



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Administration
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MEMORANDUM

To: The Honorable Marvin L. Abney
Chairman, House Finance Committee

The Honorable William J. Conley, Jr.
Chairman, Senate Finance Committee

From: Thomas A. Mullaney
Executive Director/State Budget Officer

Date: May 17, 2019

Subject: Amendments to Article 3 of the FY 2020 Appropriations Act
(19-H-5151)

The Governor requests that Sections 16 and 17 of Article 3 entitled "Relating to Government Reform" be amended with the changes reflected in the attached, in addition to those submitted on March 5, 2019 and April 1, 2019.

By way of context, Article 3, Sections 15, 16 and 17 require national background checks using the Federal Bureau of Investigation's ("FBI") fingerprint system ("System"). The FBI requires General Assembly approval, through the passage of legislation, to authorize the use of the System. The FBI reviewed Article 3 and determined that Section 15 qualifies for access to the System. However, with reference to Sections 16 and 17, the FBI raised the following issues:

1. Section 16: The term "other agents" is overly broad and must be clearly defined. On behalf of the FBI, the Criminal Justice Information Law Unit ("CJILU") has determined if enacted as drafted, the language in RIGL § 37-2-81 does not qualify for access to FBI criminal history record information ("CHRI") under the authority of Pub. L. 92-544.
2. Section 17: The CJILU has determined that RIGL § 40-13.2-4 and RIGL 40-13.2-5 would not qualify for access to FBI CHRI under the authority of Pub. L. 92-544 because they authorize dissemination of FBI CHRI to a private entity. Specifically, RIGL § 40-13.2-5 (f) states that the employer will maintain on file, subject to inspection by the department, evidence that criminal-records checks have been initiated on all employees seeking employment after August 1, 1985.

The FBI, with the assistance of the United States Department of Justice, has determined the parameters of Pub. L. 92-544 and set the criteria for approval use the system as follows:

TDD#: 277-1227

- a. The statute must exist because of a legislative enactment;
- b. It must require the fingerprinting of applicants who are to be subjected to a national criminal history background check;
- c. It must, expressly ("submit to the FBI") or by implication ("submit for a national check"), authorize the use of FBI records for the screening of applicants;
- d. It must identify the specific category(ies) of licensees/employees falling within its purview, thereby avoiding overbreadth;
- e. It must not be against public policy; and
- f. It may not authorize receipt of the CHRI by a private entity.

Based on the issues identified by the FBI and the criteria provided, the following amendments to Article are required.

Section 16

Section 16 was amended to address this issue raised by the FBI as follows:

The definitions of newly proposed R.I. Gen. laws § 37-2-81(a)(1) & (2) of "Agency" and "Agency Head" were clarified to mean State executive branch "Departments." Additionally, the definition of "Vendor" was narrowed to eliminate the inclusion of "agents of the vendor," in order to address the concern regarding overbreadth of the language. Throughout the rest of the proposed statute, the term "other agents" was deleted. Additionally, the terms "employees" and "subcontractors" were also deleted in the Statute because these terms are already included in the definition of "vendor" and are redundant. In total, Section 16 was amended and narrowed to address the issue raised by the FBI.

Section 17

Section 17 was amended to address this issue raised by the FBI as follows:

R.I. Gen. Law §40-13.2-4 was clarified to include facilities licensed or operated by the Department of Children, Youth and Families and to specify that the Department of Human Services and the Department of Children, Youth and Families will promulgate rules regarding disqualifying information for the purpose of determining whether or not employing an applicant could endanger the health or welfare of a child. The amendment also clarifies that the Bureau of Criminal Identification informs either the Department of Human Services or the Department of Children, Youth and Families, whichever is the appropriate regulatory agency, of the results, including the nature of the disqualifying offense(s).

R.I. Gen. Law §40-13.2-5(a) was clarified to include criminal background checks required under the federal Child Care Development Block Grant of 2014 (CCDBG), Public Law 113-186 and to remove reference to the National and Rhode Island Sexual Offender Registries. It also provides for checks to be conducted on employees every five years in accordance with this federal act.

R.I. Gen. Law §40-13.2-5(b) simply clarifies that the executive regulatory agency referenced is the Department of Children, Youth and Families.

R.I. Gen. Law §40-13.2-5(e) clarifies that the applicant and employer will only be informed of the absence or presence of disqualifying information and will not receive the actual reasons for disqualification. R.I. Gen. Law §40-13.2-5(f) is removed and numeration is modified. This removal is substituted by modifications to R.I. Gen. Law §40-13.2-5(f) (new) to comport with the federal law and require the employer to show proof of the initiation of required criminal background checks.

If you have any questions regarding these amendments, please feel free to call me at 222-6300.

TAM: 20-Amend-26

cc: Sharon Reynolds Ferland, House Fiscal Advisor
Stephen Whitney, Senate Fiscal Advisor
Michael DiBiase, Director of Administration
Jonathan Womer, Director, Office of Management and Budget

ARTICLE 3

RELATING TO GOVERNMENT REFORM

SECTION 16. Effective September 1, 2019, Chapter 37-2 of the General Laws entitled "State Purchases" is hereby amended by adding thereto the following section:

37-2-81. Authority to conduct state and national background checks for vendors with access to federal tax information.

(a) Definitions. As used in this section, the following terms shall be defined as follows:

(1) "Access," shall mean the direct and indirect use, contact, handling or viewing of federal tax information, as defined herein, in paper or electronic form, regardless of the frequency, likelihood or extent of such access or whether the access is intentional or inadvertent.

(2) "Agency" or "state agency," shall mean a Rhode Island state agency department within the executive branch.

(3) "Agency head" shall mean the director or designee of a state agency department for which the vendor is providing services.

(4) "Division" shall mean the division of purchases.

(5) "Federal tax information" or "FTI" shall mean:

i) Federal tax returns or information created or derived from federal tax returns that is in an agency's possession or control, which is covered by the confidentiality protections of the Internal Revenue Code and subject to 26 U.S.C. section 6103 (p)(4) safeguarding requirements, including oversight by the Internal Revenue Service ("IRS"); and is received directly from the IRS or obtained through an authorized secondary source, such as the Social Security Administration (SSA), Federal Office of Child Support Enforcement (OCSE), Bureau of the Fiscal Service (BFS), Centers for Medicare and Medicaid Services (CMS), or another entity acting on behalf of the IRS pursuant to an Internal Revenue Code ("IRC") 6103(p)(2)(B) agreement; and

ii) shall not include federal tax returns or information created or derived from federal tax returns received directly from taxpayers or other third-parties.

(5) "Vendor" shall mean any individual, firm, corporation, partnership or other corporate entity, including, but not limited to, employees, and subcontractors of the vendor, and/or agents of the vendor, who is are performing services for the state and who have or will have has access, as defined herein, to FTI.

(b) The agency head shall require a vendor's employees, subcontractors and other agents to complete a state and national fingerprint-based criminal background check, as authorized by Public Law 92-544, to determine the suitability of a vendor's employees and subcontractors if the services to the state requires or includes, or may require or include, access to FTI. This requirement for a vendor shall be incorporated by reference into the vendor's agreement with the state. No new vendor employee, or subcontractor or other agent who has or may have access to FTI shall perform services for the State until the person is deemed suitable by the agency head. Existing vendor employees, and subcontractors or other agents, as of the effective date of this statute, shall complete the background check requirement within a reasonable time as approved by the agency head.

(c) The national fingerprint-based criminal background check shall be facilitated through the Rhode Island office of the attorney general or other law enforcement authorized agency, using the same criteria established under § 36-3-16 for applicants and current state employees. The information shall be forwarded to the Federal Bureau of Investigation (FBI) for a national criminal history check, according to the policies, procedures, and/or regulations established by the office of the attorney general or other law enforcement authorized agency. The office of the attorney general or other law enforcement authorized agency may disseminate the results of the national criminal background checks to the Department of Administration and/or the agency head where the services are being provided.

(d) Reciprocity. Nothing herein shall prevent the agency head, at his or her discretion, from accepting a recent national fingerprint-based criminal background check for a vendor employee, subcontractor or other agent related to FTI access conducted in another suitable jurisdiction.

(e) The agency head may receive criminal offender record information to the extent required by federal law and the results of checks of national criminal history information databases under Public Law

92-544. Upon receipt of the results of state and national criminal background checks, the agency head shall treat the information as non-public and exempt from disclosure in accordance with the Rhode Island Access to Public Records Act, R.I. Gen. Laws 38-2-2(4)(B). Information acquired by any agency in the background check process pursuant to this section shall be used solely for the purpose of making a determination as to the suitability of a vendor in a position which requires or includes, or may require or include, access to FTI.

(f) The state shall not be responsible for any fees charged through the office attorney general, other law enforcement authorized agency or other jurisdiction to conduct the state and national background check for a vendor. ~~employees, subcontractors or other agents.~~

(fg) A vendor, ~~or its employees, subcontractors or other agents,~~ who refuses to comply with the fingerprint-based background check requirement shall be considered unsuitable for services requiring or involving, or which may require or involve, access to FTI. Refusal to comply by the vendor may result in termination of the contract with the State and/or other procurement sanctions if appropriate. Nothing herein shall prevent the vendor from replacing an employee, ~~or subcontractor or other agent~~ who refuses to comply with this requirement, subject to written approval by the agency head.

(gh) Upon receipt of the results of a state and national criminal background check for the vendor, ~~employees, subcontractors or other agents~~ the agency head shall review the results and determine the suitability of the person with regard to service in a position requiring or involving, or which may require or involve, access to FTI. In making a determination of suitability, the agency head may consider mitigating factors relevant to the vendor's scope of work and the nature of any disqualifying offense. Unsuitability of a vendor may result in termination of the contract with the State and/or a requirement that the vendor to replace the employee, ~~or subcontractor, or other agent,~~ with a suitable person, subject to written approval by the agency head.

(hi) If the office of the attorney general or other law enforcement authorized agency receives criminal record information from the state or national fingerprint-based criminal background checks that includes no disposition or is otherwise incomplete, the subject person shall be responsible for resolving

any issues in other jurisdictions causing an incomplete background check. The vendor shall immediately notify the state in writing the name and circumstances of any employees, or subcontractors or agents who have received an incomplete background check. Failure to establish suitability of a vendor employee, subcontractor or other agent may result in termination of the contract with the State and/or a requirement that the vendor to replace the employee, subcontractor or other agent with a suitable person, subject to written approval by the agency head.

(j) Nothing in this section shall limit or preclude an agency's right to carry on a background investigation of a vendor using other authorized means.

(k) The department of administration is hereby authorized to promulgate and adopt regulations necessary to carry out this section.

(l) The judicial branch is hereby authorized to comply with the provisions herein related to vendors working on behalf of the judiciary receiving access to FTI.

SECTION 17. Effective September 1, 2019, sections 40-13.2-2, 40-13.2-4, and 40-13.2-5 in Chapter 40-13.2 entitled "Certification of Child Care and Youth Serving Agency Workers" is hereby amended to read as follows:

§ 40-13.2-2. Qualification for childcare employment.

Notwithstanding any other provisions of law to the contrary, any person seeking to operate or seeking employment in any facility which is, or is required to be, licensed or registered with the department of children youth and families, the department of human services, or seeking employment at the training school for youth if that employment involves supervisory or disciplinary power over a child or children or involves routine contact with a child or children without the presence of other employees, shall undergo an employment background check, a CANTS (child abuse and neglect tracking system) check of substantiated complaints, and criminal records check as provided for in this chapter. The director of the department of children, youth, and families and the director of the department of human services may by rule identify those positions requiring background checks, CANTS checks and criminal records checks.

§ 40-13.2-4. Criminal records check – Operators of child care facilities which must be licensed or registered with the department.

Any person seeking to operate a facility, that is, or is required to be, licensed or registered with the department of human services or the department of children, youth and families, shall apply to the Rhode Island bureau of criminal identification, attorney general's office, or the department of children, youth and families or the state or local police department, for a nationwide, criminal-records check. The check will conform to the applicable federal standards, including the taking of fingerprints to identify the applicant, and any expense associated with providing the criminal-records check shall be paid by the applicant and/or requesting agency. The director of the department of human services or the department of children, youth and families will determine by rule those items of information appearing on a criminal-records check, which constitute disqualifying information because that information would indicate that the employment could endanger the health or welfare of a child or children. Upon the discovery of any disqualifying information with respect to a proposed operator, the Rhode Island bureau of criminal identification will inform the director of the department of human services or the department of children, youth and families, in writing, of the nature of the disqualifying information.

40-13.2-5. Criminal-records check —Employees of child day care, day care centers, family day care homes, group family day care homes, child placing agencies and residential child-care facilities which must be licensed by the department.

(a) A Any person seeking employment in a “child day care” program, a “family day care home”, “group family day care home”, or in a “child day care center” as defined in section 42-12.5-2 of the general laws, ~~if that employment involves supervisory or disciplinary power over a child or children or involves routine contact with a child or children without the presence of other employees, in any facility that is, or is required to be, licensed or registered with the department,~~ or any adult household member of any operator of a “family day-care home” and “group family day-care home,” or seeking that employment or to volunteer at the training school for youth, shall, after acceptance by the employer of the affidavit required by § 40-13.2-3, apply to the bureau of criminal identification of the state police or the

local police department, or the office of the attorney general, or the department of children, youth and families, for a nationwide, criminal-records check. The check will conform to applicable federal standards including the taking of fingerprints to identify the applicant. Further, any person seeking employment in a “child day care” program, in a “child day care center”, and/or in a “child day care provider” as defined in section 42-12.5-2 of the general laws, if that employment involves supervisory or disciplinary power over a child or children or involves routine contact with a child or children without the presence of other employees shall apply to the bureau of criminal identification of the state police or the local police department or the office of the attorney general to conduct all necessary criminal background checks as required by the Child Care and Development Block Grant of 2014 (CCDBG), Pub.L.113-186. to search the National Crime Information Center’s National Sex Offender Registry and a search of the Rhode Island Sex Offender Registry. The criminal record checks as required by this section and the checks of the National Sex Offender Registry and the Rhode Island Sex Offender Registry, as referenced in this section, shall be conducted for every five years of continuous child care employment from the date of the previous criminal background check.

(b) Any person seeking employment in a “child placing agency” as defined in section 42-72.1-2 of the general laws, if that employment involves supervisory or disciplinary power over a child or children or involves routine contact with a child or children without the presence of other employees, shall, after acceptance by the employer of the affidavit required by § 40-13.2-3, apply to the bureau of criminal identification of the state police or the local police department, or the office of the attorney general or the department of children, youth and families, for a nationwide, criminal-records check. The check will conform to applicable federal standards including the taking of fingerprints to identify the applicant.

(c) Any person seeking employment in a “child caring agency”, “children’s behavioral health program”, or in a “foster and adoptive home” as defined in section 42-72.1-2 of the general laws, that is, or is required to be, licensed or registered with the department of children, youth and families, shall, after acceptance by the employer of the affidavit required by § 40-13.2-3, apply to the bureau of criminal

identification of the state police or the local police department, or the office of the attorney general, or the department of children, youth and families, for a nationwide, criminal-records check. The check will conform to applicable federal standards including the taking of fingerprints to identify the applicant.

~~(b)~~(d) Upon the discovery of any disqualifying information as defined in accordance with the rule promulgated by the director, the bureau of criminal identification of the state police or the local police department or the office of the attorney general or the department of children, youth and families will inform the applicant, in writing, of the nature of the disqualifying information. In addition, the bureau of criminal identification of the state police or the office of the attorney general, or department of children, youth and families, or the local police department will inform the relevant employer, in writing, without disclosing the nature of the disqualifying information, that an item of disqualifying information has been discovered.

~~(e)~~(e) In those situations in which no disqualifying information has been found, the bureau of criminal identification of the state police or the local police department or the office of the attorney general, or the department of children, youth and families will inform both the applicant and the employer, in writing, ~~of this fact~~ than no disqualifying information has been found.

~~(f)~~(d) ~~The employer will maintain on file, subject to inspection by the department, evidence that criminal records checks have been initiated on all employees seeking employment after August 1, 1985, and the results of the checks.~~

~~(f)~~(g) ~~(e)~~ Failure to show proof that the employer has initiated requests for background checks required by this section ~~maintain that evidence on file~~ will be prima facie grounds to revoke the license or registration of the operator of the facility.

~~(g)~~(h) ~~or (f)~~ It will be the responsibility of the bureau of criminal identification of the state police or the office of the attorney general, or the local police department, or the department of children, youth and families, to conduct the nationwide, criminal-records check pursuant to this section. The nationwide, criminal-records check will be provided to the applicant for employment ~~without charge.~~ Any expense

associated for providing the criminal-records check shall be paid by the applicant and/or the requesting agency.