9pp

TESTIMONY

OF

PROFESSOR GARY S. GILDIN

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

before the

House Judiciary Committee

regarding the

CRIMINAL HISTORY RECORDS INFORMATION ACT

October 31, 1990

I want to thank the Committee for the opportunity to testify this morning. My name is Gary Gildin. I am a Professor at The Dickinson School of Law and am present today on behalf of the American Civil Liberties Union of Pennsylvania to testify in opposition to proposals to amend the Criminal History Records Information Act.

Let me begin by identifying the interests at stake. The impetus for the proposed amendments is the desire of law enforcement agencies to increase their ability to fight crime by computerizing intelligence, investigative and treatment information. The technology of the 1990's could arm law enforcement in ways to radically enhance its ability to detect crime, to prosecute and punish persons who violate the law. Technology is available to intercept all telephone conversations. Technology is available to plant bugs to eavesdrop on conversations in homes and places of business. Technology is available for video surveillance through hidden cameras. Technology is available to create computerized dossiers on every citizen.

However, while this legislature is sensitive and sympathetic to the needs of law enforcement and the problem of crime in the 1990's, it has not authorized criminal justice agencies routinely to employ all available technologies because there is another interest in the balance. This interest is not protection of criminals. Instead the competing interest is protection of innocent

persons against governmental invasions of spheres of personal privacy.

Unlike law enforcement agencies, innocent citizens do not have an extensive and organized lobbying network. This is especially true where, as is the case with the proposed amendments to the Criminal History Records Information Act, the legislation does not single out or target any specific class of individuals for treatment. Instead, it has been the special responsibility of this legislature to act as the guardian of the rights of innocent persons against invasions of privacy that may result from the zeal to flush out crime. Today it is the special responsibility of members of this committee to balance the needs of law enforcement against the invasions of privacy contemplated by proposals to amend the Criminal History Records Information Act, proposals which purport to increase computerization of information about persons innocent of any wrongdoing.

It was just a little over ten years ago that the legislature of this Commonwealth struck the balance between what information could and could not be computerized by criminal justice agencies. Today I am suggesting that the balance struck in 1979 was proper and should not be disturbed. At the very least, the proposed blanket lifting of all restrictions that were imposed in 1979 is overbroad.

Let me talk first about the Criminal History Records Information Act as amended in 1979. The legislature rightfully recognized the utility to government in some

circumstances of placing certain criminal history information on computer. Indeed the legislation permitted computerization of what was called "criminal history record information". This information is defined at Title 18, § 9102 to be information "arising from the initiation of a criminal proceeding." Under this definition, criminal justice agencies were entitled to computerize records of arrests, records of indictments, records of other formal criminal charges and the disposition of those charges. Therefore, under the law as it exists today and for the past eleven years, when someone is legitimately stopped, arrested or suspected, law enforcement can do a computer check to determine whether that person has any prior arrests or prior criminal charges and the outcome of those charges.

The criminal history information that the government is at present permitted to computerize has five characteristics. First, all of the information arises out of the initiation of criminal proceedings. Therefore computer files will only exist for persons who were in fact formally accused of crime. Second, the source of the information to be computerized is records that are public. Third, the information computerized is objective and verifiable. Fourth, the records are limited to arrests and the like that do not invade or detail the privacies of daily life. Fifth, the subject of the computer record has the right to access, review and correct the records. 18 Pa. C.S. §§ 9151-9153.

While the legislature authorized computerization of criminal history records information, at the same time it prohibited computerization of three categories of information. The legislature first prohibited computerization of "intelligence information", which is defined as "[i]nformation concerning the habits, practices, characteristics, possessions, associations or financial statements of any individual." As the definition recognizes, intelligence information may include data on persons who are not in fact processed through the criminal justice system. In fact, intelligence information may exist for persons who are not even alleged to have committed a crime.

The legislature similarly prohibited the computerization of "investigative information", which is defined as "[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident...." As with intelligence information, investigative information could be generated even where no criminal proceeding was initiated because the investigation failed to disclose probable cause to believe the subject of the investigation committed any crime.

Finally, the legislature prohibited computerization of "treatment information", defined as "[i]nformation concerning medical, psychiatric, psychological or other rehabilitative treatment provided, suggested or prescribed."

Why did the legislature proscribe computerization of these three categories of information? Why should the efforts to amend the Criminal History Record Information Act to allow computerization of these categories of information be rejected?

Rather than analyze each definition individually, let me try to differentiate the information that may not be computerized from the five previously identified characteristics of criminal history information presently permitted to be computerized.

The first characteristic concerns the persons on whom computer files will be maintained. Under the present law, computer files only will be established for persons against whom criminal proceedings have been initiated. That is when the arrest record is generated; that is when the conviction record is generated. The proposed amendment, if approved, will enable government to computerize files on persons who are not guilty; in fact, computer files may be generated for persons who have not even been subjected to criminal proceedings because no probable cause exists to believe that they were guilty of any crime. Therefore, the proposed amendments expand the net of innocent persons upon whom computer records will be established.

The second characteristic of criminal history record information permitted to be computerized under the present legislation is that the source of the data is public records. The proposed amendment would widen the sources of

information to be computerized well beyond public records. Any information gathered in the course of intelligence gathering, including records of anonymous tips and rumors from unreliable sources could be computerized. The amendments would further authorize computerization of treatment information, which is not public and which in many cases by statute must be maintained as confidential. The proposed amendments do not address the conflict with statutes guaranteeing the confidentiality of treatment records, such as the Drug and Alcohol Abuse Act, Title 71, § 1690.108.

The third characteristic of criminal history record information that may be computerized under present law is that the data is objective. On the other hand, the proposed amendments would authorize computerization of data that is entirely subjective. The government proposes to computerize data concerning an individual's "habits", "practices", and "characteristics". Obviously this data is likely to be far less reliable than records of arrests and convictions.

The fourth characteristic of data presently computerized is that it cannot be deemed to be "private". However, the proposed amendments would permit law enforcement to computerize information of the most private nature. The amendments would allow computerization of information about an individual's "possessions", including guns, "finances" and "associations". A citizen's participation in political or religious organizations as

well as attendance at assemblies, rallies or similar speeches all could be computerized under the amendment. This, of course, will have a dramatic chilling effect on first amendment activities.

The fifth characteristic of the present legislative scheme allowing computerization of certain criminal history records is that the subject of the record has the opportunity to access the records and correct any inaccurate data. However, despite the vastly increased risk that information to be computerized under the proposed amendments will be unreliable, no provision is made in the proposals to give the individual access to and an opportunity to correct errors in these records. No provisions are included to amend § 9151 to allow that access to records of investigative and treatment records. As a result, hardened criminals will have a greater right of review than the innocent persons who are subject to the proposed amendment.

As a result of the proposed amendments, there will be an increased number of innocent persons on whom computerized files are created. Furthermore, the amendments would radically expand the nature and the quantity of the information that will be in computer files. Beyond the public criminal history records that are currently computerized, the proposed amendments will infuse the computer file with unreliable and subjective data, rather than verifiable objective information. Law enforcement could establish files dealing with virtually every detail of

an individual's private life unrelated to any criminal activities. And despite the increasing risk that such information will be unreliable, the proposed amendments disempower the victims from reviewing or correcting that file.

We have useful models of societies that totally subject the privacy of citizens to the interest in maintaining law and order. We can look to totalitarian regimes, the Soviet Union and the KGB, and Orwell's Big Brother as examples of society whose primary goal is law and order. Privacy is secondary at best. But one of the distinctive features of the American society is that it recognizes the important value of privacy -- not to protect it absolutely but to weigh it in the balance. I urge this Committee that there is no reason to depart from or disturb the balance between law enforcement and privacy that was properly struck by the legislature in 1979. Certainly the proposed amendments are far too sweeping and make no attempt to limit computerization to discrete needs presently alleged by law enforcement agencies.

Thank you.