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## BULLETIN

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No. 2022-3

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**Subject: Criminal History Record Information (CHRI) Retention**

The NIGC processes fingerprints submitted by tribes for background investigations of primary management officials (PMO) and key employees (KE). Prior to issuing a gaming license to a PMO or KE, a tribe is required to perform a fingerprint check through the FBI<sup>1</sup> records system as part of the background investigation on each applicant. The criminal history record information CHRI<sup>2</sup> obtained as a result of the check assists the tribe in determining the applicant's eligibility for employment.

This bulletin addresses FBI CHRI retention obligations and how these obligations may intersect with the National Indian Gaming Commission (NIGC) regulatory mandates for retaining primary management official and key employee licensing applications, eligibility determinations, and investigation reports.

### **I. CHRI & CHRI Dissemination**

Initially, it is important to understand the functions and purpose of the CHRI. CHRI comprises “information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, information[ ], or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, and release. The term does not include identification information such as fingerprint records if such information does not indicate the individual’s involvement with the criminal justice system.”<sup>3</sup> CHRI is also information that is transferred or reproduced directly from CHRI or information that confirms the existence or nonexistence of CHRI.<sup>4</sup> CHRI includes

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<sup>1</sup> Federal Bureau of Investigation.

<sup>2</sup> Criminal History Record Information.

<sup>3</sup> 28 C.F.R. § 20.3.

<sup>4</sup> See Next Generation Identification Audit, Noncriminal Justice Access to Criminal History Record Information, Policy Reference Guide (hereinafter NGI) at 1 (Apr. 6, 2020).

any media that contains CHRI, such as: letters, emails, documents, notes, conversations—in person or via phone/text, and spreadsheets or tables.<sup>5</sup>

In order to assist, TGRAs<sup>6</sup> determine the eligibility of applicants for key employee (KE) or primary management official (PMO) positions in their gaming operation(s), the NIGC obtains CHRI from the FBI on these applicants and disseminates it to the TGRAs. The NIGC provides this assistance pursuant to a joint MOU<sup>7</sup> between the agency and TGRAs, which memorializes the parties' understandings and responsibilities regarding the submission of noncriminal justice fingerprints and the transmittal, receipt, storage, use, and dissemination of CJJ<sup>8</sup> and CHRI. As noted, this bulletin's focus is retention of CHRI after its proper use.

## II. CHRI Retention Obligations

### A. CHRI retention

So how long must TGRAs retain CHRI? CHRI may be destroyed as soon as practicable by TGRAs—potentially at the conclusion of a licensing appeal process or the CHRI audit process (whichever comes later), in accordance with the TGRA's media sanitization and destruction policy. The FBI CJIS Security Policy instructs that CHRI “records shall be stored for extended periods only when they are key elements for the integrity and/or utility of case files and/or criminal records.”<sup>9</sup> Further, the policy indicates that “[p]hysical media shall be securely disposed of when no longer required . . . .”<sup>10</sup>

### B. CHRI & NIGC regulatory retention requirements

#### i. Investigation reports & sanitizing CHRI

NIGC regulations do not require that CHRI itself be retained,<sup>11</sup> just summary CHRI if it is transferred into an investigation report.<sup>12</sup> Specifically, NIGC regulations, Sections 556.6 (b)(2)(iii)(C) and (D) require that an investigation report include “every known criminal charge . . .” and “every felony . . . .” So TGRAs may put summary CHRI in an investigation report. Under NIGC regulations, an investigation report must be retained by a TGRA for three (3) years from the date of the primary management official (PMO) or key employee's (KE) employment termination date.<sup>13</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> Tribal Gaming Regulatory Agencies.

<sup>7</sup> Memorandum of Understanding.

<sup>8</sup> Criminal Justice Information is the term used for the FBI Criminal Justice Information Services (CJIS) provided data necessary for law enforcement and civil agencies to perform their missions including, but not limited to biometric, identity history, biographic, property, and case/incident history data.

<sup>9</sup> See CJIS Security Policy, Section 4.2.4.

<sup>10</sup> *Id.* at Section 5.8.4.

<sup>11</sup> See 25 C.F.R. parts 556 and 558.

<sup>12</sup> See 25 C.F.R. §§ 556.6 (a) & (b)(2)(iii)(C) and (D); 558.3(e).

<sup>13</sup> 25 C.F.R. § 558.3(e).

But TGRAs may avoid putting summary CHRI in investigation reports—and maintaining CHRI for a significant period of time with its required protections<sup>14</sup>—by sanitizing the CHRI. To sanitize CHRI, TGRAs use it as a lead to reach out to source record-owners, such as local courts or state criminal history record repositories, and obtain the original criminal history<sup>15</sup>. Importantly, both the process used to acquire the source record information and the resulting original criminal history information must not directly reference or be attributed to the national FBI check. This is because information is considered CHRI if it confirms the existence or nonexistence of CHRI.

*ii. Licensing applications & eligibility determinations*

The other documents that NIGC regulations direct be held for three years after a KE or PMO's termination do not necessitate the inclusion of CHRI or a summary of it.<sup>16</sup> Applications for KE and PMO licensing explicitly contain only information *from* the applicant.<sup>17</sup> NIGC regulations require that “[a] tribe shall request from each primary management official and from each key employee [certain] information . . . ,” including felony, misdemeanor, and criminal charges.<sup>18</sup> Such information is not CHRI though, because it is not from a criminal justice agency.<sup>19</sup> And fingerprints given as part of that application also are not CHRI.<sup>20</sup>

Eligibility determinations simply require that the TGRA review a person's criminal record and determine if they are suitable.<sup>21</sup> So eligibility determinations should not include CHRI or a summary of it. Of course TGRAs need to be careful not to summarize, reproduce, or confirm the existence or nonexistence of CHRI in eligibility determinations, as that constitutes summary CHRI.<sup>22</sup> If TGRAs do include CHRI in the eligibility determination, then it must be maintained for three (3) years from the date of the PMO or KE's employment termination.

*iii. Abbreviated background investigations*

Finally, CHRI results also may be destroyed as soon as practicable when TGRAs implement an abbreviated background investigation process. This occurs when after the

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<sup>14</sup> See CJIS Security Policy, Sections 4 and 5; see also NIGC Bulletin No. 2020-2, *Fingerprint processing — applicant Privacy Act rights and protecting CHRI* at 3-4 (Feb. 18, 2020), [https://www.nigc.gov/images/uploads/bulletins/Bulletin - Privacy Act rights protecting CHRI - FINAL FINAL.pdf](https://www.nigc.gov/images/uploads/bulletins/Bulletin_-_Privacy_Act_rights_protecting_CHRI_-_FINAL_FINAL.pdf)

<sup>15</sup> Or, in other words, source record information.

<sup>16</sup> See 25 C.F.R. § 558.3(e).

<sup>17</sup> See 25 C.F.R. § 556.6(a) (“the tribe shall maintain a complete application file containing the information listed under 556.4(a)(1) through (14)”).

<sup>18</sup> See 25 C.F.R. § 556.4(a).

<sup>19</sup> See 28 C.F.R. § 20.3(g)(2).

<sup>20</sup> See National Identity Services Audit Noncriminal Justice Access to CHRI, Policy Reference Guide at 1 (07/22/2019) (CHRI “does not include identification information such as fingerprint records if such information does not indicate the individual's involvement in the criminal justice system.”).

<sup>21</sup> See 25 C.F.R. § 556.5.

<sup>22</sup> See National Identity Services Audit Noncriminal Justice Access to CHRI, Policy Reference Guide at 1 (07/22/2019) (“Information is considered CHRI if it is transferred or reproduced directly from CHRI received as a result of a national FBI Check . . . . Information is considered CHRI if it confirms the existence or nonexistence of CHRI.”).

submission of a completed application, CHRI is requested, evaluated, and then used to ask the applicant to withdraw their application. In those cases, TGRAs do not prepare an investigation report, make an eligibility determination, or create and submit a Notice of Results (NOR). Consequently, summary CHRI is not contained in any of those documents and may be destroyed upon the application's withdrawal, in accordance with the TGRA's media sanitization and destruction policy.

### **III. Conclusion**

In sum, NIGC regulations do not require that CHRI results themselves be retained, and such results may be destroyed as soon as practicable by a TGRA. Also, TGRAs must be careful to sanitize CHRI for purposes of investigation reports and avoid including summary CHRI or confirming its existence or nonexistence in eligibility determinations. Doing so ensures that CHRI is not subject to the NIGC regulatory retention requirements for investigation reports and eligibility determinations.

Should you have any questions regarding the information covered in this bulletin, please contact a [NIGC Region Office](#) or the CJIS Audit Unit at [cau@nigc.gov](mailto:cau@nigc.gov).