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CDIA Testimony regarding House Bill 5368:

Proposed SCAO Court Rule Would Slow Consumer Background Checks, Introduce New Safety Gaps

Dear Chairman Filler, Vice-Chair Mueller and members of the House Judiciary Committee:

Michigan's State Court Administrative Office (SCAO) has released a new court administrative rule (ADM 2020-26) that would slow and introduce new gaps in criminal background checks run on millions of Michiganders yearly. Following concerns that the rule creates new risks for Michigan consumers, the effective date of the rule was extended to January 1, 2022.

Under SCAO's new rule, each consumer subject to a background check would now have to obtain from a report subject a custom new authorization form and provide that to the court in order to complete the background check. The new SCAO documentation is expected to delay employment, tenant, contractor, nonprofit volunteer, and professional license background checks for consumers who have lived in Michigan – and increase work for court clerks.

Verifying criminal background checks with court records is a key step in delivering accurate background checks. Consumer reporting agencies (CRAs) have an obligation under the federal Fair Credit Reporting Act (FCRA) to maintain "strict procedures" for certain employment screening to ensure that a reported public record is "complete and up to date." 15 U.S.C. 1681k(a)(2) This obligation means court record users cannot rely on iChat alone, given its express limitations.

Under current law and process, employers and other court record users certify that they will use a criminal history report about a specific applicant for evaluating his or her application for employment. Court researchers rely on this FCRA-required certification when conducting their research, providing sufficient identifying information to the court to identify the subject, and returning a specific case result for the employer to evaluate. Additional documentation, such as SCAO proposes, is not needed under the FCRA or by courts in other states. Were the SCAO rule to take effect as written, delays for Michiganders alone, applying for jobs anywhere, would result.

With a recovering economy, now is not the time for SCAO to introduce new court delays that disadvantage Michiganders seeking employment and housing.

SCAO proposes that the public use Michigan's iChat police records for background checks instead of traditional court searches. From court researchers' regular trips to courts around the state, we know several courts have begun to tell researchers that the courts are getting a jump on the January deadline with the support of SCAO and are routing all background check research inquiries to iChat exclusively, instead of the court. Relying on iChat without court records is a public safety mistake

that, left unaddressed, would compromise Michiganders' safety and the completeness and accuracy of public safety background checks.

Specifically, SCAO's proposed use of iChat contradicts Michigan State Police's iChat usage policy and introduces new gaps in public safety background checks:

1. The iChat system, by design and statute, is an incomplete source of Michigan criminal history data. Convictions involving jail time of less than 93 days, by statute, are not meant to be included in iChat, but are found in court records. See Mich. Comb. L. 28.243.

Some examples of criminal history not included in iChat under statute are:

- Domestic violence convictions that result in imprisonment of fewer than 93 days (under Mich. Pen. C. 750.81)
 - Assault and battery convictions that result in imprisonment of fewer than 93 days (under Mich. Pen. C. 750.81)
 - Criminal violations where no fingerprints were collected
 - Active warrants, where a Michigan person is being sought for a criminal violation
2. iChat also has substantial data gaps in its execution, not just its design. The U.S. Department of Justice has found that iChat in practice has a high rate of missing dispositions. "Missing dispositions" are criminal charges that iChat has not been able to match to a subsequent outcome, such as a conviction or dismissal. Reporting disposition information is an important step to ensure justice-involved persons get a fair shake.

The U.S. Dept. of Justice's most recent study finds that 19% of felony charges in the Michigan criminal history records system lack a matching disposition. The US DOJ also found that iChat does not attempt to locate missing dispositions before returning results for its non-criminal justice searches. "Survey of State Criminal History Information Systems, 2018," Tables 1, 14

Without more, iChat's known data gaps and missing dispositions are unacceptable to private sector researchers, their clients, and consumers. iChat can be a useful source tool, but researcher access to court records at scale is regularly needed. To overcome iChat gaps, researchers have searched court records for decades in order to verify the current state of the record and report it accurately.

Because of iChat's limits, the Michigan State Police have designed iChat to be used in conjunction with the courts:

1. iChat's own FAQs instruct iChat users to contact the courts when iChat misses a known record in its report results:

"What if I know there is a record but I got a "no record" response or I received a record for which I need additional information regarding the case?"

“Check with the local court regarding the case for which you have knowledge. If you need additional information regarding a case on the record, you will need to contact the police, prosecutor or court noted on the record. The recorded information provided is all that the Criminal Justice Information Center has available.” (<https://apps.michigan.gov/Home/FAQS>)

2. iChat further instructs users not to use iChat search results for “adverse action” – a term of art to describe declines of Michiganders’ applications for employment, contractor, nonprofit volunteer, and rental housing applications:

“The iChat system will return a search result based on the search criteria entered. The search result may or may not have a criminal history record. Please review the results carefully and do not take adverse action based solely on this record.” (emphasis added) Source:

https://apps.michigan.gov/ICHAT_Docs/Help%20Files/Help%20file%20-%20Viewing%20Search%20Results.pdf

What’s the solution? As CDIA has proposed, SCAO should clarify that court clerks and access interfaces will continue to promptly verify a criminal record where a user presents identifying information, such as a full name and Date of Birth, about a search subject.

Cumbersome regulatory delays, such as SCAO’s proposed added consumer documentation, should be rejected. By continuing to reply promptly to researchers’ searches, SCAO and court clerks can support prompt, accurate processing of Michiganders’ applications for jobs.

Thank you for the consideration of our comments and I would be happy to answer any questions you may have.

Sincerely,

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