



# CLEAN SLATE RELIEF

## *The Impact on Criminal Record Sharing and Immigration*

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The way state criminal records are shared across state boundaries has long been a source of confusion and opacity, raising many questions including who has access to state criminal records, in what form, and what happens when a state criminal record is later expunged or sealed. This memorandum seeks to demystify the contours of record sharing, outlining some of the main structures and laws that govern criminal record sharing, particularly focusing on sharing with federal immigration agencies. We examine how agencies like Immigration and Customs Enforcement (ICE) use state criminal record sharing in their enforcement efforts to target noncitizens, and how United States Citizenship and Immigration Services (USCIS) uses state records to deny immigration benefits.<sup>1</sup>

### **I. The National Crime Information Center, Interstate Identification Index, and the National Fingerprint File Allow for the Exchange of Criminal Records Beyond a State’s Boundary**

The National Crime Information Center (NCIC) is an electronic database of crime data maintained by the Federal Bureau of Investigation (FBI) and is used by virtually every criminal justice agency in the United States.<sup>2</sup> When law enforcement searches the NCIC, they are querying information contained in 21 different “files” or databases.<sup>3</sup> The NCIC essentially functions as an interface for local, state, and federal law enforcement to search multiple state and federal crime information databases at once.

<sup>1</sup> There are other means by which DHS can obtain criminal records, such as through private third-party vendors or by engaging with state and local entities, which are beyond the scope of this memo. Additionally, this memo does not address the obligations of noncitizens to disclose records when applying for immigration benefits.

<sup>2</sup> National Crime Information Center (NCIC), <https://www.fbi.gov/services/cjis/ncic> (last visited Oct. 18, 2022); FBI State Identification Bureau Listing, <https://www.fbi.gov/services/cjis/identity-history-summary-checks/state-identification-bureau-listing> (last visited Oct. 18, 2022).

<sup>3</sup> National Crime Information Center (NCIC), <https://www.fbi.gov/services/cjis/ncic> (last visited Oct. 18, 2022).

The Interstate Identification Index (III), which can be accessed through the NCIC, is a system for exchanging state criminal records.<sup>4</sup> This means that responses from the III through NCIC are not the actual criminal records, but information about the existence of the records and how to retrieve them.<sup>5</sup> Using a person's name, approved users can submit an inquiry and if there is a matching record, they may submit a second inquiry to obtain the criminal record.<sup>6</sup>

As of 2019, all 50 states participate in the III.<sup>7</sup> States that participate in the III fall into two categories: National Fingerprint File Program (NFF) states and non-NFF states.<sup>8</sup> The NFF program is optional for each state. It essentially allows states to control the record querying process so that any query points directly to the state's criminal record depository without the FBI being an active intermediary and custodian of the records.<sup>9</sup> In exchange for joining the NFF program, states must abide by certain record sharing requirements as explained in Section III below. As of 2021, there were 23 NFF states and 28 non-NFF states.<sup>10</sup>

If a search of III results in a hit from a non-NFF state database, the FBI sends the requesting agency a copy of the state record kept on file by the FBI in the III.<sup>11</sup> This means that record copies stored in the III may not be in alignment with the state's records, if the state has not fully updated the FBI about each case development.<sup>12</sup> Practically speaking, non-NFF states must constantly share new records such as updated case dispositions and expungements to the FBI.<sup>13</sup>

The significant distinction between these is in how records may be duplicated and shared across agencies, which has implications for when records are subsequently changed by post-conviction relief or other developments on a state level. When a record is identified from an NFF state, the query is done directly from the NFF state repository. This means that the FBI reaches out directly to the NFF state repository and then the state disseminates the record to the requesting agency.<sup>14</sup> NFF sharing allows for querying state-maintained crime information without the need for the FBI to maintain copies of state files.<sup>15</sup>

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<sup>4</sup> Law Enforcement Records Management Systems (RMSs) as They Pertain to FBI Programs and Systems, Criminal Justice Information Services Division of Federal Bureau of Investigation, pgs. 14-16, <https://ucr.fbi.gov/law-enforcement-records-management-system>.

<sup>5</sup> *Id.* at 13, 16.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> Interstate Identification Index (III) National Fingerprint File (NFF), <https://www.fbi.gov/services/cjis/compact-council/interstate-identification-index-iii-national-fingerprint-file-nff> (last visited Oct. 18, 2022).

<sup>8</sup> See Compact Council: National Fingerprint (NFF) Benefits Flyer, <https://www.fbi.gov/file-repository/compact-council-ratification-flyer/view> (last visited Oct. 18, 2022).

<sup>9</sup> *Id.*

<sup>10</sup> Interstate Identification Index (III) National Fingerprint File (NFF), <https://www.fbi.gov/services/cjis/compact-council/interstate-identification-index-iii-national-fingerprint-file-nff> (last visited Oct. 18, 2022).

<sup>11</sup> See Compact Council: National Fingerprint (NFF) Benefits Flyer, <https://www.fbi.gov/file-repository/compact-council-ratification-flyer/view> (last visited Oct. 18, 2022).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

## II. Immigration and Customs Enforcement and United States Citizenship and Immigration Services Rely on the III When Seeking to Arrest Noncitizens or Deny Them Immigration Benefits

Immigration and Customs Enforcement (ICE) relies heavily on the NCIC and III when searching for criminal records on immigrants.<sup>16</sup> For example, when a person is booked or arrested by a state or local law enforcement agency, electronic fingerprints collected by law enforcement trigger an automated query through the NCIC.<sup>17</sup> If the fingerprints sent match previously collected fingerprints by the Department of Homeland Security, ICE is automatically notified and subsequently decides whether to take action on an individual by issuing a detainer or otherwise investigate the person further.<sup>18</sup>

United States Citizenship and Immigration Services (USCIS) also uses the NCIC and III to access criminal records when applicants apply for an immigration benefit. USCIS personnel are “permitted to query NCIC III when fraud is articulated, a [national security] concern has been identified, there is an indication of a criminal record or criminal activity, or there is a need to know to perform official duties.”<sup>19</sup> This means that USCIS accesses these systems in an enormous number of applications for immigration benefits, such as green cards, naturalization, and other statuses.

## III. National Crime Prevention and Privacy Compact Governs How Records in the III Can Be Used for Noncriminal Justice Purposes Such as For Immigration Purposes

Many criminal history queries are routine matters of criminal law enforcement, but non-criminal agencies also may request criminal records. States have different rules for dissemination of

<sup>16</sup> See ICE Request for Records Disposition Authority, pg. 1, [https://docs.google.com/viewer?url=https%3A%2F%2Fwww.archives.gov%2Ffiles%2Frecords-mgmt%2Frcs%2Fschedules%2Fdepartments%2Fdepartment-of-homeland-security%2Frg-0567%2Fdaa-0567-2017-0002\\_sf115.pdf](https://docs.google.com/viewer?url=https%3A%2F%2Fwww.archives.gov%2Ffiles%2Frecords-mgmt%2Frcs%2Fschedules%2Fdepartments%2Fdepartment-of-homeland-security%2Frg-0567%2Fdaa-0567-2017-0002_sf115.pdf). There are other systems, such as the National Law Enforcement Telecommunications System (Nlets), which is a similar system used to also share criminal information, but Nlets is generally used when records are not available through the NCIC/III system ([https://wiki.nlets.org/index.php/Section\\_15:\\_Criminal\\_History\\_Record\\_Information\\_Transactions\\_\(CHRI\)#Multi-State\\_Query\\_Functionality](https://wiki.nlets.org/index.php/Section_15:_Criminal_History_Record_Information_Transactions_(CHRI)#Multi-State_Query_Functionality)).

<sup>17</sup> ICE Secure Communities Standard Operating Procedures, [https://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf). Fingerprints submitted by state and local law enforcement officers to the FBI are sent from their respective centralized agency (in California, it is the California Department of Justice).

<sup>18</sup> *Id.* Fingerprints are queried against DHS’ IDENT database. If there is a positive match, an Immigration Alien Query is sent to ICE Law Enforcement Support Center to assess whether to pursue action against the person.

<sup>19</sup> USCIS National Background Identity, and Security Check Operating Procedures, pg. 30, [https://imlive.s3.amazonaws.com/Federal%20Government/ID58548032607222773313348902028328599871/2.%20Attachment%203.13%20National%20Background%20Identity%20and%20Security%20Checks%20Operating%20Procedures%20\(NaBISCOPE\).pdf](https://imlive.s3.amazonaws.com/Federal%20Government/ID58548032607222773313348902028328599871/2.%20Attachment%203.13%20National%20Background%20Identity%20and%20Security%20Checks%20Operating%20Procedures%20(NaBISCOPE).pdf).

records in this context and have formed agreements to reconcile these varying systems. The National Crime Prevention and Privacy Compact (Compact) establishes formal procedures for the exchange of criminal history data in the III for **noncriminal justice purposes**.<sup>20</sup> Noncriminal justice purposes expressly includes “immigration and naturalization matters, and national security clearances.”<sup>21</sup>

When a state ratifies the Compact, it agrees to provide criminal history information for noncriminal purposes, regardless of whether this noncriminal use would be permitted in the state sending the information.<sup>22</sup> In fact, the Compact was established because of the varying state statutes and policies that restrict the dissemination of criminal history records for noncriminal justice purposes.<sup>23</sup> Ratifying the Compact is one of the requirements prior to becoming an NFF state.<sup>24</sup>

Unlike joining the NFF, becoming a Compact state does not change how a state maintains their records, merely how they may be used for noncriminal justice purposes. Non-NFF states that have ratified the Compact still forward their records to the FBI.<sup>25</sup> As of December 2021, 34 states have fully ratified the Compact, 11 have only signed the Compact without fully ratifying, and 11 have done neither.<sup>26</sup> By signing, states agree to voluntarily abide by the Compact’s policies regarding the noncriminal justice use of the III without needing to ratify the Compact.<sup>27</sup> This means that they agree to send their criminal records to other states for non-criminal justice purposes, such as employment, even if such a request would not be granted under their own state laws.

#### **IV. It Is the State’s Responsibility to Ensure that Expungement and Sealed Records Are Accurately Reflected in the III**

Federal regulations state that it is the “the responsibility of each criminal justice agency contributing data to the III System ... to assure that information on individuals is kept complete, accurate, and current so that all such records shall contain to the maximum extent feasible dispositions for all arrest data included therein. Dispositions should be submitted by criminal justice agencies within 120 days after the disposition has occurred.”<sup>28</sup> However, this does not

<sup>20</sup> 34 U.S.C. § 40316(a).

<sup>21</sup> 34 U.S.C. § 40316(18).

<sup>22</sup> Survey of State Criminal History Information Systems, 2018, U.S. DOJ Office of Justice Programs, pg. viii (published Nov. 2020), <https://www.ojp.gov/pdffiles1/bjs/grants/255651.pdf>.

<sup>23</sup> Interstate Identification Index/National Fingerprint File Operational and Technical Manual, U.S. DOJ FBI Criminal Justice. Information Services Division, pg. 2 (published Dec. 2005), <https://dojmt.gov/wp-content/uploads/Interstate-Identification-Index-Fingerprint-File-Manual.pdf>.

<sup>24</sup> Interstate Identification Index/National Fingerprint File Operational and Technical Manual, U.S. DOJ FBI Criminal Justice. Information Services Division, pg. 2 (published Dec. 2005), <https://dojmt.gov/wp-content/uploads/Interstate-Identification-Index-Fingerprint-File-Manual.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> Compact Council States and Territories Map, <https://www.fbi.gov/file-repository/compact-council-states-territories-map/view>.

<sup>27</sup> Survey of State Criminal History Information Systems, 2018, U.S. DOJ Office of Justice Programs, pg. viii (published Nov. 2020), <https://www.ojp.gov/pdffiles1/bjs/grants/255651.pdf>.

<sup>28</sup> 28 C.F.R. § 20.37.

guarantee that states submit all the information or that they do so in a timely fashion. As a result, inquiries through III may receive outdated and incorrect information.

All states can remove records from the III through different means, such as through expungements or sealing records. When a state record ceases to exist because of an expungement, to remove it from FBI records, states should contact the FBI to ensure that the record also gets expunged in the III.<sup>29</sup> NFF states do not have to submit expungement requests to the FBI, because they assume responsibility of the information and maintain the data in their own systems, but if all data in a record has been sealed or expunged, the FBI states that they should send an electronic delete record message to have the entire file deleted.<sup>30</sup> When a record is removed from the III, an agency submitting an inquiry through the III will receive a response stating that “the record is no longer on file” and it would state the reason (e.g. the file was expunged).<sup>31</sup>

States can also seal their records for specific purposes (e.g., specific noncriminal purpose) thereby only allowing the records to be accessed to authorized agencies for authorized purposes.<sup>32</sup> If a state has ratified the Compact, records sealed must conform to Art. I (21) of the Compact.<sup>33</sup> Under this provision, adult sealed records are defined as those that are: “(i) not available for criminal justice uses; (ii) not supported by fingerprints or other accepted means of positive identification; or (iii) subject to restrictions on dissemination for noncriminal justice purposes pursuant to a court order related to a particular subject or pursuant to a Federal or State statute that requires action on a sealing petition filed by a particular record subject.”<sup>34</sup> With respect to juveniles, records can be sealed, however each state determines this by its own law and procedure.<sup>35</sup>

Communication with the FBI to ensure that records are properly reflected in their systems is only one part of the problem. The FBI and state databases themselves are often inaccurate and thus queries from their databases are often missing expungements and other final dispositions. For example, the FBI found that as many as 50% of their records are inaccurate because final dispositions are not timely updated.<sup>36</sup> According to a survey of state criminal databases, “in 49 states only 68% of all arrests in state databases have final case dispositions

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<sup>29</sup> Interstate Identification Index/National Fingerprint File Operational and Technical Manual, U.S. Dept. of Justice, (Chapter 3, Section 5.5, page 17). <https://dojmt.gov/wp-content/uploads/Interstate-Identification-Index-Fingerprint-File-Manual.pdf>.

<sup>30</sup> *Id.* at page 4, chapter 14, Section 3.

<sup>31</sup> *Id.* at page 23.

<sup>32</sup> *Id.* at chapter 15, section 1, page 1; Frequently Asked Questions Regarding the National Crime Prevention and Privacy Compact Act of 1998, <https://ucr.fbi.gov/cc/library/compact-frequently-asked-questions> (page 12).

<sup>33</sup> Frequently Asked Questions Regarding the National Crime Prevention and Privacy Compact Act of 1998, <https://ucr.fbi.gov/cc/library/compact-frequently-asked-questions> (page 7).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See The “Wild West” of Employment Background Checks, National Employment Law Project, National Employment Law Project, pg. 4 (published August 2014), <https://s27147.pcdn.co/wp-content/uploads/2015/03/Wild-West-Employment-Background-Checks-Reform-Agenda.pdf>.

reported.”<sup>37</sup> Many state databases are simply not updating their records properly, greatly reducing the intended effects of expungements in the first place.

There are various reasons why states fail to maintain accurate final disposition information. For example, thirteen states report that 25% or more of all dispositions received could not be linked to a specific repository arrest record.<sup>38</sup> Take for example Indiana’s criminal database. Indiana reports that it takes over a year for a final felony disposition to even be *received* by their state repository.<sup>39</sup> Even when a disposition is received, some states take more than a year for the disposition to be entered into the state’s database.<sup>40</sup>

## V. Conclusion

The Federal Bureau of Investigation (FBI)’s Interstate Identification Index (III) within the National Crime Information Center is one of the main national systems that Immigration and Customs Enforcement (ICE) and United States Citizenship and Immigration Services (USCIS) uses to access criminal record information. ICE uses the III for its enforcement duties to assess whether to target and deport immigrants, and USCIS uses it in its decisions to approve immigration benefits. Various interstate programs and agreements, such as the National Fingerprint File and the Crime Prevention and Policy Compact, regulate the way criminal records are stored and shared with the FBI and other states and agencies. The FBI still operates at the center of criminal record sharing, and thus states should ensure that their records are accurately reflected in the III. When states expunge or seal records, communication with the FBI is key to ensure that immigrants are not wrongfully identified for deportation or denied immigration benefits.

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<sup>37</sup> Survey of State Criminal History Information Systems, 2018, U.S. DOJ Office of Justice Programs, pg. viii (published Nov. 2020), <https://www.ojp.gov/pdffiles1/bjs/grants/255651.pdf>.

<sup>38</sup> The "Wild West" of Employment Background Checks, National Employment Law Project, National Employment Law Project, pg. 8 (published August 2014), <https://s27147.pcdn.co/wp-content/uploads/2015/03/Wild-West-Employment-Background-Checks-Reform-Agenda.pdf>.

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.*



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**About the Immigrant Legal Resource Center**

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