

INVESTIGATIVE REPORT

*****PUBLIC REPORT*****

Edited to remove confidential information

Ombudsman Complaint A099-0131
(Finding of record and closure)

September 1, 1999

SUMMARY OF THE COMPLAINT

A South-Central Alaska resident contacted the Office of the Ombudsman this spring to complain that the Department of Public Safety (DPS) Alaska Public Safety Information Network (APSIN) had incorrectly posted information that the complainant had the HIV/AIDS virus.

The complainant told the Ombudsman intake officer that Anchorage Police Department officers arrested the complainant on a bench warrant earlier. According to the complainant, the officer placed the complainant in his police cruiser then returned to the complainant's house where he asked the complainant's spouse if the complainant had AIDS. The officer told the spouse that his computerized information indicated that the complainant had the deadly virus.

The complainant denies carrying the HIV virus, a fact verified by medical tests three times with in the past four years. The complainant contacted "state records" officials who told the complainant that they had not posted any information on state computers indicating that the complainant had AIDS. However, the complainant was uncertain of the agency name or state employee's identity.

The intake officer contacted DPS APSIN Control Terminal Officer Kathleen Mather, who confirmed that the complainant did have an APSIN entry which indicated the complainant was HIV/AIDS positive. Ms. Mather said that DPS would remove the incorrect information from the APSIN entry if the complainant presented medical proof that the complainant does not have the disease. Ms. Mather told investigators that she did not know how or when the

information got into the APSIN system nor could she determine the source of the information.

Assistant Ombudsman Linda Lord-Jenkins investigated the following allegation:

Unreasonable: The Department of Public Safety's Alaska Public Safety Information Network maintained and provided incorrect medical information to Anchorage Police officers that the complainant had the HIV/AIDS virus when the complainant does not have the virus.

INVESTIGATION

The Alaska Public Safety Information Network system

DPS is authorized and required by AS 12.62 and 13 AAC 68 to maintain records and information on individuals charged and convicted of crimes. The APSIN information is divided into two types. The first type is "basic person" information, which contains the personal descriptors.

Under 13 AAC 68.905 (28) "personal descriptors" means information used to identify a person, which may consist of one or more of the following: full name and aliases; date and place of birth; country of citizenship; physical characteristics, including sex, race, height, weight, eye color, hair color, scars, marks, tattoos, and amputations; occupation and employer; driver's license number and state of issue; social security number; and any other identification number assigned by a government unit.

The "personal descriptors" record contains an entry option labeled "Medical Code." That code, in this case, indicated that the complainant had the HIV virus. However, the APSIN medical code can indicate other types of information including but not limited to arthritis, behavior disorders like autism, schizophrenia, suicidal tendencies, cancer, diabetes, drug abuse, mental retardation, seizures, stroke and senility, cerebral palsy, epilepsy, pregnancy, pulmonary diseases, and tuberculosis.

The second type of information on APSIN is criminal information, which includes arrest and criminal conviction history and any information about the subject's ongoing criminal activity.

Under statute and 13 AAC 68.215, APSIN information can be

entered into the APSIN system only by a person employed by a criminal justice agency that is authorized to have direct access to the system. The employee must be approved for a security clearance by the Department of Public Safety, which requires a fingerprint-based state and national criminal background check. The employee must obtain an operator certificate by passing a written test demonstrating knowledge of the laws, policies, and procedures governing APSIN.

The DPS controls the type of information an APSIN operator can access and the type of functions an APSIN operator can perform based on job duties. A dispatcher employed by the Anchorage or North Pole Police Department would for example, be authorized direct access to the system and could enter data into the APSIN system. However, DPS Deputy Commissioner Del Smith pointed out that even he, as deputy commissioner, cannot update information in the system.

Just as APSIN has two categories of information, it has dual levels of tracking access to APSIN information. For updates to information on the system, APSIN indicates only the identity of the last person to update information. The APSIN software also does not have the capability of keeping a record of which personal descriptor information was updated. Therefore, it is impossible to determine who entered the HIV information on the complainant's file or when it was entered. APSIN also does not contain any record to indicate which agency or individual provided the updated information to the system. Thus, DPS was unable to determine the source of the incorrect information on the complainant.

Under AS 12.62.160 and 13 AAC 68.220, APSIN is required to log the identity of any operator who views (but does not update) certain criminal justice information under AS 12.62.900. The APSIN system maintains a "query log" that tracks the identity of all people who check on a person. This log is kept for three years and automatically purges inquiries that are made three years and one day prior to the current date.

The statute does not require a log of those certified operators who enter information into APSIN.

AS 12.62.160 also directs that people who are authorized access to APSIN information may not disclose that information to those who are not authorized access:

Criminal justice information and the identity of recipients of criminal justice information is

confidential and exempt from disclosure under AS 09.25. The existence or nonexistence of criminal justice information may not be released to or confirmed to any person except as provided in this section and AS 12.62.180(d).

13 AAC 68.300 states at (b)(5) that information in the APSIN report may be used only for the purpose or activity for which it was released; it may not be released to another person except as provided under 13 AAC 68.300 - 13 AAC 68.345 or as otherwise provided by state or federal law; misuse of criminal justice information is subject to civil and criminal penalties.

Spouses are not included in the category of individuals entitled to receive this information except possibly as an extension of AS 12.62.160(b)(1), which states:

An assessment or summary of criminal justice information may be provided to a person when, and only to the extent, necessary to avoid imminent danger to life or extensive damage to property.

13 AAC 68.335, release of criminal justice information to avoid imminent danger to life or extensive damage to property, states:
(a) The repository, or an agency authorized direct access to records maintained by the repository under 13 AAC 68.215, may release an assessment or summary of criminal justice information maintained by the repository to a person for a purpose described in AS 12.62.160(b)(1), except that information that is sealed under AS 12.62.180 may be released under this section only when necessary to prevent imminent harm to a person.

(b) Release of information under this section is not subject to the requirements of AS 12.62.160(c)(3).

Neither AS 12.62.160 nor 13 AAC 68.335 defines imminent danger. Black's Law Dictionary defines imminent danger in the following manner:

In relation to homicide in self defense, this term means immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. State V Smith, 43 OR. 109.71 P. 973. Or, as otherwise defined, such an appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense. State V Fontenot, 50 La. Ann. 537, 23 So., 634, 69 Am. St. Rep. 455.

13 AAC 68.310, report of criminal history record information available to any person, states, among other things:

(d) As a condition of receiving a report under this section, a person may not release the contents of the report to another person unless the release is authorized in writing by the subject of the report.

13 AAC 68.335 allows an agency authorized direct access to records maintained by the repository under 13 AAC 68.215, to release an assessment or summary of criminal justice information maintained by the repository to a person for a purpose described in as 12.62.160(b)(1).

AS 12.62.170, and 13 AAC 68.200, directs the commissioner to have corrected any information that is found to be incorrect on the APSIN system within 30 days.

U.S. Department of Justice Federal Bureau of Investigation policy

The FBI issued a Criminal Justice Information Services information letter on June 30, 1998, writing that FBI General Counsel Howard Shapiro advised that the inclusion of AIDS/HIV positive information on the National Crime Information Computer (NCIC) System was of “doubtful legality under the Privacy Act.” He further said that disclosure of such information was of “questionable constitutionality.” The FBI letter stated:

The Privacy Act limits agency records about an individual to those “relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order.” 5 U.S. C §552a(e)(91). The primary purpose of including AIDS/HIV information in the NCIC System was to protect the health and safety of law enforcement personnel, a lawful purpose under the Privacy Act, provided that the information is “relevant and necessary” to accomplish that objective. However, upon extensive review, it appears that the medical research which exists in this field, including information from the Centers for Disease Control (CDC), indicates that the risk of infection to law enforcement personnel as a consequence of work-related contacts or exposure to HIV Positive individuals is virtually nonexistent; hence, inclusion of AIDS/HIV Positive information in the NCIC System is not arguable “relevant and necessary” to accomplish the purpose of protecting law enforcement personnel.

(Footnote 1: Furthermore, under the Privacy Act, release of information without the individual’s written consent

is only permissible under an exception listed in the Act. An analysis of the various exceptions indicates that the dissemination of AIDS/HIV Positive information would likely be impermissible under the Privacy Act.)

Additionally, the Constitution limits dissemination of this type of information. Federal courts have determined that the release of personal medical information must be narrowly tailored to meet an important governmental interest. The scientific research indicates that the risk of AIDS/HIV transmission from human bites, saliva, and tears is virtually nonexistent, therefore, no important governmental interest can be discerned which justifies the systemic disclosure of personal medical information via the NCIC System.

(Footnote 2: It should be noted that law enforcement officers are presently instructed to assume that all suspects are HIV Positive and to take “universal precautions” to prevent exposure. See “Law Enforcement Considerations,” Guidelines for Prevention of Transmissions of Human Immunodeficiency Virus and Hepatitis B Virus to Health Care and Public-Safety Workers, CDC Recommendations and Reports, U.S. Department of Health and Human Services, Vol. 38. No. S-6, 1989. Hence, arguably the concern is being met by appropriate generalized practices.)

Given these conclusions and the limited permissible uses of this information, the OGC has opined that the risk of litigation from the compromise of personal medical information clearly outweighs any potential benefit to law enforcement personnel and recommends against the inclusion of disclosure of AIDS/HIV Positive information in the NCIC System.

The letter informed recipients to cease indicating the AIDS/HIV Positive medical conditions as personal descriptors when entering an NCIC record. “Furthermore, these should not be conditions indicated on a fingerprint card submitted to the FBI.”

DPS response to the complainant’s complaint

Following the Ombudsman’s April 28 written inquiry, Commissioner Ron Otte directed APSIN staff to delete the AIDS positive status

notation from the complainant's system record.

DPS Deputy Commissioner Smith was directed to review this matter for DPS. He said that he asked APSIN staff how the erroneous information was placed on the system. He was told staff did not know and would be unable to determine the source of the information. He said the complainant's criminal history, although containing no felony entries, was so lengthy that an attempt to track arrest/conviction records would not yield the source of the information. At the investigator's request, he provided the APSIN inquiry log for the complainant.

A review of the complainant's APSIN inquiry log indicated more than 400 inquiries on 111 different dates from different agencies in the last three years. Inquiries were noted from the Alaska State Troopers in Anchorage, Fairbanks, Juneau and Soldotna; the Alcohol Safety Awareness Program (ASAP); the Anchorage Municipal Prosecutor; Department of Corrections Adult Probation in Anchorage; the Anchorage, Fairbanks, North Pole and Kenai Police Departments; Department of Corrections at Hiland Mountain, Sixth Avenue, Wildwood Pre-Trial, and Fairbanks Correctional Center.

Although that does not indicate how many times criminal information was added to the complainant's APSIN record, it is indicative of the complexity of any attempt to track how the mis-information came to be in the complainant's record, said Mr. Smith.

Because of the FBI policy change, Alaska DPS in June inactivated the medical information field from the APSIN information screen. APSIN Control Officer Kathy Mather said that deleting this field also removed information on other medical conditions such as epilepsy, tuberculosis, and mental instability outlined on page two.

Mr. Smith said that medical information that would otherwise be in the medical field could be placed in the APSIN miscellaneous field, i.e. information that a person is autistic or suicidal. It could be argued that including such information was necessary and relevant to help law enforcement officers carry out their duties. Mr. Smith also said that DPS is studying the issue to determine if and how such information could be legally included on the APSIN records.

Mr. Smith told Ms. Lord-Jenkins that within days of the medical information being removed from APSIN one police officer contacted his office to complain that the removal would hinder him in his work.

ANALYSIS AND PRELIMINARY FINDING

The facts in this complaint are undisputed: APSIN contained incorrect medical information about the complainant. APSIN disseminated that information to an authorized recipient who then released the information to someone unauthorized to receive the information: the complainant's spouse. The Ombudsman therefore proposed to find this complaint *supported* by the facts outlined in this report.

RECOMMENDATIONS

When the Ombudsman contacted DPS to discuss the situation, DPS managers acted quickly to rectify the complaint specific to the complainant. Thus, that portion of this complaint is *rectified*.

Based on the Ombudsman inquiry and the FBI 1998 information letter, DPS also directed that the medical field be removed from APSIN pending further review. DPS inactivated the medical code field entirely, making it impossible to determine if a person not only has HIV/AIDS but also if a person has other conditions that might be of concern to an arresting officer, such as knowing that a person is subject to seizures, is mentally ill or is mentally handicapped. All of these factors arguably are important for officers to know when approaching a subject. Mr. Smith pointed out that one officer already has complained about the loss of this information.

Our review of the FBI information letter does not lead us to the conclusion that all medical information must be deleted from criminal information systems, only AIDS/HIV positive data. Nor are we convinced that placing medical information in the miscellaneous information field serves the purpose. Either medical information is legitimately on APSIN or it is not. Changing the "field" will not satisfy the law. Perhaps the law will be satisfied by simply removing the HIV/AIDS data. Perhaps not. This area is complicated and wrapped in numerous legal opinions on medical privacy. The Ombudsman therefore recommends:

Recommendation 1: DPS should seek an attorney general's opinion to determine if including medical information on the APSIN system can be considered to serve a legitimate criminal justice purpose such as forewarning police officers that a subject may be mentally ill and incapable of responding

appropriately to an officer. Such forewarning could protect not only the officer but enable an officer to better deal with a mentally or physically incapacitated citizen.

This case was opened because an Anchorage police officer violated Alaska statute and regulations by revealing information obtained from APSIN to a person who was not entitled to it. Anchorage Police participate in the APSIN system under an agreement to keep confidential such information except as outlined in statute. The Ombudsman therefore recommends the following:

Recommendation 2: DPS should issue its own informational letter to criminal justice agencies participating in APSIN reminding them of their statutory obligations to keep confidential APSIN information except as outlined in statute. Further, DPS should request Anchorage Police to conduct an internal review of the release of the complainant's confidential medical information.

AGENCY RESPONSE TO PRELIMINARY FINDING

Commissioner Otte responded to the Preliminary Finding on August 2. He stated, in part:

In response to the analysis and preliminary findings of this complaint, we do not have evidence that APSIN contained incorrect information in the medical code field about the complainant. In the instant case, we are unable to identify the source or the accuracy of the medical information that appeared in the medical code field of the APSIN for the complainant. The complainant has (denied carrying the HIV virus.) We do not have records that either prove or disprove the complainant's assertion. The lack of verification of the accuracy of the medical information was one of our reasons for eliminating this information in APSIN; another reason is our question as to the appropriateness of any medical information being maintained in APSIN.

As we stated, criminal history information in APSIN (information about an event) must be validated by source documents. Information describing a person is more fluid and therefore cannot be based on a document but must be based on sight or self-report. In reviewing this matter, what we found troubling was that we do not have a mechanism for tackling the history of which agency and operator updated person

information and a reference to the source of the information. For example, something that would show: “March, 1999, Anchorage PD dispatcher updates hair color for an individual based on the contact and observation of Officer X.”

Ombudsman response: Based on the commissioner’s statement that DPS had not received information about the complainant’s HIV status, the investigator contacted the complainant. The complainant said that a laboratory report had been taken to DPS but Ms. Mather was unavailable. The complainant did not leave the report with other DPS staff nor did the complainant attempt to deliver it any other time. The complainant provided a copy of a June 30, 1999, laboratory test report which stated that the complainant’s HIV-1 AB screen was non-reactive. The report provided to the Ombudsman stated: A non-reactive result indicates that HIV1 (HTLV-III) antibodies have not been found in this patient specimen. A non-reactive result, however, does not preclude previous exposure or infection with HIV1.) A copy of this confidential report is being provided to DPS for the purpose of this report.

Because the complaint’s assertion that the complainant does not carry the AIDS virus has been supported by the laboratory documentation and because DPS acknowledged that APSIN contained information to the contrary, we find this allegation to be *supported by the facts*. The finding of record in this case will so state.

AGENCY RESPONSE TO RECOMMENDATIONS

Recommendation 1: DPS should seek an attorney general’s opinion to determine if including medical information on the APSIN system can be considered to serve a legitimate criminal justice purpose such as forewarning police officers that a subject may be mentally ill and incapable of responding appropriately to an officer. Such forewarning could protect not only the officer but enable an officer to better deal with a mentally or physically incapacitated citizen.

Agency response: The Department of Public Safety accepts this recommendation with a minor modification. Attached for your information is a copy of a memorandum that I sent to Dean Guaneli, Chief Assistant Attorney General, Department of Law, seeking his guidance and recommendations concerning inclusion of medical information in

APSIN. It is my opinion that the Department of Law will be able to address these questions and provide guidance to the Department short of a formal AG's opinion.

Recommendation 2: DPS should issue its own informational letter to criminal justice agencies participating in APSIN reminding them of their statutory obligations to keep confidential APSIN information except as outlined in statute. Further, DPS should request Anchorage Police to conduct an internal review of the release of the complainant's information.

Agency Response: The Department of Public Safety accepts this recommendation. Based on the guidance and recommendations furnished by the Department of Law, DPS will circulate a letter to all Chiefs of Police in the State of Alaska. We have written to the Chief of the Anchorage Police Department (copy attached) and have also discussed this matter with him and recommend that he consider appropriate follow-up action.

Mr. Otte's letter to Mr. Guaneli asked the following question:

I would like your guidance and recommendation concerning inclusion of medical information in APSIN. Can this information be considered to serve a legitimate criminal justice purpose such as forewarning police officers that a subject may be mentally ill and incapable of responding appropriately to an officer? An additional area of concern is the level of documentation appropriate to support entry of medical condition information and the availability of supporting documentation.

I have enclosed a copy of APSIN "Control Terminal Agency Directive 98-8" on access, use and dissemination of APSIN information. This directive has been issued to every APSIN user agency. If you think this directive should be revised to clarify APSIN confidentiality and dissemination rules, please suggest changes.

Mr. Otte included a copy of his letter to Anchorage Police Chief Duane Udland in which he recounted the facts in this matter and made the following statement:

In response to this incident and citizen's complaint, all "HIV/AIDS" medical information has been removed from the APSIN and the program has been modified to preclude entry of any information into the medical code field of APSIN. We have asked the Department of Law to review this matter and advise us of appropriate follow-up action. We anticipate sending a letter to all police chiefs requesting that they remind employees of the confidentiality of the information contained in APSIN and caution them about any release of this

information.

Because this incident involved an employee(s) of your department, we wanted to provide you with specific information so that you can take appropriate follow-up and/or corrective action.

At the time of this writing, Police Chief Udland had not responded to Commissioner Otte's letter.

FINDING OF RECORD AND CLOSURE

Because of Commissioner Otte's acceptance of and decisive response to these recommendations, this complaint has been closed as *supported* and *rectified*. The Ombudsman has asked DPS to provide this office with copies of any department policy that arises from contact with the Alaska law enforcement community regarding this matter. Additionally, DPS has been asked to provide this office with any written response from the Anchorage Police Department regarding this matter.