, Texas, 78765-4143 or ErrorResolution@txdps.state.tx.us or contact the Federal Bureau of Investigation (FBI) at the Special Correspondence Bureau of the FBI at 304-625-3878. See also 28 CFR § 16.34 (procedures for obtaining change, correction, or updating of FBI information).

²⁸Tex. Gov't Code § 411.1405(e)(factors considered for employment purposes). See footnote 22.

²⁹The BON does not discriminate on the basis of race, color, religion, sex, national origin, age, disability, or veteran status. All applicants in similar situations will be treated in the same manner.

³⁰Tex. Gov't Code § 411.1405(d).

³¹Tex. Gov't Code § 411.0845(d).

³²*Id.*

Conclusion

The BON believes the authority to conduct CBCs is granted with an inherent responsibility to implement sufficient safeguards to ensure confidentiality. The BON will take every step possible to ensure that all agency staff fulfills this responsibility by maintaining the confidentiality of the CBC information to which they have access. Finally, the BON will not use the information contained in a CBC as the sole basis for making a final decision regarding licensure or employment.