

BEFORE THE  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

---

---

COMMENTS OF THE  
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO A NOTICE OF PROPOSED RULEMAKING

DOCKET NO. FBI 111P; AG ORDER NO. 2833-2006

---

---

JAMES J. JOHNSTON  
President  
Owner-Operator Independent  
Drivers Association, Inc.  
1 NW OOIDA Drive  
Grain Valley, MO 64029

CLAIRE SHAPIRO  
Eisen & Shapiro  
10028 Woodhill Rd.  
Bethesda, MD 20817

Counsel for Owner-Operator Independent  
Drivers Association, Inc.

November 6, 2006

BEFORE THE  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

---

The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) hereby submits these comments in opposition to the September 5, 2006, notice published by the Department of Justice, (the “Department”), at 71 Fed. Reg. 52302, soliciting comments on its proposal to amend Part 20 of its regulations, which pertains to criminal justice information systems, to include nonserious offenses (“NSO”) among the criminal history records collected and retained in the Fingerprint Identification Records System (“FIRS”) and the Interstate Identification Index (“III”) maintained for the Department by the Federal Bureau of Investigation (“FBI”). At present, the FIRS and III systems are used to compile information only on “serious and/or significant adult or juvenile offenses.” 28 C.F.R. § 20.32(a). The pertinent regulation expressly “excludes arrests and court actions concerning nonserious offenses” from these databases, unless they are accompanied by a serious or significant offense. *Id.* at § 20.32(b). Thus, this amendment fundamentally alters the existing rule in a manner of great concern to OOIDA.

OOIDA is a not-for-profit trade association incorporated in Missouri with its principal place of business located at 1 NW OOIDA Drive, P.O. Box 1000, Grain Valley, Missouri 64029. OOIDA is the largest trade association representing the interests of independent owner-operators and professional truck drivers on all issues that affect small business truckers. OOIDA actively promotes the views of commercial truckers before a broad variety of forums, including federal and state agencies, legislatures, courts, other trade associations, and private businesses, in an ongoing effort to obtain equitable and safe working conditions for these commercial truck drivers.

OOIDA's more than 145,000 members collectively own and operate more than 220,000 heavy duty trucks and small truck fleets. When an individual applies to drive a heavy duty truck, his potential employer does a mandatory check of his motor vehicle record and, in many cases, also performs a discretionary criminal background check as part of the pre-employment process. 49 C.F.R. § 391.23. If a driver will be moving hazardous materials ("hazmats") a broader criminal background check is also required before a hazmat endorsement can be added to his commercial drivers license. 49 C.F.R. § 383.141. If information about NSOs contained in the FBI databases is available to the public then it is likely to become part of any broader background check. Because many motor carriers already have a reputation among truckers for misusing available background information, easy access to this NSO information could provide an additional basis for rejecting qualified applicants for trucking jobs. Accordingly, the proposed changes to the Department's regulations could well have a significant adverse impact upon OOIDA's member truck drivers.

## **DISCUSSION**

### **I. NSOs are minor indiscretions that do not reflect a criminal disposition.**

The FBI has for decades maintained two databases that contain individual crime-related information—the FIRS, which contains fingerprint records, and the III, which contains substantive criminal history record information ("CHRI"). For more than 30 years, these databases have contained fingerprints and data pertaining only to "serious and/or significant" criminal offenses. 28 C.F.R. § 20.32. As explained above, the Department now proposes to expand the databases to include within their scope of coverage NSO fingerprints and data.

As set forth in the current rule, NSOs include activities such as "drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarms, non-specific charges of suspicion

or investigation, and [non-serious] traffic violations. . .” 28 C.F.R. § 20.32(b). The FBI’s periodically-published list of more than 100 nonserious offenses also includes violations relating to subjects as diverse as abusive language, dog laws, fishing without a license, use of fireworks, hitchhiking, jaywalking, mooching, runaway, truancy, and venereal control registration. Clearly, these minor (and often youthful) indiscretions are not the type of activities that suggest a criminal predisposition. Rather they are the type of offenses that most people try to put behind them and forget about after paying a fine. Indeed, individuals often pay a fine for an NSO simply because it is not worth taking the time and expense to exonerate themselves in such a minor matter. Certainly, these NSOs are not the types of activities that should be of concern at the federal law enforcement level and, accordingly, are not the types of offenses that should clutter up FBI databases.

II. Collection of fingerprints from all available sources may aid law enforcement.

The Department now contends that “retaining NSOs will increase law enforcement’s latent fingerprint search capability by increasing the universe of criminal history record fingerprint submissions retained by the FBI against which a latent fingerprint search can be made.” 71 Fed. Reg. at 52304. The FBI currently receives fingerprints from a variety of law enforcement and non-criminal justice sources. OOIDA recognizes that the collection of fingerprints serves a legitimate law enforcement purpose and, accordingly, does not object to the proposed amendments to the extent that they apply to fingerprints. As noted in the Department’s notice, the larger the fingerprint database, the more likely that a match can be found for prints found at the scene of a crime. OOIDA firmly believes, however, that the compilation of an expansive fingerprint database does not in any way necessitate or justify the collection of any additional CHRI about NSOs.

III. Privacy concerns played a critical role in determining the form and scope of Part 20.

In effect, the FBI says it wants to begin collecting and exchanging information on NSOs now because, with its technologically-advanced and computerized data collection systems, the agency has the capacity to do so. The mere ability to collect certain information, however, does not make it right to do so. Nor does it make it legal in light of the *Tarlton* court decision (discussed below) interpreting the regulations.

To get a proper perspective on OOIDA's objections to the collection of this NSO CHRI data, which has been excluded from the FBI's databases for more than 30 years, the Part 20 regulations must be viewed in their historic context. Part 20 implemented the Crime Control Act of 1973 (the "Act"), in which Congress addressed growing concerns about the high incidence of crime in the United States through the establishment of better coordinated and intensified efforts aimed at the prevention of serious crime and the detection, apprehension, and rehabilitation of criminals. Public Law 93-83, *Declaration and Purpose*. The Act provided grants and other forms of federal assistance for state and local law enforcement and criminal justice efforts. In conjunction with the assistance programs, the states were required to collect and provide to the federal government certain data about criminal activities.

The Act also reflected Congress' desire to curb the illegal surveillance and investigation of individuals by federal agencies, as exemplified by J. Edgar Hoover at the FBI, and to prevent potential abuses of individual rights presented by the government's increasing use of computers to store and retrieve personal data. These very concerns led, in the same year that Part 20 was proposed, to the enactment of the Privacy Act of 1974, a statute limiting the collection, maintenance, use, and dissemination of personal information by federal agencies. 5 U.S.C. § 552a. Consistent with

the policies addressed more directly in the Privacy Act, the Crime Control Act required all government agencies, when they collected crime-related data, to “assure that the security and privacy of all information is adequately provided for. . .” Public Law 93-83, § 524(B).

Echoing this ongoing statutory concern, the preamble to both the original proposed and final rulemaking notices for Part 20 described the primary purpose of the regulations as “to afford greater protection of the privacy of individuals who may be included in the records of the Federal Bureau of Investigation. . .” 38 Fed. Reg. 5636 (Feb. 14, 1974)(proposed); 40 Fed. Reg.22114 (May 20, 1975)(final). Thus, the Department took great care to balance its need for criminal record information with the protection of the rights of the involved individuals against unwarranted invasions of their privacy stemming from the agency’s collection, maintenance, use, and disclosure of this personal information.

With the passage of time, the critical role played by privacy concerns in formulating these regulations has obviously been forgotten by the Department and the FBI. However, the Department should stay the course. The concerns about unwarranted governmental invasions of privacy that led to the adoption of Part 20, with its NSO exclusion, are especially valid today in our data-hungry environment and clearly outweigh any benefits to be gained from the collection and exchange of NSO criminal history record information.

IV. The FBI’s claim that the NSO exclusion was adopted to ease the administrative burden on the agency is unsupported.

The Department did not offer any specific explanation in the commentary accompanying the original Part 20 rulemaking as to the reason for limiting data collection in 28 C.F.R. § 20.32 to “serious and/or significant offenses” and for specifically excluding “nonserious charges.”

Nevertheless, the Department affirmatively states in the present rulemaking that the exclusion of NSOs “served an administrative purpose to alleviate the workload in the 1970s when the FBI manually collected and stored fingerprint cards.” 71 Fed. Reg. at 52304. Given the **complete absence** of any language in the earlier rulemakings expressly or even implicitly referring to administrative convenience, that premise must be rejected out-of-hand. OOIDA submits that the privacy concerns actually mentioned in the rulemaking, concerns that were a major focus of government legislation throughout the time period in which these Part 20 regulations were being proposed and finalized, led to the exclusion of NSOs.

The decision issued by the United States District Court for the District of Columbia in *Tarlton v. Saxbe*, 407 F. Supp. 1083 (D.D.C. 1976), only one year after Part 20 was adopted, enforced the NSO exclusion and confirmed that it represented more than an accommodation of administrative convenience that could later be ignored at the whim of the Department. Indeed, the *Tarlton* court specifically held that nonserious offenses are to be deleted from all criminal records “on conversion to computerized files. . .” *Id.* at 1087-1088. The Department states that this ruling (like the regulation being interpreted) was based on administrative concerns, not any “legal requirement.” Here again the Department’s reasoning is not and can not be supported by any language used by the court. The Department can not nullify the court’s decision simply by rewriting the regulation. Because the plain language of the *Tarlton* decision is still good law today, the Department must continue to exclude NSOs from the FBI’s “computerized files.”

V. The states should not control what information is retained in FBI databases.

The Department maintains that events since the 1970s have prompted reconsideration of the Part 20 regulations. In particular, the agency contends that certain states have asked to include NSOs

in their submissions because “definitions of ‘serious’ or ‘significant’ offenses vary significantly among the States,” and inclusion of these crimes in “the FBI’s repository of criminal history records would more closely mirror state maintained criminal history repositories.” 71 Fed. Reg. at 52303. The fact that some unnamed states would perhaps like to rid themselves of the responsibility of maintaining CHRI is not sufficient reason to create a federal database of arguably insignificant legal violations. The states do not have the authority to control what information is retained in FBI databases. This is especially so where, as here, state submission of NSO data under Part 20 is purely voluntary and certain states including Maryland have indicated that they will not voluntarily provide such data to the FBI.

While adding nonserious crimes to the database would shift the burden for retaining this data from the state to the federal government, it will only exacerbate the problem created by state variations in the categorization of crimes. The definitions of nonserious offenses as reflected in local ordinances and state statutes tend to vary even more from state to state than do the definitions of serious crimes. Some, such as public drunkenness, loitering, and vagrancy, which are off-shoots of Jim Crow laws intended to target specific groups of people, are not offenses in some Northern states but are still enforced in many Southern states. Others, such as disturbing the peace or disorderly conduct are catch-alls interpreted in a purely subjective manner at the discretion of the involved officer. Still others, such as bans on leaf blowers or noise ordinances that prevent ice cream trucks from playing music, are idiosyncratic matters reflecting purely local sensibilities. This great variability works against their inclusion in any federal databases.

VI. All NSO data is currently available from other sources.

Uniformity is also touted as a benefit derived from the collection of NSO data – more

“uniform” collection at the federal level of information now available only from the states, more “uniform” sharing of information, and more complete and “uniform” background checks. 71 Fed. Reg. at 52303. Setting up the FBI databases as a centralized “one-stop-shop” for collection of information under the mantra of uniformity ignores the fact that NSO records, like other criminal data, are public data. This information is available through the jurisdictions where the offenses occurred and, in our entrepreneurial society, is available through a variety of private-sector companies that act as a clearinghouse for such information. Indeed, an internet search has found companies that claim to perform thorough criminal background checks free of charge and/or for fees ranging from \$12.95 to \$49.95. Thus, the Department has overstated the need for a central repository for such information.

The example given by the Department to illustrate how the proposed amendments to the FBI databases will improve upon the current system ignores this vast marketplace of vendors that are willing and able to provide criminal background information to all takers. The Department argues that an applicant for a state school bus driver position in one state may have a history of traffic offenses in another jurisdiction that would not be disclosed in a check of the FBI’s current records and therefore may not be discovered before he is hired. 71 Fed. Reg. at 52303. This, of course, assumes that the FBI is the only source for data pertaining to the potential employee’s driving record. In fact, employers already have access to a driver’s past driving record through state agencies, insurance companies, and third parties such as USIS/DAC Services which provide employers with a full range of driver screening reports. It also assumes that both involved states have voluntarily opted to provide the NSO records to the FBI which, as noted above, is not uniformly true.

VII. The FBI's dissemination of NSO criminal history records may well have an adverse effect on individual lives.

As recognized by the Department, there has been a “significant increase in requests for CHRI to conduct criminal background checks for noncriminal justice employment and licensing purposes. . .” 71 Fed. Reg. at 52303. Certainly OOIDA has seen an increase in the trucking industry. However, NSOs are not considered in the hazmat endorsement process, nor do they have any impact on the security threat assessments required by Department of Homeland Security.

Yet the Department completely ignores the adverse effect that dissemination to the public of NSO data outside of law enforcement channels may well have on individual lives. OOIDA is concerned that including minor NSOs on truck drivers' records will work against a number of drivers who are perfectly qualified for the jobs they are seeking. Indeed, given the current climate, the mere discovery of an NSO might be used against drivers and, because the data is collected at the federal level, is more likely to skew an employer's view against a potential employee.

Of particular concern are minor traffic offenses that are now removed from a driver's record after a set period of time, yet may not be removed so readily from the FBI's files. The retention of data regarding such offenses is particularly unwarranted when the reality is that long distance truck drivers generally pay the fines levied for such offenses, even when guilt is disputed, because it is not feasible to take time from work to return for hearings in some distant part of the country where a ticket was issued.

The vast majority of NSOs simply would not have any bearing upon an individual's employability, especially if they occurred far in the past. Thus, an NSO ordinarily should be an event that an individual can leave behind as time passes. Such a minor offense should not remain as a

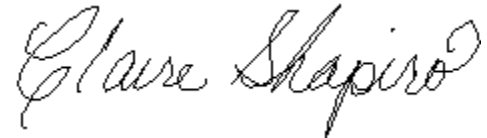
permanent blemish on an individual's record, never to be erased. Accordingly, it is OOIDA's position that the rule pertaining to offenses includable in the FBI databases, to the extent that it involves substantive CHRI about the nature and disposition of such offenses, should not be amended. Apart from fingerprint data, 28 C.F.R. § 20.32 should continue to be limited to "serious and/or significant" offenses.

#### CONCLUSION

Effective law enforcement may indeed require the collection of the types of CHRI maintained in the FBI's III database, namely descriptions of arrests and other formal criminal charges as well as the dispositions of those charges. However, the past criminal records that typically prove useful are those that involve serious or significant crimes, the very information the FBI has been collecting for the past 30 years. With limited exceptions, the commission of a nonserious offense has little bearing on an individual's proclivity to engage in future criminal conduct and is not something that would be used by the FBI or the Department in the performance of their law enforcement duties. Indeed, the limited benefits to be gained by retention of CHRI data pertaining to NSOs, with the exception of fingerprints, are far outweighed by the potential downsides, including the invasion of individual privacy rights and the possible adverse consequences that could flow from the collection and dissemination of this information. For these reasons, as discussed more fully above, OOIDA respectfully requests, with the exception of an expansion of the FIRS to include fingerprints obtained in connection with NSOs, that 28 C.F.R. § 20.32 be retained in its current form, excluding arrests and

court actions concerning NSOs from the FBI's data-collection requirements.

Respectfully submitted,

A handwritten signature in black ink that reads "Claire Shapiro". The signature is written in a cursive, flowing style.

JAMES J. JOHNSTON  
President  
Owner-Operator Independent  
Drivers Association, Inc.

CLAIRE SHAPIRO  
EISEN AND SHAPIRO  
10028 Woodhill Rd.  
Bethesda, MD 20817

Counsel for Owner-Operator Independent  
Drivers Association, Inc.