



## **LAW ENFORCEMENT INFORMATION NETWORK Defense Counsel Access and Pre-Sentence Investigation Reports**

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, or the Interstate Identification Index (III) by defense attorneys.

The following information is meant to replace the guidance previously provided in a LEIN Training Bulletin dated [March 22, 2011](#), as it pertains specifically to pre-sentence investigation reports produced pursuant to Michigan Compiled Law (MCL) 771.14.

### **Pre-Sentence Investigation Reports (PSIR)**

MCL 771.14 requires probation officers to produce and provide to the court a PSIR outlining, among other things, a potential probationer's criminal history and the recommendation for sentence. Section (5) allows the review of the PSIR by both the prosecutor and defense counsel prior to sentencing. Section (6) grants both parties the right to challenge any information contained in the PSIR. Section (7) requires the PSIR be provided to the prosecutor and defense counsel not less than two business days before sentencing, allowing the prosecutor and defense counsel to retain a copy of the report. Section (8) requires that, in the case of an appeal of the sentencing or the accuracy or relevancy of the information contained in the PSIR, a copy of the PSIR and a copy of any attachments must be provided to the defense counsel.

Since these reports and attachments may contain information obtained from the NCIC or 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 above, FBI-managed criminal history record information (CHRI) may only be provided to defense counsel and/or defendant by the criminal court judge or the prosecutor.

### **Due Process**

The Michigan Supreme Court General Council has stated that the failure to provide a criminal defendant and his or her defense attorney with the same database-derived CHRI provided to the court and the prosecuting authority as required by MCL 771.14 would violate the defendant's right to due process. A defendant has a due process right not to be sentenced on the basis of inaccurate information, and a defendant must be given an opportunity to review information on which his or her sentence is based and raise objections or point out extenuating circumstances. In order to protect the defendant's due process rights, all CHRI referenced in the defendant's PSIR that is provided to the court and the prosecuting authority must also be provided to the defendant and his or her defense attorney.

The FBI's Office of the General Counsel (OGC) has stated that DOJ regulations will yield if enforcement results in defendants being denied a Federal or State Constitutional right. Since Michigan has determined that denying defense counsel access to criminal history records obtained from the FBI and included within the Michigan presentencing investigation reports is a Constitutional violation, the FBI

would not find a legal objection to including these records to ensure a fair criminal trial or sentence. This is particularly the case when the prosecution and criminal courts have access to the defendants' criminal records and are relying upon these criminal history records in the course of the criminal trial or sentencing.

## **Dissemination**

As a result of the FBI OGC's clarification, the inclusion of information from NCIC and III in PSIRs and its subsequent dissemination in accordance with MCL 771.14 is authorized and no longer requires a court determination, with the exception of NCIC Restricted Files, which are specifically restricted to law enforcement personnel.

NCIC Restricted files include:

- Gang File
- Known or Appropriately Suspected Terrorist File
- Supervised Release File
- National Sex Offender Registry File
- Historical Protection Order File of the NCIC
- Identity Theft File
- Protective Interest File
- Person with Information data in the Missing Person File
- Violent Person File
- NICS Denied Transactions File

The dissemination of criminal history record information obtained from LEIN, NCIC, and/or III to defense counsel and/or the prosecutor must be documented (secondary dissemination), including the date of dissemination, the names and agencies of those receiving the information (defense attorney or defendant, and prosecutor).

Specific questions related to this information may be directed to the LEIN Field Services Unit at [MSPLEINFSS@michigan.gov](mailto:MSPLEINFSS@michigan.gov) or 517-241-0667.