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Cambridge & Somerville Legal Services Office

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BY EMAIL (dcjisregs.comments@state.ma.us) and
BY MAIL

Agapi Koulouris
Office of General Counsel
Department of Criminal Justice Information Services
200 Arlington Street, Suite 2200
Chelsea, MA 02150

RE: Comments on Proposed DCJIS regulations
803 CMR 2.00, 5.00, and 11.00

Dear Attorney Koulouris:

On behalf of our client group and based on our many years of experience representing low income tenants of, and applicants to, private and subsidized rental housing, we are submitting the following comments on the Department of Criminal Justice Information Services' (DCJIS) proposed regulations of March 2016 as they relate to access to housing. For convenience, these comments are listed in the order of the regulations and not the order of importance.

803 CMR 2.04 iCORI Registration

The regulations should expressly provide that fees shall be waived for individuals who are indigent. Specifically, the second sentence of Section 2.04 (1) should be amended to state that "A registration fee may be required *except where the registrant is indigent as defined in M.G.L. c. 261, §27A."* and Section 2.04 (9) should be amended to add at the very end "*or by a person who is indigent as defined in M.G.L. c. 261, §27A."* As drafted, the regulation simply allows DCJIS to establish rules for the waiver of all or part of a fee as it deems appropriate. A quick check of the DCJIS website shows fee waiver standards for certain nonprofit organizations but not for individuals.

803 CMR 2.05 Levels of Access to CORI

In describing the various levels of access in 803 CMR 2.05 (3), (4), and (5), the regulations repeatedly state that the specified level "includes" access to certain offenses. Since the use of the word "includes" indicates this is not an exclusive listing, it needs to be revised to

provide that, e.g., "Required 1 Access to CORI is access *limited* to ..." or some other phrase to denote that this is an exclusive listing of what the person is entitled to.

803 CMR 2.09 Requirements for Requestors to Request CORI

In section 2.09 (3), which lists acceptable government-issued identification, the regulation should acknowledge that there may be others besides the 5 listed documents (by changing the word "are" to "include" at the end of the introductory sentence in (3)). For example, a person may have a federally-issued card with a photograph.

In section 2.09 (4) relating to verification of identity, the DCJIS should retain the current language of "other forms of documentation as determined by DCJIS" in the event that a person does not have a government-issued identification card, birth certificate, or social security card.

803 CMR 2.16 (3) CORI Policy Requirements for Certain Requestors and the Need to Know Requirements

Subsection (3) requires each requestor to maintain a "need to know" list of staff authorized to receive and review CORI, with said list being made available to DCJIS upon request. The regulations should also provide that the list shall be made available to the subject and the subject's advocate with the subject's written permission. This will add another incentive for compliance.

803 CMR 2.17 Requirement to Maintain a Secondary Dissemination Log

Although this section 2.17 relates to employers, volunteer organizations, and government licensing agencies, section 803 CMR 5.12 (3) requires various housing providers to log any dissemination in accordance with the requirements of 803 CMR 2.17 and accordingly, we have the following comments as they affect housing applicants.

Subsection (1) should require the second dissemination log to be maintained not just for dissemination outside the agency, but also within the agency. This would help insure that only those with the "need to know" within the agency obtain the CORI. The statute, at M.G.L. c. 6, §172 (f), requires a secondary dissemination log and does not limit this to those outside the agency.

Subsection (4) should require that the secondary dissemination log be maintained for twelve months after a CORI is destroyed. The statute requires that the log be maintained for one year following dissemination (and so assuming that the date of destruction would be the last day of dissemination, maintaining the log for one year would meet the statute and also allow the subject or DCJIS a short time period in case the log is needed for any audit or compliance check).

Subsection (5) should provide that this log is also available to the subject and the subject's advocate with the subject's written permission. This too would add an extra incentive for compliance and provide the applicant with a critical tool to protect against misuse.

803 CMR 2.21 Audits by DCJIS

Subsection 3(d) should also allow the DCJIS audit staff to inspect the documentation used for an adverse housing decision. Although this section relates to audits of any requestor (and applies to landlords, property management companies, real estate agents, and public housing authorities pursuant to 803 CMR 5.16), subsection 3(d) only lists documentation of adverse employment, volunteer, and licensing decisions as being required to be provided to DCJIS audit staff.

803 CMR 2.24 Inaccurate CORI

Since the regulations themselves do not specify the process for correcting inaccurate CORI, the regulations, at a minimum, should retain the existing language that the DCJIS shall provide the details of the current policies and procedures for correcting inaccurate CORI upon request.

In addition, the regulations (either here or in section 5.14) should provide that *"When a subject challenges an inaccurate CORI, the housing provider, at the request of the subject, shall suspend a final determination for at least sixty (60) days while the DCJIS completes its investigation to determine whether or not the CORI is inaccurate; and thereafter, the housing provider shall request a new CORI before making its final decision. Any inaccurate CORI (and related docket sheets) shall be immediately destroyed in accordance with 803 CMR 2.13."* By including such a provision, the subject is not unfairly penalized by an inaccurate CORI and the risk of dissemination of inaccurate CORI is reduced.

803 CMR 2.25 CORI Complaints

In subsection (1) (b) the word "organization" should be deleted or else the word "person" should be added to make it clear that a complaint can be filed against any person (defined as a natural person, corporation, association, partnership, or other legal entity).

In addition, this subsection (1) should retain the current language about filing a complaint where there is identify theft resulting in inaccurate CORI.

803 CMR 2.xx (add new section re: disposition date)

The regulations should specify the information to be provided in the CORI and expressly require that the *disposition date be provided for all closed offenses*. While the current information listed on the CORIs is more limited than in the past (e.g. no longer includes abbreviations explaining the chronology of the case), the "disposition date" is frequently listed as "unknown." As a result, housing authorities often require an applicant for public housing or a Section 8 voucher to go to the individual trial courts to obtain the docket sheet to show the disposition date. This is burdensome, expensive, and time consuming for applicants (particularly those who are low income and/or disabled) and may result in the housing authority obtaining more information than they are entitled to (as docket sheets may list other closed cases which did not result in a conviction). One purpose of having the CORI is to provide a centralized location

for a housing provider to easily obtain the CORI to which it is entitled and, accordingly, the provision of incomplete information defeats this purpose.

803 CMR 5.04 Access to CORI by Landlords, etc.
803 CMR 5.05 Access to CORI by Public Housing Authorities

Both these provisions should include the pre-2012 provision that "requests for CORI shall not be made prior to the final application screening process" so that CORI is obtained only towards the end of the screening process and where the applicant is otherwise eligible. This would prevent housing providers from obtaining CORI prematurely (with the increased possibility of improper dissemination).

803 CMR 5.08 Storage and Retention of CORI

Subsection (2) prohibits the retention of CORI for longer than 7 years from the last date of residency or the date of the housing decision, whichever is later. We object to such a long retention period. There is no reason to retain CORI after the housing applicant has been either (i) approved and leased up or (ii) rejected and a final determination (and exhaustion of any appeals) has been made as to eligibility and qualification based upon CORI. To retain information for up to 7 years from the last date of residency could mean holding the CORI for years and years. For instance, if a tenant remained in her apartment for 10 years, the housing authority could retain the CORI for 17 years. The longer a CORI is held, the longer there is a chance of improper dissemination. While this regulation tracks the language in M.G.L. c. 6, §172 (f), the 7 years is an outside limit and nothing in the statute prohibits the DCJIS from shortening the time to what is relevant to a particular requestor's use of the CORI. In addition, M.G.L. c. 93, §52 (a)(5) expressly prohibits consumer reporting agencies from making a report containing "Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years."

Accordingly, we suggest that (2) be replaced with:

CORI shall not be retained for longer than the date upon which the applicant has been housed or, if rejected, the date an adverse decision becomes final with no further right of appeal.

803 CMR 5.10 Required Dissemination of CORI or other Criminal History Information…

In subsection (1), the word "hard"[1] should be added before "copy" so that it is clear that the housing authority (and other entities listed) must provide a hard copy of the actual CORI or other criminal history information relied upon. In the past, there have been problems with housing providers allowing the applicant (and advocate) to review and take notes, but not have an actual copy of the CORI. For consistency, a similar change should be made to 2.14 (1) relating to employers, volunteer organizations, and governmental licensing agencies; 5.14 (1)(c)

[1] / In other places in the regulations, DCJIS refers to paper copies as "hard" copies. See, e.g., 803 CMR 2.12 (1) and 2.13 (1).

and (d) relating to landlords, property management companies, and real estate agents; and 11.12 (a) and (c) relating to CRA acting as a decision maker.

The current regulatory language [5.11 (3)] should be retained as to the required dissemination of an applicant's CORI to the applicant's advocate who has the applicant's written permission. This seems to have been moved to the "permissive" dissemination [5.11 (5)] and instead the regulations should be clear that the landlord, etc. is always required to provide a hard copy of the CORI to an advocate with the subject's written permission.

803 CMR 5.11 Permissive Dissemination of CORI

Subsection (3) allows a public housing authority to broadly disseminate CORI to an owner (of an apartment to which an applicant is applying). This is not permitted under federal housing law and so should be deleted. We have attached the U.S. Department of Housing and Urban Development's New England PIH Advisory Letter # 12-2 (dated August 13, 2012).

As noted above, subsection 5.11 (5), concerning dissemination to an applicant's advocate, should be deleted as dissemination to the advocate is mandatory (with the applicant's written permission).

803 CMR 5.12 Requirement to Maintain a Secondary Dissemination Log

See comments relating to 803 CMR 2.17 above. In particular, the dissemination log for landlords, property management companies, real estate agents, and public housing authorities should include a record of *internal* dissemination within the agency (and not just outside the agency). This would help ensure that only those with the "need to know" have access to CORI.

803 CMR 5.14 Adverse Housing Decision based on CORI or other Criminal History Information

In subsections (1)(a) and (2)(a) the regulations should clarify that landlords, property management companies, real estate agents, and public housing authorities must follow applicable state or federal **guidance**. For example, see applicable "*Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*" (Notice PIH 2015-19, November 2, 2015) and HUD's recent "*Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*" [2] (April, 4, 2016), copies of which are enclosed. We recommend adding the following italic text: "....applicable federal and state laws, regulations, *and guidance*" to these sections and other sections in the regulations that reference federal and state laws and regulations.

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[2] / Importantly, in this 2016 Guidance, HUD's Office of General Counsel states that "housing providers that apply a policy or practice that excludes persons with prior convictions must still be able to prove that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. (Section 2, page 6).

A provision should be added to require (in subsection 1) a landlord, property management company, real estate agent and (in subsection 2) a public housing authority and property management company of subsidized housing *to offer the applicant the opportunity to delay a decision where there is an open criminal case that may lead to an adverse decision on the housing application.* This would allow an applicant (if he/she so elects) to put the application on hold (without losing his/her place on the waitlist) at least for a reasonable time for the resolution of the criminal case. Through individual advocacy, some housing authorities already provide for this but a uniform rule would be more desirable. Currently, if an applicant is denied housing due to an open case, she may need to wait at least a year to re-apply and/or the waitlist may now be closed so the wait to re-apply is even longer than a year. In many instances, an open case indicates just an arrest. Yet, as per the recent HUD's Office of General Counsel Guidance on Application of Fair Housing Act Standards to the use of Criminal Records by Providers of Housing and Real Estate-Related Transactions dated April 4, 2016, "excluding individuals because of one or more prior arrests (without any conviction) cannot satisfy its burden of showing that such policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest" (page 5).

Similarly, the housing provider should delay a decision where the applicant is challenging the accuracy of the CORI with DCJIS (and then, upon resolution of such dispute, obtain a new CORI showing any revisions made as a result of the dispute and immediately destroy the old CORI and any docket sheets as set forth in 803 CMR 2.13). See comment on 803 CMR 2.24 above.

In subsection (1) (g), the applicant should have the opportunity to dispute both the accuracy and the *relevancy* of the information. A comparable provision should also be added to subsection (2) which, as proposed, now deletes even the opportunity to dispute the accuracy of the CORI (and to 11.12(1)(g) which just permits disputes with the CRA as a decision maker as to accuracy and not also relevancy).

803 CMR 5.xx (add new section on sealed records)

The regulations should specifically provide that housing applicants are not required to report "sealed" records. Housing providers are entitled to Required Access 1, Standard Access, or Open Access depending on the type of housing and provider. None of these levels include sealed records. Yet, housing applications typically ask the applicant if she was convicted of a crime. This creates a dilemma for the applicant as a conviction may now be sealed. By statute (M.G.L. c. 276, §100C), CORI employment applicants may answer "no record" if the record is sealed. We request that the regulations specifically require a comparable provision for housing applicants and provide that

> *An applicant for housing with a sealed record may answer "no record" with respect to that record. The application shall so inform the applicant of this right.*

803 CMR 11.08 Storage of CORI (by CRA)

Subsection (2) provides that CRA decision makers may only store and retain CORI as provided in 803 CMR 2.12. Section 2.12 (4) provides that CORI may not be retained longer than 7 years for employment, volunteer service, or licensing decision but does not cover housing decisions, which is instead found in 803 CMR 5.08 (2). The provision relating to CRAs (11.08 (2)) should also reference the time limit (as revised – see comment above) in 5.08 (2) as it relates to housing decisions by CRAs. Again, once a person is housed or rejected with all appeals expired, there is no need for the CRA to maintain the CORI used for this admission decision and retaining it only increases the chance of improper dissemination. See also the prohibition found in M.G.L. c. 93, §52(a)(5).

803 CMR 11.12 Adverse Decisions by a CRA Acting as Decision Maker

As commented above, subsections (1) (a) and (c) should be amended to add the word "hard" to make it clear that the CRA must provide the hard copy (or paper copy) of his/her consumer report and CORI and (1) (g) should be amended to allow the applicant to also dispute the relevancy (not just accuracy) of the information contained in the CORI.

803 CMR 11.xx (new section – require secondary dissemination log)

The regulations should also require CRAs to maintain a secondary dissemination log as set forth in 803 CMR 2.17 (with the suggested revisions above to require that the log be maintained for dissemination within an agency, be retained for 12 months after the CORI is destroyed, and be available to the subject and subject's advocate with written permission). The statute requiring a secondary dissemination log (M.G.L. c. 6, §172(f)) applies to all requestors and so CRAs (as requestors) are covered too.

Thank you for consideration of our comments.

Sincerely yours,

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