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Criminal Offender Record Information – Frequently Asked Questions

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We are often asked questions about the proper access to, and use of, Criminal Offender Record Information, also known as "CORI," by public entities in Massachusetts. The state Department of Criminal Justice Information Services (DCJIS) has a variety of online resources, including a guide entitled "What You Need to Know About Massachusetts Criminal Records," available at: https://www.mass.gov/files/documents/2019/03/18/CORI%20booklet%20FINAL.pdf. Below find general responses to some Frequently Asked Questions relative to CORI checks in the employment, licensing, and housing contexts. You should consult with your municipal counsel or DCJIS for guidance in any particular situation, however.

1. **Can I run CORI checks for all government positions, not just those that involve direct and unmonitored contact with children, elderly, and disabled persons?**

Massachusetts' CORI laws and regulations do not prohibit running CORI checks on applicants for all government jobs or on those presently holding such positions. Public employers are only required to run CORI checks on certain categories of personnel (including volunteers). Whether to run CORI checks on other types of applicants or holders of government positions, such as, for example, a clerical position, requires some consideration as to the reasons for the CORI check. Nevertheless, there are risks for running CORI checks for every position, as discussed in more detail in response to Questions 2 and 4, below.

2. **Can I run CORI checks on current employees, and not just applicants for employment?**

The CORI laws and regulations do not prohibit running CORI checks on current (as opposed to prospective) employees. However, before a governmental entity decides to run CORI checks on all employees, the policy implications of such a decision merit consideration. The more CORI checks a public entity performs, the more CORI records the entity will have to maintain confidentially and securely, and the greater the risk that CORI information will be inadvertently and/or improperly disclosed. If CORI checks are run on current employees, consideration must be given to what action may be taken if unfavorable CORI is returned. What if the most valued (and long-time) member of a department has a negative CORI that includes a domestic violence charge? As the saying goes, "a bell once rung cannot be un-rung." If CORI check are performed on current employees, the public entity may find itself in the possession of information previously unknown, which will compel that entity to consider potential adverse employment action, or run the risk of increased liability in the future for not taking action. Finally, running CORI checks on existing, union employees may give rise to bargaining obligations, requiring advance consultation with legal counsel.

3. **If I run CORI checks on current employees, and am contemplating taking a potentially adverse employment action against an employee as a result of a negative CORI, am I required to provide advance notice of a possible adverse employment decision?**

Setting aside the policy, legal, and practical considerations associated with running CORI checks on current employees, CORI regulations detail specific notice requirements that an employer must follow before taking adverse action against an employment applicant or employee based on the subject's CORI. DCJIS considers this advance notification to be a due process right of an individual. Thus, for both applicants and existing employees, certain advance written notification must be made before any adverse action based upon CORI may be taken. From an administrative perspective, it is also likely easier to have one "standard" notification form to use for both applicants for employment and existing employees.

4. **When is the "best" time in an application process to run a CORI check?**

The CORI Regulations define an "employment applicant" as "an individual who has applied for employment and who meets the requirements for the position for which the individual is being screened for criminal history by an employer." This definition includes volunteer applicants, subcontractors, contractor or vendor applicants, and individuals applying for special state, municipal, or county employee positions as defined in G.L. c. 268A, § 1.

As indicated above, CORI checking all applicants results in an increased number of CORI records to safeguard and a greater risk that CORI information will be inadvertently and/or improperly disclosed. Moreover, while some candidates would be screened out from further consideration without regard for the results of a CORI check (i.e., not qualified for job, insufficient education or experience, etc.), the fact that a CORI check is run on a candidate gives rise to at least the implication that the individual was not selected based upon an unfavorable CORI check, which can raise a host of questions, complications and potential legal claims.

Thus, to minimize potential liability, the better practice with respect to applicants is to make a conditional offer of employment to a finalist or finalists pending a satisfactory CORI check (and any other necessary preconditions to employment), and then run the CORI check. It is permissible, of course, to secure all applicants' consents to running CORI checks at the beginning of the application process, through the CORI Acknowledgement Form, so that there is no unnecessary delay in performing the appropriate CORI checks during the process of selecting a finalist or finalists.

Housing and licensing applicants are likely to be treated somewhat differently. Usually, there is not a set limit on the number of licenses, and each licensing applicant is evaluated on the merits of the individual application and the relevant statutory or other legal requirements, rather than compared with one another. For housing applicants, federal or state laws or regulations may apply that dictate when a CORI check is performed. In fact, state regulations specifically require that public housing authorities shall only request a housing applicant's CORI as the final step in the application process.

5. **Who has a "need to know" CORI information about applicants or current employees, licensees or applicants for housing?**

Prior to significant changes to CORI laws in 2010, where an employer or other entity was authorized to run CORI checks for certain purposes, access to CORI information nonetheless was restricted to those individuals within the organization who had executed what was known as an "Agreement of Non-Disclosure Form." Revised state regulations adopted in light of CORI reform legislation eliminated that requirement, and actually broadened the scope of persons who may have access to CORI to those individuals within an organization with a "need to know." However, statutory changes have added criminal penalties and monetary fines against individuals for improper disclosures of CORI. Thus, pursuant to DCJIS' recommendation, it is still prudent to limit those individuals to whom actual CORI information is provided and advise them regarding the organization's CORI Policy and all limitations on the use and disclosure of CORI. Moreover, the person(s) actually running a CORI check must review the iCORI Training Documents, which are available online at: https://www.mass.gov/criminal-record-check-services.

Can a Board of Selectmen/Select Board, or City/Town Council have access to CORI of an applicant for employment, for instance? The answer is, it depends. If the Board of Selectmen/Select Board, or City/Town Council is the appointing authority, then it is reasonable to conclude that they would be involved in evaluating candidates, including CORI information. What if the Board or Council is not the appointing authority, but has the ability to ratify or approve another official's hiring decision? These seems a closer case, but we can envision circumstances where the hiring official needs to explain the hiring decision (which may include explanation of the decision to reject an otherwise qualified candidate due to CORI), as part of the Board's/Council's deliberations about whether to approve or ratify the hiring official's decision. In any event, however, CORI disclosure should be strictly limited to the extent possible, and when disclosure of CORI is made to individuals with a "need to know," the public employer should remind those persons about the limitations on secondary disseminations (and it may also be useful to remind them about the individual liability for improper use/dissemination of CORI.)

One way to look at this is to consider how involved in the hiring decision a person may be, with the presumption that those close to the decision are more likely to have a "need to know" than those that are relatively uninvolved. However, decision about this issue must be made on a case by case basis depending on the applicable facts. Note that it is likely unnecessary, and possibly risky, for a screening committee, which can often include residents, to have access to the results of CORI checks. In any event, as noted above, CORI checks would typically be recommended later in the process.

The same principles apply in the housing context. However, local housing authorities and redevelopment authorities are subject to additional regulations (760 CMR 8.00 *et seq*.) governing the confidentiality and privacy of personal tenant and applicant information. The regulations specifically limit board member access to applicant or tenant personal data to circumstances where there is a need for access in order for the board to conduct business properly.

Licensing decisions implicate a different set of considerations. Where the licensing authority is a governmental body, such as the Board of Selectmen/Select Board, or City/Town Council, charged with making suitability

determinations concerning license applicants, it is possible that the body will "need to know" the content of an applicant's CORI report. As with employment decisions, however, if such information is shared, members of the governmental body should be cautioned against improper dissemination or handling of CORI made available to them. In addition, where a public body governed by the Open Meeting Law is considering licensing applicants, then the portion of the licensing hearing where CORI is to be considered may appropriately be held in executive session (see number 6, below).

6. **If a governmental body has a "need to know" CORI, can/should the body discuss CORI in open or executive session?**

CORI details should **not** be discussed in open session, regardless of whether it is for employment, licensing, or housing purposes. Depending upon the circumstances, it would be appropriate to discuss CORI in executive session under either Purpose 1 (G.L. c. 30A, § 21(a)(1)) or Purpose 7 (G.L. c. 30A, § 21(a)(7)) of the Open Meeting Law. Because Purpose 1 triggers certain individual rights, consideration should be given as to whether it is optimal to invoke that purpose for entering executive session. To ensure that the appropriate exemption is invoked, and in the appropriate manner, consultation may be appropriate with the chief executive officer or with counsel. Particularly in the licensing context, it will generally **not** be appropriate to hold the entire licensing hearing or proceeding, including any vote(s) on the license application, in executive session. Be careful to ensure that CORI discussed during an executive session is not improperly disclosed during the open session portion of the proceeding.

7. **If I can't ask about an applicant's criminal history on an employment application, can I ask the individual about his/her criminal history during an interview?**

The so-called "Ban the Box" provision of CORI reform legislation which took effect in 2010, prohibits employers from including questions concerning an applicant's criminal history on most[1] employment applications. This prohibition is limited to the initial application used to commence the hiring process. Employers may, however, run CORI checks during the hiring process on finalists or other applicants who meet the qualifications for the position, and may ask such applicants about information appearing on a CORI check during a post-application interview, subject to certain exceptions discussed below.

Importantly, as of October 13, 2018, based upon additional CORI reform legislation passed earlier in 2018, employers are not allowed to ask questions, either orally or in writing, at any stage of hiring process, about the following:

- a criminal case that did not end in a conviction
- an arrest or criminal detention (*e.g.* being held at a police station) that did not end in a conviction
- a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace

[1] For instance, different rules apply to law enforcement employment.

- a conviction for a misdemeanor where the date of the conviction or the release date from incarceration was three (3) or more years ago, unless the applicant was convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information
- a juvenile record, except for juvenile cases that transferred from the Juvenile Court to an adult court and where the juvenile is tried and convicted as an adult, OR
- any sealed or expunged criminal record.

Rather, after the initial application, employers may only ask an applicant during an interview about:

- any felony conviction (regardless of date of conviction) if the conviction is not sealed or expunged; and
- any misdemeanor conviction that was not a first time conviction for drunkenness, simple assault, speeding, a minor traffic violation, affray, or disturbing the peace if:
  - the applicant was convicted or released from incarceration for said misdemeanor conviction during the last three years,
  - **or** in the case of an older misdemeanor conviction, the applicant has since been convicted of any offense within three years immediately preceding the date of such application for employment or such request for information;
    and
  - the case is not sealed or expunged.

8. How do the CORI rules apply to Board of Health access to CORI information regarding staff and volunteers of recreational camps for children?

Under 105 CMR 430.090, each camp operator is required to conduct background checks on all staff members and volunteers. That background check must include a CORI check (including a juvenile report), a SORI (sex offender record information) check, as well as an out-of-state criminal background check where the individual is not a permanent resident of Massachusetts. When a board of health conducts inspections of recreational camps under 105 CMR 430.000 *et seq*. to ensure compliance with all applicable regulatory requirements, the board of health designee (i.e., health agent) will have access to CORI information when they attempt to verify that the necessary background checks have been performed by the camp operator. Indeed, it is the camp operator's responsibility to conduct the background check and to determine whether or not to employ an individual with a criminal background. These requirements apply to all camps, including those that are not owned or operated by a municipality.

Under the current CORI laws, a board of health is not considered a "requestor" of CORI in these circumstances. Moreover, camp operators are required to share criminal offender record information with the government entities charged with overseeing, supervising, or regulating them.

Thus, camp operators must provide access to CORI checks of its staff and volunteers, when requested by the board of health in the discharge of its official duties in licensing recreational camps for children. Typically, such access is provided when the health agent is on-site to conduct an inspection; complications relative to securely maintaining the confidentiality of such information would arise if a board of health requests copies of CORI

reports, for instance. The camp operator must maintain a secondary dissemination log including each time it has provided access to CORI information to the board of health/health agent, but it is DCJIS' responsibility to audit camp operators for the existence or non-existence of such log, and failure to maintain a log would not provide an independent basis for the board of health to deny a license application or renewal.

Of course, CORI reports contain confidential information. Thus, as noted, care should still be exercised when the health agent or other board of health designee discusses with the board of health CORI information made available when conducting a camp inspection. If any CORI will be discussed, therefore, such discussion should not take place during an open session of a board of health meeting, particularly in light of the heightened civil and criminal penalties for improper handling or dissemination of CORI, including personal liability.

9. **Are background check requirements the same for all municipal employees, including public school and child care employees or law enforcement employees?**

No. There are different state and federal requirements for employees of school districts, child care programs, and criminal justice agencies.

Please contact Attorney Janelle M. Austin (jaustin@k-plaw.com), Attorney Michele E. Randazzo (mrandazzo@k-plaw.com) or any other attorney at the firm at 617-556-0007, with any questions concerning CORI FAQ's.