

CALIFORNIA DEPARTMENT OF JUSTICE

TITLE 11. LAW

DIVISION 1. ATTORNEY GENERAL

CHAPTER 23. CONFIRMATION OF INDIVIDUALS DESIGNATED BY A PUBLIC OR PRIVATE AGENCY AS A CUSTODIAN OF RECORDS

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

Various California laws authorize public and private agencies access to criminal history information for adoption, certification, employment, licensing, and permitting purposes.

Under Penal Code section 11102.2, every agency must to designate at least one Custodian of Records to assume responsibility for the security, storage, dissemination, and destruction of criminal history information that is furnished to the agency by the Department.

As mandated, the Department maintains a confirmation program to process fingerprint-based background clearances and applications from individuals designated by agencies as Custodian of Records. Prior to confirming a designated individual, the Department must to determine whether the designated individual possesses the required honesty, credibility, truthfulness, and integrity to fulfil the responsibilities of the position in accordance with subdivisions (f) and (g) of Penal Code section 11102.2.

The Department proposes these regulations to specify the application process for the Department's Custodian of Records confirmation program, including appeal procedures related to denied or revoked confirmations.

BENEFITS ANTICIPATED FROM REGULATORY ACTION

This rulemaking action will benefit individuals designated as Custodian of Records by satisfying due process and public policy requirements in a manner that is impartial and transparent.

SPECIFIC PURPOSE AND NECESSITY OF EACH SECTION

Article 1. General

§ 999.600. Definition of Key Terms.

This section defines the terms that will be used throughout the chapter. Defining these terms is necessary for these terms to be defined because many lend themselves to different interpretations within different contexts. Definitions help establish appropriate scope and applicability. This uniformity assists affected parties understand their responsibility with respect to the application process for the Department's Custodian of Records confirmation program, including procedures related to denied or revoked confirmations.

Subdivision (a) defines “Applicant” to mean an individual applying for confirmation as a Custodian of Records. This definition is necessary for clarity throughout the chapter.

Subdivision (b) defines “Agency” as having the meaning set forth in Penal Code section 11102.2, subdivision (a)(2). This definition is necessary to clarify the applicability of these regulations to both public and private entities receiving criminal history information from the Department.

Subdivision (c) defines “Criminal offender record information” or “CORI” as having the same meaning set forth in Penal Code sections 11075, subdivision (a) and 13102. This definition is necessary to specify the type of background check conducted on Custodian of Records applicants.

Subdivision (d) defines “Custodian of Records” as having the same meaning set forth in Penal Code section 11102.2, subdivision (a)(1). This definition is necessary for affected parties to understand the term and use of Custodian of Records throughout the chapter.

Subdivision (e) defines “Department” to mean the California Department of Justice. This definition is necessary for affected parties to understand what the term Department means and refers to throughout the chapter.

Article 2. Application for Confirmation as a Custodian of Records

§ 999.601. Application for Confirmation.

The purpose of this section is to set forth the procedures individuals must follow when applying for confirmation as a Custodian of Records.

Subdivision (a) requires individuals designated as a Custodian of Records to apply for confirmation by submitting a Custodian of Records Application for Confirmation, BCIA 8374, and consistent with Penal Code section 11102.2, exempts criminal justice agency personnel who have undergone a state and federal criminal record background check from this requirement. This subdivision is necessary to provide guidance on who must apply to be a Custodian of Record and what form to be used for the application.

Subdivision (b) requires a Custodian of Records applicant to submit a completed Custodian of Records Application for Confirmation and fingerprint images to the Department via Live Scan or a 10-print fingerprint card. This subdivision is necessary to comply with Penal Code section 11102.2, subdivision (c), and to provide Custodian of Records applicants with two methods of submitting fingerprint images, electronic submission via Live Scan, or hard-copy. Allowing hard-copy fingerprints is necessary to provide an alternative fingerprinting method for Custodian of Records applicants that are located outside the State of California. The alternative fingerprinting method is necessary to ensure Custodian of Records applicants located outside the State of California are not unduly burdened by having to complete a Live Scan within the State of California.

In accordance with Penal Code section 11102.2, subdivision (c)(1), “fingerprint images and related information” are required by the Department to process Custodian of Records applicant’s fingerprint-based background checks. The Department requires applicants to submit the necessary related information via the Department’s Request for Live Scan Service, BCIA 8016CUS, in order to assist in searching, receiving, and reviewing the criminal history information.

Subdivision (c) specifies the form in which the payment, the amount charged pursuant to Penal Code section 11102.2, subdivision (b), shall be made and that it must be made payable to the Department.

BCIA 8374:

Applicant Information:

The BCIA 8374 captures data pertinent to processing applications for Custodian of Records confirmations. Personal descriptor fields on the form, like first, middle, and last name, complete residential address, phone number, date of birth, driver’s license or other identification number, and email, provide the Department with the information necessary to confirm if the applicant meets the minimum age requirement in Penal Code section 11102.2, subdivision (b), to identify the applicant, and to contact the applicant in multiple methods, since they serve as primary contact for their agency. Additionally, the Department uses the personal information on the BCIA 8374 to further verify the applicant’s fingerprint-based background check results.

Agency/Organization Information:

The agency/organization information allows the Department to verify that they have a right to receive background check responses, with a current ORI, and to match and add the Custodian of Records applicant to the correct agency profile. The contact information fields on the form permit the Department to contact the Custodian of Records applicant and agency/organization via multiple methods.

Questions:

Question 1 is necessary to know the proposed Custodian of Records applicant’s relationship to the agency/organization either as an employee or a contractor and whether the applicant could serve as a Custodian of Records for the agency/organization. Establishing that a relationship exists between the Custodian of Records and agency/organization is necessary because the Custodian of Records will be responsible for ensuring the agency/organization meets the requirements for the security, storage, dissemination, and destruction of criminal records furnished to the agency/organization and serving as the primary contact for the Department for any related issues.

Question 2 is necessary to confirm the fingerprint background check response, which may indicate aliases. This helps confirm the response, and ensure that the individual is truthful in providing information, as required by Penal Code section 11102.2, subdivision (e).

Question 3 is necessary to ensure that the individual is honest, credible, and trustworthy to assume the Custodian of Records position under Penal Code section 11102.2, subdivision (e). An

applicant's truthfulness in responding to this question helps the Department assess their suitability for this role when comparing the answer and the results of the criminal history background check.

Question 4 is necessary to confirm that the applicant has not been convicted of a felony offense or any other offense that involves moral turpitude, dishonesty, or fraud, or that impacts the applicant's ability to perform the duties or responsibilities of a Custodian of Records, as required by Penal Code section 11102.2, subdivision (f).

Question 5 is necessary to ensure that the applicant possesses the required honesty, credibility, truthfulness, and integrity to assume the position of Custodian of Records, as required by Penal Code section 11102.2, subdivision (e). Knowledge of a denial, revocation, suspension, or restriction of a professional license also helps the Department determine, under Penal Code section 11102.2, subdivision (g)(5), whether the individual has committed any act involving dishonesty, fraud, or deceit.

Question 6 is necessary to ensure that the applicant has not been adjudged liable for damages in any suit grounded in fraud, misrepresentation, or in violation of the state regulatory laws, for which the Department may deny an applicant pursuant to Penal Code section 11102.2, subdivision (g)(4).

Question 7 is necessary to confirm the applicant has not failed to satisfy any court ordered money judgment, including restitution, for which the Department may deny an applicant pursuant to Penal Code section 11102.2, subdivision (g)(6).

Certification:

The application must be signed under penalty of perjury to emphasize the importance of providing truthful information in the form because the Department uses the information on the BCIA 8374 to further verify the fingerprint-based background check results and to make an eligibility determination. The Department must be able to rely on the truth and accuracy of all statements, answers, and representations made in the application in order to ensure that confirmed Custodian of Records are eligible under Penal Code section 11102.2, subdivisions (e), (f), and (g). Reaffirming the importance of the role of a Custodian of Records is necessary because Custodian of Records handle sensitive criminal data involving protected and confidential personal information.

Privacy Notice:

BCIA 8374 includes a privacy notice to ensure compliance with Civil Code section 1798.17. Civil Code section 1798.17 requires a privacy notice on any form used to collect personal information from individuals to explain the collection and use of that personal information, what personal information must be provided, how the individual can access the information, when the personal information may be disclosed, and how to contact the Department and staff with questions. The Department has named the Custodian of Records Program Analyst as the individual to contact with questions, and provided phone, email, and mail methods to contact the Department.

BCIA 8016CUS:

The Department's Request for Live Scan Service, BCIA 8016CUS, contains the data elements necessary to process an electronic fingerprint submission, search for matching criminal history, and review the criminal history information.

Applicant Submission:

The applicant submission section contains the data elements necessary to process an electronic fingerprint submission and search for matching criminal history information. Request for Live Scan Service forms are generally used for background checks and have similar data fields. The Department has customized the form for the Custodian of Record program. The first few data fields are pre-populated. An ORI is the acronym for Originating Agency Identifier and is the code assigned by the Live Scan Program. This data field ensures that the requesting agency (the Department) has legal authorization to access criminal justice information. The BCIA 8016CUS is pre-populated with the Department's ORI, as the Department must review the Custodian of Records applicant background check results to make a confirmation determination, and has the legal authorization to conduct background checks for these applicants for this purpose. The authorized applicant type data field is similarly needed to ensure that the applicant type also has legal authorization to access criminal justice information. The BCIA 8016CUS is pre-populated with the applicant type "CUSTDN RECORDS 11102.2 PC," which identifies the Department's specific program that has legal authority to submit a request under the Department's ORI. The Live Scan Program also requires that the "type of license/certification/permit OR working title" be provided since criminal background checks are limited by statute, and not every type of license, certification, permit, or employment qualifies for a fingerprint background check. For Custodian of Records applicants, the BCIA 8016CUS is pre-populated with the approved "CUSTODIAN OF RECORDS" working title.

Contributing Agency Information:

The contributing agency information and the agency authorized to receive the criminal record information is pre-populated with the Department's information as the Department receives criminal record information for Custodian of Records applicants in order to fulfill its confirmation duties under Penal Code section 11102.2..

Applicant Information:

The applicant information data elements are required by the Department to process a Live Scan background check. These data elements, such as name, alias, date of birth, sex, height, weight, eye color, hair color, place of birth, social security number, address, and driver license number or miscellaneous number, help the Department process the criminal background check results and ensure that the results match the individual. The Billing Number (Agency Billing Number) helps identify what agency/organization the applicant is submitting their information to serve as the Custodian of Records.

The Department also requires that the applicant acknowledge and sign and date that they read the Privacy Notice, Privacy Act Statement, and Applicant's Privacy Rights. This is important because Live Scan collects biometric data and the Department wants to ensure that the applicant is aware of the protections afforded to their information.

Level of Service:

The Level of Service box is required because there are two different statutorily-approved levels of service for background checks: federal criminal history and California-state criminal history. Federal law limits who may access federal criminal history for purposes of licensing, employment, and certification. Custodian of Records applicants have been approved for federal level of service. Therefore, for this program, both levels of service are received. The Department has pre-populated this selection on the BCIA 8016CUS, which helps the Department know which level of service is needed for the background check service and to send the fingerprints to the federal government.

Your Number:

The OCA Number (Agency Identifying Number) stands for "Originating Case Agency" and is an optional field for applicant agencies to use for internal needs. Some agencies populate this field with a facility number to sort applicants by facility/location, while others assign a unique number to each applicant to help match the response to the correct applicant.

Original ATI Number:

Sometimes the Live Scan fingerprints are initially rejected. When an applicant resubmits their fingerprints via Live Scan (considered resubmissions), the Department's Live Scan Program has required in those instances, that the original ATI Number, which is the automated transaction identifier number assigned specifically to the individual's fingerprint impressions when submitted through the Live Scan, be provided. If the fingerprints are rejected a second time, being able to identify both instances of the fingerprint submission can help determine if there is an issue with the individual's fingerprints and if they will need to submit a hard print copy.

The requirement to submit the rejection is also necessary because the Department and Live Scan operators want to make sure that the individuals aren't getting duplicate fingerprints and are instead re-submitting their fingerprints because of an error the first time. These data elements in also help the Department track and determine if positive identification cannot be established by fingerprints.

Employer Information:

This information is required to make sure that the applicant is submitting an application on behalf of an agency/organization that is qualified to receive criminal history information.

The Live Scan Transaction Completed By:

This information is a requirement of the Department's Live Scan Program. The Live Scan operator taking the fingerprint must complete the box to ensure the Live Scan Program can monitor the integrity and effectiveness of the Live Scan Program.

Privacy Notice:

BCIA 8016CUS includes a privacy notice. Civil Code section 1798.17 requires a privacy notice, regarding the collection and use of personal information, to be provided on any form used to collect personal information from individuals. The Department has determined the privacy notice is necessary to ensure compliance with Civil Code section 1798.17.

FD-258:

Where electronic fingerprint submissions via Live Scan within California are not possible, the Applicant Fingerprint Form, FD-258 is the universal form used in the United States to capture and record fingerprint impressions that are to be used for non-criminal justice purposes, such as: adoption, certification, employment, licensing, and permitting.

The Federal Bureau of Investigation's (FBI) FD-258 contains the data elements necessary to process a manual fingerprint submission and search for matching criminal history in the Department's criminal history information system. The Department chose to use this form because the FBI has approved it, it would need to be sent to the FBI for the federal criminal history information, and is the universal form used by fingerprint rollers.

Article 3. Custodian of Records Confirmation

§ 999.602. Confirmation by the Department.

Subdivision (a) conveys the Department's responsibilities upon receipt of a Custodian of Records applicant's fingerprint-based background check and application for confirmation. This section is necessary to establish the conditions upon which the Department will proceed with making an eligibility determination for a Custodian of Records confirmation.

Subdivision (b) requires the Department to notify both applicant and agency of a confirmation or application denial. This subdivision is necessary to ensure that both applicant and agency are aware of the Department's eligibility determination and may take subsequent action.

§ 999.603. Duration of Confirmation.

The purpose of this section is to clarify the duration of a Custodian of Records confirmation.

Subdivision (a) specifies a Custodian of Records confirmation remains in effect for the duration of the individual's designation as a Custodian of Records by the agency listed on the application or until the confirmation is surrendered or revoked. This section is necessary to clarify the duration of confirmations and the Department's continuous oversight of a Custodian of Records that is specified in Penal Code section 11102.2, subdivisions (c)(2), (f), (g), and (h).

Subdivision (b) requires agencies to notify the Department when a Custodian of Records no longer serves in that capacity in accordance with Penal Code section 11102.2, subdivision (h). This subdivision is necessary to provide guidance on how and to where the notice should be submitted. Using the COR's name and ORI will help the Department confirm what COR is being referenced.

§ 999.604. Non-Transferability of Confirmation.

The purpose of this section is to specify a confirmation is only valid for the individual it has been granted to and to only be used for the agency listed on the Custodian of Records Application for Confirmation. This section is necessary to clarify how a Custodian of Records confirmation can be used and ensure the Department maintains its oversight of which individuals have been designated as Custodian of Records and by which agencies. Each Custodian of Records confirmation relates to a specific individual, not a specific agency. The agency cannot replace the Custodian of Records without the Department's oversight and confirmation.

Article 4. Procedures for Denial of an Application or Revocation of an Existing Custodian of Records Confirmation; Request for Reconsideration; and Administrative Hearing

§ 999.605. Denial of an Application or Revocation of an Existing Custodian of Records Confirmation.

The purpose of this section is to convey the Department's responsibilities when a Custodian of Records application is denied, or an existing confirmation is revoked. This section is necessary to specify the scope of actions the Department will take in relation to denied applications and revoked confirmations and the information the applicant will receive from the Department.

§ 999.606. Request for Reconsideration.

The purpose of this section is to specify the Department's reconsideration process when a Custodian of Records application is denied, or an existing confirmation is revoked. This section is necessary to provide guidance on how and to whom a request for reconsideration should be submitted, including the evidence. The request for reconsideration must occur before an administrative hearing because it helps provide the Department and applicants an ability to correct any mistakes before incurring the cost and time delays associated with an administrative hearing. This section is also necessary to specify the scope of actions the Department will take in relation to requests for reconsideration.

§ 999.607. Administrative Hearing.

Subdivision (a) requires submission of a request for an administrative hearing to the Department within 30 days of the written notice of denial of reconsideration. This subdivision is necessary to specify how an applicant or Custodian of Records may further appeal the Department's decision on reconsideration and set forth a reasonable timeframe within which a request may be submitted.

Subdivisions (b) and (c) convey the administrative adjudication procedure available if the Custodian of Records applicant or individual subject to the revocation wishes to further appeal the Department's decision. These sections are necessary to satisfy due process and public policy requirements in a manner that is impartial and transparent.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

The Department concludes:

(1) The proposal would not create or eliminate jobs within the state because it only specifies the application process for the Department's Custodian of Records confirmation program, including appeal procedures related to denied or revoked confirmations.

(2) The proposal would not create new businesses or eliminate existing businesses within the state because it only specifies the application process for the Department's Custodian of Records confirmation program, including appeal procedures related to denied or revoked confirmations.

(3) The proposal would not result in the expansion of businesses currently doing business within the state because it only specifies the application process for the Department's Custodian of Records confirmation program, including appeal procedures related to denied or revoked confirmations.

The Department also concludes that:

(1) The proposal would not have a discernable impact on the health and welfare of California residents because it only specifies the application process for the Department's Custodian of Records confirmation program, including appeal procedures related to denied or revoked confirmations.

(2) The proposal would not have a discernable impact on worker safety because it only specifies the application process for the Department's Custodian of Records confirmation program, including appeal procedures related to denied or revoked confirmations.

(3) The proposal would not have a discernable impact on the state's environment because it only specifies the application process for the Department's Custodian of Records confirmation program, including appeal procedures related to denied or revoked confirmations.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR SIMILAR DOCUMENTS RELIED UPON

The Department relied on the following document in proposing these regulations:

- California Justice Information Services Division Information Bulletin 10-06-BCIA, *Applicant Agency Custodian of Records Confirmation*, 08/19/2010

EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the proposed action would not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The Department determines that these proposed regulations do not have an adverse impact on small businesses.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY'S REASON FOR REJECTING THOSE ALTERNATIVES

The Department finds that no alternatives were presented to, or considered by, the Department that would be more effective in carrying out the purpose of these proposed regulations or would be as effective and less burdensome to affected private persons than these proposed regulations.

Performance Standard as Alternative:

The proposed regulation requires Custodian of Records applicants to provide necessary information on a form prescribed by the Department. Prescribing a form is the easiest way to make sure that the Custodian of Records applicant provides all required information. By creating a procedure for the Department to verify the eligibility of the Custodian of Records, the proposed regulation protects the confidentiality of the criminal history data.