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Criminal Background Investigations

Montgomery County Department of Recreation

OIG Publication # OIG-22-014

MAY 9, 2022

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EXECUTIVE SUMMARY

The Montgomery County Office of the Inspector General (OIG) conducted a review of the Department of Recreation's compliance with background investigation requirements. We focused our testing on the department's temporary-seasonal employees because they represent approximately 94% of the department's workforce and were most likely to interact with minors, senior citizens, and other vulnerable populations. Since 1986, Maryland law has required employees working in county-operated recreation centers serving minors undergo a criminal background investigation.

The review was announced in the OIG's FY 2022 work plan and furthers the OIG's goal to perform proactive work that is relevant and enhances the efficiency and effectiveness of county programs.

OBJECTIVES

Through this inspection we attempted to determine (1) if REC conducts criminal background investigations for temporary-seasonal employees as required by state law; and (2) whether REC's process for conducting temporary-seasonal employee criminal background investigations complies with applicable policy, law, and regulation.

SCOPE & STANDARDS

Our review was conducted between November 2021 and March 2022 in accordance with the *Association of Inspectors General Principles and Quality Standards for Inspections, Evaluations, and Reviews by Offices of Inspector General* (May 2014).

RESULTS

- REC conducted criminal background investigations for all 159 pertinent temporary-seasonal applicants and employees in our sample.
- REC's background investigation policy has never been finalized and has been in draft since 2004.
- REC's practices do not comport with policy when processing criminal background investigations.
- REC does not have a formal policy concerning the retention and destruction of criminal history information and related hiring records.
- REC is receiving criminal history information for individuals not affiliated with the department.
- REC has no written policy regarding continued monitoring or reinvestigation of employees.

RECOMMENDATIONS

- Expedite the formalization of the draft background investigations policy.
- Establish a process to enable individuals to contest the accuracy of their criminal history information and related employment decisions.
- Develop formal policy concerning the destruction and retention of criminal background information and related hiring records.
- Discontinue monitoring individuals who are no longer affiliated with REC.
- Develop a policy addressing the reinvestigation and ongoing monitoring of employees.
- Maintain an accurate employee roster in the Maryland Criminal Justice Information System's subscription service if employee monitoring is continued.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
TABLE OF CONTENTS	ii
BACKGROUND	1
OBJECTIVES, SCOPE, AND METHODOLOGY.....	2
FINDINGS AND RECOMMENDATIONS	3
OIG COMMENTS TO THE CAO'S RESPONSE	8
APPENDIX A: THE CAO'S RESPONSE	9

BACKGROUND

The mission of the Montgomery County Department of Recreation (REC) is “to provide high quality, diverse, and accessible programs, services, and facilities that enhance the quality of life for all ages, cultures, and abilities.” REC hosts a variety of classes, camps, workshops, tours, and community/social activities, including youth development programming and afterschool programs. Additionally, REC operates 23 recreation centers, seven senior centers, four indoor aquatics facilities¹ and seven regional outdoor pools.

REC’s approved operating budget for fiscal year (FY) 2022 is \$48.7 million. According to the county’s payroll system, approximately 94% (2,079 of 2,214 employees)² of REC’s workforce consists of temporary-seasonal employees hired to administer, implement, and/or evaluate a specialized area of REC programming. Temporary-seasonal employees may be hired to assist in a variety of REC programming including sports, camps, classes, outreach, administrative tasks, and facilities maintenance.

Since 1986, Maryland law³ has required that employees of “a recreation center or recreation program operated by the State, a local government, or a private entity primarily serving minors” undergo a federal and state criminal background investigation.⁴ Documentation shows REC has fingerprinted individuals to obtain their criminal histories since at least 1993. REC issued a draft policy on background investigations in 2004⁵ following the publication of an Office of Legislative Oversight (OLO) report which recommended that the county develop a countywide policy for background investigations. To date, no formal countywide policy has been implemented, but in 2021 the county formed a department stakeholder working group to research, review, and develop policy recommendations for background investigations and suitability determinations for all departments.

REC’s operating policy requires that all employees, including temporary-seasonal employees, contractors, and volunteers undergo a criminal background investigation regardless of the position for which they are hired. REC administrative personnel coordinate the hiring and background investigation process, and maintain all appropriate records related to the process. Criminal history records are obtained through a user agreement with the Maryland Department of Public Safety and Correctional Services (Public Safety), using the Maryland Criminal Justice Information System - Central Repository (CJIS).

Once a hiring manager decides to hire an applicant, a conditional offer of employment is made, and the prospective REC employee is asked to schedule a fingerprinting appointment. Following

¹ REC also partners with Adventist Community services to operate the Piney Branch Elementary School pool.

² As of September 28, 2021.

³ Maryland Family Law Article § 5-561.

⁴ Criminal background investigations in this instance constitute obtaining criminal history records based on fingerprint submissions.

⁵ *Background Investigations*, effective March 31, 2004. The policy does not appear to have been formally signed by the Director of REC, but REC management asserted that it is currently followed by REC in conducting criminal background investigations.

fingerprinting, REC receives an email from CJIS with a link to access a separate, encrypted email system through which REC staff may download a copy of the state and federal criminal history reports. Those reports are reviewed prior to the extension of a final offer of employment.

Objectives, Scope, and Methodology

Through this review we sought to determine (1) if REC conducts criminal background investigations for temporary-seasonal employees as required by state law; and (2) whether REC's process for conducting temporary-seasonal employee criminal background investigations complies with applicable policy, law, and regulation.

Our scope included current REC temporary-seasonal employees as well as individuals who applied for a REC temporary-seasonal position between September 15, 2020, and September 14, 2021. We obtained a list of 2,079 current temporary-seasonal employees from the county's Oracle Business Intelligence (BI) System. We used data analytic software to extract a random sample of 58 employees for testing.

For applications processed during the sample period, REC provided a listing of 3,350 line-items⁶ detailing the receipt of an application and changes to an applicant's status as they progressed through the hiring process. Based on discussions with the Office of Human Resources and REC, applicants who did not appear to have reached a point in the hiring process to require a criminal background investigation were excluded. We used data analytic software to identify a sample of 143 recent applicants for testing.

We interviewed county and state employees in relevant departments; reviewed law, regulation and policy and conducted a site visit at REC. Sampled records were tested to ensure that criminal history background investigations were completed and documented as required.

This review was conducted in accordance with the *Association of Inspectors General Principles and Quality Standards for Inspections, Evaluations, and Reviews by Offices of Inspectors General* (May 2014).

⁶ Because individual applicants may apply to multiple job announcements and have multiple status changes as they proceed through the hiring process, the number of individual applicants is less than the number of line items in the spreadsheet.

FINDINGS AND RECOMMENDATIONS

REC conducted criminal background investigations for almost every record in our sample. REC was able to demonstrate that a criminal background investigation was conducted for all but one of the 58 sampled current temporary seasonal employees. The subject record pertained to an employee who was hired prior to legislation requiring that an employee undergo a criminal background investigation took effect. In the sample of 143 recent applicants, for the 102 who were eventually hired by REC, all underwent a criminal background investigation.

REC's background investigation policy, which applies to all REC employees, has never been finalized by the director and has been in draft since 2004. We observed that REC does not always follow the processes outlined in policy when conducting criminal background investigations, and the policy does not address ongoing monitoring, reinvestigation, or the retention and destruction of records.

Finding 1: REC's practices do not comport with policy when processing criminal background investigations.

We compared REC's practices with its policy and found that REC's practice deviated from policy at the point in the hiring process where applicants are asked to disclose their criminal history, as well as in notifying management if an individual has a criminal history. REC also has not established an employment review panel as outlined in their policy to adjudicate appeals of employment decisions related to an individual's criminal history results.

Applicant Disclosure of Criminal History

We noted that REC, although not required to, adheres to the County Code with respect to when in the hiring process prospective employees are asked about their criminal history. However, this practice is not reflected in their policy. In 2014, the County Council enacted the Fair Criminal Record Screening Standards law (commonly referred to as "Ban the Box" legislation) which precluded employers in the county, including, in most instances, county government, from inquiring about an applicant's criminal history or conducting a criminal background investigation prior to the conclusion of the first interview. In 2021, the County Council amended the law to prohibit inquiries into an applicant's criminal history prior to the extension of a conditional offer of employment. The law does not apply to entities such as REC that provide programs, services, or direct care to minors and vulnerable adults.

Although REC's practice is to not ask about criminal history until after extending a conditional offer of employment, their policy requires an applicant to disclose any conviction, probation before judgement, not criminally responsible disposition, or pending criminal charge at the time of application. A disagreement between policy and practice could lead to inconsistent treatment of applicants and unequitable hiring decisions.

Notification to Management

REC policy requires the administrative specialist responsible for personnel operations to notify their division chief and the department director if they receive information from CJIS that an applicant has a criminal history record so they may determine the individual's suitability. We were told however, that in many instances when an applicant's background investigation indicates a criminal history the administrative specialist was not informing management of the result. The administrative specialist routinely uses their own judgment and interpretation of policy in deciding what to elevate to management. The administrative specialist told us that they evaluate the severity of the reported violation and the length of time since the incident when deciding whether criminal history information should impact an offer of employment.

Prior to our review REC management was unaware that they were not told about all applicants and employees with a criminal history as required by policy. Providing management the opportunity to consider only a small subset of criminal histories could lead to disparate hiring decisions.

Appeals Process

By using CJIS to conduct criminal background investigations, REC is obligated to follow state and federal regulations that require hiring officials to inform applicants of their right to challenge the accuracy of the information contained in their criminal history record and provide them with reasonable time to do so prior to an employment decision being made.⁷ While applicants are informed of their right to contest the information on their criminal history record during the application process, REC's policy does not provide for a process to meet these requirements.

REC's policy requires the creation of an employment review panel and that five managers be trained to consider the appeals of those denied employment or disciplined because of criminal history information. REC has never established an employment review panel as required by their background investigations policy. No managers have been trained to serve in this capacity.

By not establishing a mechanism to ensure that applicants and employees are afforded the opportunity to challenge the accuracy of information and related decisions, REC is not complying with its policy or CJIS user obligations and may be disadvantaging some individuals.

⁷ COMAR § 12.15.02.10. Right of a Covered Individual to Appeal the Findings in a Printed Statement and 28 CFR §50.12 Exchange of FBI Identification Records.

Recommendation 1

We Recommend REC:

- a) Expedite the formalization of the background investigations policy so it is no longer in draft form and includes the process REC uses to satisfy state and federal requirements with respect to informing applicants of their right to contest information on their criminal history record.
- b) Ensure that policy and practice are consistent with respect to when in the hiring process an applicant is asked about their criminal history.
- c) Provide training to administrative staff on policy requirements for processing criminal background information received from CJIS.
- d) Establish a process for individuals to appeal the accuracy of their criminal history information and related employment decisions.

Finding 2: REC does not have formal policy concerning the retention and destruction of criminal history information and related hiring records.

REC could not provide a list of applicants who were denied employment because of the results of a background investigation. Similarly, REC does not retain documentation of hiring and selection decisions for those who are denied employment because of their criminal history. When asked whether REC could recall any recent candidates who were denied employment due to adverse findings in their criminal history reports, the employee who processes background investigations recalled one applicant who was denied employment in late 2021. For that applicant, REC was unable to provide any documentation other than a copy of a letter sent to the applicant stating, "Due to information received as a result of the State of Maryland, FBI, and/or CPS background investigation, you are not eligible for hire at this time." No further details regarding how the applicant's background investigation impacted the hiring decision were available when we visited REC less than a month after the denial letter was sent to the applicant.

REC's background investigation policy does not address records retention or destruction. In July 2011, the CJIS External Audit Unit conducted an audit of REC's policies and record-keeping processes. The audit report recommended that REC "develop a written policy for securing, accessing, storing, disseminating, and destroying CHRI⁸ when it is no longer needed." To satisfy the CJIS audit recommendation, a REC employee involved in hiring drafted an informal document entitled, *Montgomery Country Department of Recreation Policy: For securing, accessing, storing, disseminating, and destroying CHRI when it is no longer needed*. This document was not reviewed by REC management, is not an official policy, and was not disseminated beyond the

⁸ CHRI is an initialism for criminal history records information

REC Administrative Specialist and CJIS. Moreover, this document does not address destruction or retention of criminal history results for applicants who are not hired.

Due to the complexity of applicable regulations, REC should analyze relevant laws and regulations prior to implementing formal policy concerning the retention and destruction of CHRI and related documentation. Should an applicant or employee file a charge of discrimination based upon the agency's use of criminal history records, a formal policy may aid the county in defending its decision.

Recommendation 2

We recommend REC develop formal policy concerning the destruction and retention of criminal background information and related hiring records.

Finding 3: REC is receiving criminal history information for individuals not affiliated with the department.

Once REC receives an applicant's initial criminal history report, CJIS can provide automated notifications ("alerts") for individuals who are subsequently arrested or convicted within the state of Maryland if they appear on the agency's employee roster. Since 2018, CJIS has required using agencies such as REC to use its Subscription Application Manager (SAM) system to directly manage their employee roster. In July 2021, CJIS sent an email cautioning all SAM users⁹ to keep their employee rosters up to date. The email further explained that agencies are prohibited from receiving alerts for individuals no longer employed by the using agency.

A November 2021 *SAM Fingerprint Activity Report* showed that REC's roster included 20,146 individuals. REC explained that they have never used SAM to make additions or deletions to the employee roster and believed that using it was optional. Therefore, REC is receiving alerts for individuals no longer affiliated with REC. Additionally, because REC was not making the necessary changes in SAM, REC's roster does not include most employees hired since the conversion to SAM in 2018. This means that some REC employees are subject to ongoing monitoring, while others are not.

Recommendation 3

We Recommend REC discontinue monitoring individuals who are no longer affiliated with REC.

⁹ According to CJIS this email was sent to everyone with an authorization number, but REC staff was unable to confirm that they received the email.

Finding 4: REC has no written policy regarding continued monitoring or reinvestigation of employees.

REC does not currently reinvestigate employees but rather relies on monitoring through CJIS to notify them of changes to employee criminal histories. They have no written policy or procedures addressing monitoring or reinvestigation of employees. As noted, REC has not complied with CJIS requirements to maintain an accurate employee roster and therefore the monitoring process does not include all employees. Informal and inconsistent monitoring practices could lead to REC missing criminal violations which may put their clients at risk.

Many government organizations require reinvestigation of employees required to undergo background investigations. Reinvestigations are often conducted on a predetermined cycle to capture changes that occurred since the previous investigation. The FBI's CJIS Security Policy¹⁰ recommends that individual background reinvestigations be conducted every five years unless the FBI's Record of Arrest Prosecutions Back Program (FBI Rap Back)¹¹ is implemented. Similarly, the Assistant Director of Audit, Training and Provider Network for CJIS recommends as a best practice that REC require employees to be re-fingerprinted every five years, regardless of whether this is required under the governing law and regulation.¹² Given the recommended best practices, REC should consider whether implementing reinvestigations and monitoring of employees meets operational goals and memorialize the decision in policy.

Recommendation 4

We Recommend REC:

- a) Develop a policy addressing the reinvestigation and ongoing monitoring of employees.**
- b) Maintain an accurate employee roster in SAM if employee monitoring is continued.**

¹⁰ REC's CHRI User Agreement with MD DPSCS requires they adhere to the U.S. Department of Justice, Federal Bureau of Investigation (FBI) CJIS Security Policy.

¹¹ Maryland Public Safety is in the process of joining FBI Rap Back which will give CJIS the ability to provide alerts for nationwide criminal history information.

¹² Licensed childcare facility employees in Maryland are required to submit to a fingerprint check at least once every 5 years. While REC provides services to children, none of its programs are licensed by the Department of Education, Division of Early Childhood, Office of Childcare.

OIG COMMENTS TO THE CAO'S RESPONSE

The County Chief Administrative Officer's response to our report is included in its entirety in Appendix A. The response notes concurrence with the OIG's recommendations. Nothing in the response caused us to alter our report.

We expect specifics of stated actions and plans to be included in the Internal Auditor's report on corrective actions which is expected in September in accordance with County Code §2-25A (Council Bill 11-19).

APPENDIX A: THE CAO'S RESPONSE

The Chief Administrative Officer provided the following response to our report:



OFFICE OF THE COUNTY EXECUTIVE

Marc Elrich
County Executive

Richard S. Madaleno
Chief Administrative Officer

MEMORANDUM

May 6, 2022

TO: Megan Davey Limarzi, Inspector General

FROM: Richard S. Madaleno, Chief Administrative Officer *RSM*

SUBJECT: Inspector General Confidential Draft Report: Criminal Background Investigations in the Department of Recreation (OIG Publication #OIG-22-0xx)

Thank you for the opportunity to respond to the issues identified in the confidential draft report. As noted in the report, Montgomery County's Department of Recreation (REC) conducted criminal background investigations for all pertinent temporary-seasonal applicants and employees in the OIG sample. REC provides programs and services that enhance the quality of life for Montgomery County residents of all ages, cultures, and ability, and takes very seriously its obligations to ensure that its employees providing these services undergo all required criminal background investigations. We recognize that additional actions, as identified in the draft report are warranted to further strengthen existing controls and processes. We are committed to making these enhancements in a timely manner.

Recommendation 1: We recommend REC:

- a) Expedite the formalization of the background investigations policy so it is no longer in draft form and includes the process REC uses to satisfy state and federal requirements with respect to informing applicants of their right to contest information on their criminal history record.
- b) Ensure that policy and practice are consistent with respect to when in the hiring process an applicant is asked about their criminal record.
- c) Provide training to administrative staff on policy requirements for processing criminal background information received from CJIS.
- d) Establish a process for individuals to appeal the accuracy of their criminal information and related employment decisions.

CAO Response: We concur. REC will review its draft policy and take all appropriate actions to finalize the policy, educate staff on their responsibilities, and implement the policy.

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Inspector General Confidential Draft Report: Criminal Background Investigations in the
Department of Recreation (OIG Publication #OIG-22-0xx)
May 6, 2022
Page 2 of 2

Recommendation 2: We recommend REC develop formal policy concerning the destruction and retention of criminal background information and related hiring records.

CAO Response: We concur. As part of the actions that will be taken to finalize and implement the policy discussed above, REC will establish and implement a policy concerning destruction and retention of criminal background information and related hiring records.

Recommendation 3: We recommend REC discontinue monitoring individuals who are no longer affiliated with REC.

CAO Response: We concur and will ensure that REC takes appropriate steps to modify its use of the Subscription Application Manager (SAM) to ensure REC does not receive notifications from the Maryland Criminal Justice Information System (CJIS) for individuals who are no longer affiliated with REC.

Recommendation 4: We recommend REC:

- a) Develop a policy addressing the reinvestigation and ongoing monitoring of employees.
- b) Maintain an accurate employee roster in SAM if employee monitoring is continued.

CAO Response: We concur. As part of the policies to be developed pursuant to the other recommendations noted above, REC will develop a policy and appropriate implementing procedures concerning the use of SAM to receive ongoing notifications from CJIS on employees who continue affiliation with REC.

We appreciate the recommendations reflected in the report and will take appropriate actions to further strengthen the existing controls and processes as noted in the report.

Thank you for bringing these matters to our attention.

cc: Fariba Kassiri, Deputy Chief Administrative Officer, Office of the County Executive
Sonia Mora, Assistant Chief Administrative Officer, Office of the County Executive
Robin Riley, Director, Department of Recreation
Bill Broglie, Internal Audit Manager, Office of the County Executive