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Law Enforcement Information Network Training Bulletin Defense Attorney Access

The following training bulletin is being distributed to authorized Law Enforcement Information Network (LEIN) and National Crime Information Center (NCIC) user agencies to provide guidance on policies and procedures as they relate to the access to information obtained from LEIN, NCIC and/or III by defense attorneys.

Specific questions related to this information, may be directed to the LEIN Field Services Audit and Training Unit at (517) 241-0641 or the LEIN Policy Analyst at (517) 241-0639.

Defense/Private Attorney Access

Generally, defense counsel and/or private attorneys do not have direct access to LEIN, NCIC or III records. They are not considered to be "criminal justice agencies" and are not a part of the "administration of criminal justice" (28 C.F.R. 20.3 (b) & (g)). Therefore, they are not permitted direct access to information contained in LEIN, NCIC or III records. Based on Michigan statute and court rules, however, defense counsel may have access to records as outlined below.

LEIN Information

MCL 28.214 states in part, "(4) *The attorney general or his or her designee, a prosecuting attorney, or the court, in a criminal case, may disclose to the defendant or the defendant's attorney of record information pertaining to that defendant that was obtained from the [state's] law enforcement information system.*"

The above statute applies **only** to information obtained from Michigan-owned databases:

- LEIN Hot-files (including LEIN Personal Protection Order file and LEIN Carry Concealed Weapon file)
- Michigan Secretary of State (SOS)
- Michigan Department of Corrections Offender Management Information System/Corrections Management Information System (CMIS)
- Michigan Criminal History Record Information (CCH)

This means that Michigan's Attorney General, the prosecuting attorney, or the criminal court judge, who represent an authorized LEIN user agency (with assigned ORI), may legally disseminate information from the above databases to a defense attorney, consistent with the above statute, without a motion for the "discovery" of the information. A law enforcement agency, or other authorized user agency not listed above, may not, for any reason, disseminate information obtained from LEIN and/or NCIC or III to a defense/private attorney.

NCIC or III

Information obtained from the FBI through the NCIC and III (other than a Michigan Record) may not be disseminated to defense counsel except via the "discovery" process, and such dissemination is only authorized by the criminal justice officials (criminal court judge or the prosecutor) as identified above. Only information already in the prosecutor's file may be



disseminated to defense counsel. Defense Counsel requests for information that is not already in the prosecutor's file must be directed to the criminal court judge and if found to be relevant or material, the criminal court judge may issue a court order to the FBI. (Even when not legally obligated to do so, the FBI's long standing procedure is to provide the criminal history record to the requesting judge.)

The NCIC manual covers the difference between discovery and inappropriate dissemination.

"...the restrictions on dissemination found in the federal regulations generally can be overcome by an order of the court of competent jurisdiction. Courts have inherent and/or statutory powers to procure evidence and ensure fairness in court proceedings. An important distinction should be drawn between court ordered production of CHRI which already exists in the prosecuting authority's files and a court order which requires a prosecuting authority to access III on behalf of the defendant. The previous discussion regarding the court order exception rests on the assumption that any III-derived CHRI is or will be in the possession of the prosecuting authority for its own use and as such is effectively part of the prosecutors own records. In any case, where the prosecuting authority will not, for its own use, access III to obtain CHRI about the defendant or witnesses, dissemination to defense attorneys of III-derived CHRI should not occur. In such case, the court order effectively should be directed at the records of the FBI or the criminal history repository of another state. Any court order of this nature directing the prosecutor to access FBI-managed criminal history record information on behalf of the defense counsel should be resisted and referred to the FBI for handling in accordance with federal laws and regulations."

Probation Officers and Pre-Sentence Investigations

Michigan Compiled Law (MCL) 771.14 requires probation officers to produce and provide to the court a pre-sentence investigative report outlining, among other things, a potential probationer's criminal history and the recommendation for sentence. The statute goes on to require the pre-sentence investigation report be provided to the prosecutor and defense counsel not less than 2 business days before sentencing, allowing the prosecutor and defense counsel to retain a copy of the report. Section (8) of the statute requires that, in the case of an appeal of the sentencing or the accuracy or relevancy of the information contained in the report, a copy of the pre-sentence investigation report and a copy of any attachments must be provided to the defense counsel. Michigan Court Rules (MCRs) Section 6.425 and 6.610 also describe these same requirements.

Since these reports and attachments may contain information obtained from the National Crime Information Center (NCIC) or Interstate Identification Index (III), it is important to point out that Michigan statute and court rules only govern the access to, and dissemination of, Michigan "owned" information. As noted below, FBI-managed criminal history record information may only be provided to defense counsel and/or defendant by the criminal court judge or the prosecutor.

Dissemination

If, after reviewing the pre-sentence investigative report, the judge determines the information obtained from NCIC or III contained therein is relevant to sentencing, he or she may share the information with the defense counsel (without a motion for the "discovery" of the information). The dissemination of the information obtained from LEIN, NCIC and/or III with the defense and/or the prosecutor must be logged (secondary dissemination), documenting the date and names of those receiving the information (defense attorney, defendant and prosecutor).

If, after reviewing the pre-sentence investigative report, the judge determines the information obtained from NCIC or III contained therein *is not* relevant to sentencing, he or she may exempt from disclosure that information, consistent with MCL 711.14 (3), which states:

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“The court may exempt from disclosure in the presentence investigation report information or a diagnostic opinion that might seriously disrupt a program of rehabilitation or sources of information obtained on a promise of confidentiality. If a part of the presentence investigation report is not disclosed, the court shall state on the record the reasons for its action and inform the defendant and his or her attorney that information has not been disclosed. The action of the court in exempting information from disclosure is subject to appellate review. Information or a diagnostic opinion exempted from disclosure under this subsection shall be specifically noted in the presentence investigation report.”

A probation officer may not, for any reason, disseminate information obtained from NCIC or III to defense counsel or any private attorney.

Best Practice

While not prohibited by policy, MSP LEIN Field Services does not recommend providing a LEIN produced printout for defense counsels’ retention. Generally, the defense counsel is not trained on proper dissemination and disposal requirements. In addition, LEIN produced printouts often contain information on individuals not associated with the criminal case in question. Rather, MSP LEIN Field Services recommends providing a LEIN produced printout for viewing purposes only or a summary document pertaining only to the defendant.

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Witnesses: Defense Counsel Access to LEIN/NCIC

According to MCL 28.214 (4), "the attorney general or his or her designee, a prosecuting attorney, or the court, in a criminal case, may disclose to the defendant or the defendant's attorney of record information pertaining to that defendant that was obtained from the law enforcement information system."

The above statute pertains only to Michigan information (nothing from the FBI or another state) and very clearly does not include witnesses. Information on witnesses that has not already been procured by, and in the possession of, the Prosecution, for its own purposes, may be obtained through the Internet Criminal History Access Tool (ICHAT) at www.michigan.gov/ichat. Information obtained for defense purposes will be subject to a charge of \$10 per query.

Also, the FBI provided direction on this specific issue which is summarized below.

Dissemination of criminal history record information (CHRI) is governed by Title 28, United States Code and federal regulations found in Title 28, Code of Federal Regulations, Part 20, which restricts dissemination of CHRI to "criminal justice agencies for criminal justice purposes." The definitions of "criminal justice agency" and "administration of criminal justice" found in 28 CFR do not include criminal defense functions. However, the FBI recognizes the existence of courts' inherent and/or statutory powers to produce relevant evidence and to ensure fairness in court proceedings. Consequently, the dissemination of CHRI to defense counsel pertaining to defendants and witness may occur under the following circumstances.

- 1) CHRI already in the possession of the prosecution as a result of appropriate access for its own use; as such, the CHRI is effectively part of the prosecution's own records and dissemination pursuant to a court order is permissible (discovery).
- 2) CHRI has not been previously obtained by the prosecution for its own use; access to CHRI solely on behalf of defense counsel may not occur. In such circumstances, a court order must be properly directed to the FBI (CJIS Division, Special Correspondence Unit, 1000 Custer Hollow Road Module D-2, Clarksburg, WV 26306). The FBI will provide the Court with the requested records along with a letter requesting the Court review the CHRI prior to providing it to defense counsel and prosecutor to insure the information is relevant to the matter before the Court.

In those instances in which the prosecutor has not previously obtained the CHRI and, nonetheless, is directed by the judiciary to provide such information, the FBI has admonished prosecutors that court orders of this nature should be resisted and referred to the FBI for handling in accordance with federal laws and regulations.