

# REGIONAL TRANSIT ISSUE PAPER

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
8	05/11/15	Open	Action	04/28/15

Subject: Waive the First Reading of RT Ordinance 15-06-01 Criminal Background Check

## ISSUE

Whether to repeal and replace Ordinance No. 14-08-01, which sets forth the parameters under which RT may conduct criminal background checks on prospective employees and concessionaires, with an ordinance that modifies the criteria for background checks for prospective employees to permit use of the Summary Criminal History information from the state Department of Justice (DOJ).

## RECOMMENDED ACTION

Motion: Waive the First Reading of an Ordinance Authorizing Background Checks on Certain Prospective Employees and Certain Prospective Concessionaires.

## FISCAL IMPACT

Waiver of the First Reading will have no fiscal impact. Adoption of the Ordinance will not result in increased costs to RT.

## DISCUSSION

On August 11, 2014, the Board approved a revised Background Check Ordinance. Under state law, RT can obtain Summary Criminal History information directly from the state Department of Justice (rather than a third-party background screening firm that must rely on publicly-available records) but only if it adopts an ordinance that complies with California Penal Code Section 11105.

When the revised Background Check Ordinance was adopted in August 2014, Staff informed the Board that a decision had been made to eliminate references to specific criminal offenses from the Ordinance to provide flexibility to the General Manager/CEO to modify, over time, the list of offenses that might be exclusionary and to add new positions to the list. Upon further consideration, Staff determined that the benefits of having access to the state Summary Criminal History Information outweigh the limitations that are imposed by having the limitations enshrined in the Ordinance. Consequently, Staff recommended that the Board amend and repeal the recently-adopted ordinance and adopt a revised ordinance that would have included an Exhibit A detailing the potentially-disqualifying offenses to comply with state law and permit RT to access the Summary Criminal History Information.

The Waiving of the First Reading was initially presented to the Board on April 13, 2015 as a consent item, however, it was pulled for discussion and continued to the April 27, 2015 meeting. At the meeting, Board members raised concerns that the list of offenses in Exhibit A was too narrow and that some of the potentially-disqualifying offenses should be disqualifying for all

Approved:

Presented:

General Manager/CEO

Director, Human Resources

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positions, not merely for public interfacing positions or positions requiring a commercial driver’s license.

Staff provided an issue paper at the April 27, 2015 Board meeting indicating additional time was needed to adequately respond to the Board’s concerns. At this point, staff has completed all research necessary to provide the Board further information regarding the concerns raised at the April 13, 2015 Board meeting.

When drafting the background check ordinance that was presented to and adopted by the Board last July, and in making the revisions presented to the Board at the April 13, 2015 meeting, staff considered a number of legal requirements relevant to both the adoption and implementation of the ordinance. These include:

- Title VII of the Federal Civil Rights Act (42 U.S.C. Section 2000e et seq.)
- The Federal Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.)
- Investigative Consumer Reporting Agencies Act (ICRAA) (California Civil Code Section 1786 et seq.)
- Consumer Credit Reporting Agencies Act (CCRAA) (California Civil Code Section 1785.1 et seq.)
- California Labor Code Section 1024.5 (which limit credit checks for prospective employees)
- California Labor Code 432.9 (“ban the box”)
- California Penal Code Sections 11105(b)(11) and 13300(b)(10)
- FTA recommendations

Of particular relevance to the Board’s concerns raised at the April 13, 2015 meeting, in April 2012, the Equal Employment Opportunity Commission (EEOC) issued a new Enforcement Guidance Document entitled “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” ([http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)). Title VII of the Civil Rights Act prohibits both intentional discrimination (disparate treatment) and facially-neutral policies that have a “disparate impact” on members of a protected classification. In *Griggs v. Duke Power Co.*, decided in 1970, the Supreme Court held that facially-neutrally employment practices that have the effect of disproportionately excluding employees and prospective employees of a particular race, gender, ethnicity or national origin must be job-related and consistent with business necessity.

The EEOC Guidance discusses how the use of arrest and conviction information in employment decisions may result in unlawful disparate treatment and disparate impact under Title VII of the Civil Rights Act. The 2012 EEOC Guidance was a re-issuance and strengthening of a document originally issued in 1987. The Guidance represents a strong statement by the EEOC that employers should tread carefully in excluding employees based on criminal conviction information and is particularly critical of any blanket prohibitions that exclude anyone with a criminal conviction from employment.

Even prior to the issuance of the guidance document, the EEOC was actively pursuing employers

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with policies that the EEOC believed were in violation of Title VII. In January 2012, Pepsi Beverages Company agreed in a post-investigation conciliation to pay \$3.13 million and provide training and job offers to some of those denied employment under the former criminal background check policy to resolve an EEOC charge alleging race discrimination in hiring.

Since the issuance of the guidance, the EEOC has pursued additional litigation against employers it believes have used criminal background checks inappropriately. In addition, the plaintiffs' bar has relied on the new guidance in pursuing individual lawsuits against employers. While some of these suits have been dismissed in favor of employers at the summary judgment stage, those victories have been at considerable expense to the affected employers. The EEOC is still litigating suits against both BMW and Dollar General alleging improper use of background checks.

Exhibit A, attached to the ordinance presented to the Board on April 13, 2015, was the culmination of efforts by staff to determine, for each job classification or group of related jobs, the criminal offenses for which exclusion might meet the Title VII legal standard of "job related and consistent with business necessity." This included review of the EEOC guidance documents and the examples contained therein, and consultation with other public transit agencies and other local public entities. RT's original and much narrower criminal background check ordinance, adopted in 1977, contained similar language linking certain positions to certain criminal offenses.

Exhibit A was originally intended for incorporation into the SOP to be adopted by the General Manager/CEO, with the view that it could easily be amended over time to reflect new criminal offenses and changing legal standards under Title VII.

When Staff determined that continued access to the DOJ Summary Criminal History Information was desired, Legal staff advised that Exhibit A would need to be incorporated into the ordinance to comply with the requirement in Penal Code Section 11105(b)(11) that the ordinance must "expressly refer[ ] to specific criminal conduct applicable to the subject person." However, after the discussions at the April 13, 2015 Board meeting, Legal staff consulted the DOJ guidance and ordinances adopted by other agencies and determined that the degree of specificity contained in the proposed Exhibit A is not required.

Staff is instead proposing that the Board adopt the following language, which will permit greater flexibility when the SOP is adopted and implemented:

*"RT shall not consider any person who has been convicted of a felony or misdemeanor involving moral turpitude eligible for employment; except that such conviction may be disregarded if mitigating circumstances exist or that the conviction is not related to the employment in question."*

This language is consistent with language that has been adopted by multiple public agencies within California, including the County of Sacramento, to obtain access to Summary Criminal History Information.

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The General Manager/CEO will still be charged with adopting a written policy and procedures for background screening that permit an individualized assessment of when prospective employees will be denied employment due to a criminal offense. The revised Ordinance, is included as an Attachment to this Issue Paper.

Before an RT ordinance may be adopted, it must first be introduced. Staff recommends that the Board approve a motion waiving the first reading of an Ordinance Authorizing Background Checks on Certain Prospective Employees and Certain Prospective Concessionaires.

ORDINANCE NO. 15-06-01

Adopted by the Board of Directors of the Sacramento Regional Transit District on this date:

June 8, 2015

**AN ORDINANCE AUTHORIZING BACKGROUND CHECKS ON ~~JOB APPLICANTS~~  
PROSPECTIVE EMPLOYEES AND CRIMINAL BACKGROUND CHECKS ON  
CERTAIN PROSPECTIVE CONCESSIONAIRES**

THE BOARD OF DIRECTORS OF THE SACRAMENTO REGIONAL TRANSIT DISTRICT  
DO ORDAIN AS FOLLOWS:

**SECTION 1:**

This Ordinance is adopted by the Board of Directors of the Sacramento Regional Transit District pursuant to *California Public Utilities Code* Section 102107 and *California Penal Code* Sections 11105, 11105.02, and 13300, to repeal and replace Ordinance 14-08-01 with this Ordinance.

**SECTION 2:**

RT Ordinance No. 14-08-01 is hereby repealed and replaced with the following:

I.

**PREAMBLE**

This ordinance is adopted by the Board of Directors of the Sacramento Regional Transit District pursuant to *California Public Utilities Code* Section 102107 and *California Penal Code* sections 11105, 11105.02, and 13300. Nothing herein contained is to be construed to limit RT's recruiting practices except as specifically set forth herein. Further, nothing contained herein, in any way, restricts RT's right to terminate or otherwise discipline an employee.

II.

**DEFINITIONS**

A. **Summary Criminal History Information:** That record of information maintained by the Attorney General or local criminal justice agency pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, date of arrest, arresting agency, and booking numbers, charges, dispositions and similar data about such person.

B. Records Security Officer: The General Manager/CEO or his/her designee, whose responsibility it is to assure confidentiality, security and proper destruction or disposal of all criminal history information in accordance with all applicable state and federal laws.

C. Concessionaire: That entity or entities, which includes, but is not limited to, owners, partners, affiliates, associates, employees, other independent contractors and those who meet the definition of *California Labor Code* section 432.7(k) (1), and who will be working with, through or for the entity to provide retail or other authorized services to RT employees, guests, invitees, patrons, customers, users or other individuals.

D. RT Customers: Those individuals who are employees, guests, invitees, patrons, customers, users or other individuals who are legally on RT premises, and may include more vulnerable members of the public who use RT premises, services, or use the Concessionaire services at the RT property or properties.

### III.

#### BACKGROUND SCREENING OF JOB APPLICANTS-PROSPECTIVE EMPLOYEES

In recruiting future employees of RT, the General Manager/CEO, or her/his designee, ~~must~~ *may* conduct a background screening of ~~all applicants-prospective employees~~. The nature and extent of the background screening will vary depending on the position for which the ~~applicant~~ *prospective employee* applied.

*RT shall not consider any person who has been convicted of a felony or misdemeanor involving moral turpitude eligible for employment; except that such conviction may be disregarded if mitigating circumstances exist or that the conviction is not related to the employment in question.*

The General Manager/CEO must establish a written policy and procedures for *implementation of the* background screening that include: (1) the nature and extent of the screening for each job category; (2) *which criminal offenses may be* disqualifying, including consideration of the *nature of the position sought and the* time that has elapsed since conviction; and (3) for positions subject to a credit check, what items on a credit report will be disqualifying. The General Manager/CEO must ensure that the adopted policy and procedures and their implementation are consistent with all applicable laws and regulations governing background screening and disqualification from employment. The policy and procedure must ensure that any disqualification is job related for the position in question and consistent with business necessity. The policy and procedures must provide an opportunity for an individualized assessment for people excluded by the screening to determine whether the policy as applied is job related and consistent with business necessity. The individualized assessment should consist of: notice to the individual that he or she has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his or her particular circumstances; and consideration as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.

#### IV.

### REQUIREMENTS FOR A "CERTIFICATE TO OPERATE CONCESSION" FOR PROSPECTIVE CONCESSIONAIRES AND RT BOARD OF DIRECTORS FINDINGS OF FACT

A prospective Concessionaire cannot be considered for a license or any other right to operate a concession on RT property without first receiving a "Certificate to Operate Concession" from RT.

The Board of Directors finds that because Concessionaires may work independently without supervision and will have access to RT Customers, some of whom may be particularly vulnerable, RT must ensure that Concessionaires are of the highest caliber and RT Customers are not placed at risk of harm. For each prospective Concessionaire, the General Manager/CEO, or his or her designee, will determine whether the Concessionaire will have access to vulnerable members of the public in an unsupervised setting. If so, the General Manager/CEO will require a background check for that Concessionaire. The Board of Directors finds that in order to protect RT Customers, the following are considered "crimes of interest" in accordance with *California Penal Code* sections 11105 and 11105.02 and the General Manager/CEO must not issue a "Certificate to Operate Concession" to a prospective Concessionaire that has been convicted of such "crimes of interest."

A. The Concessionaire has Summary Criminal History Information that shows any criminal conviction or arrest for which the person was incarcerated or released on bail, or on his or her own recognizance pending trial, for offenses involving crimes against children, molestation or other such offenses. Because RT is a public conveyance and the Concessionaire will have unfettered access to unaccompanied minors, the elderly or other vulnerable members of the public, RT must enforce this requirement to protect RT Customers.

B. The Concessionaire has Summary Criminal History Information that shows any criminal conviction or arrest for which the person was incarcerated or released on bail, or on his or her own recognizance pending trial, for offenses involving fraud or financial crimes. Because RT is a public conveyance and the Concessionaire will have unfettered access to unaccompanied minors, the elderly or other more vulnerable members of the public, RT must enforce this requirement to protect RT Customers. In addition, because the Concessionaire is not supervised and is in direct contact with RT customers, this requirement is necessary to further protect RT and RT Customers from the risk of financial loss.

C. The Concessionaire has Summary Criminal History Information that shows any criminal conviction or arrest for which the person was incarcerated or released on bail, or on his or her own recognizance pending trial, for a felony drug conviction or charge. Because RT is a public conveyance and the Concessionaire will have access to unaccompanied minors, the elderly or other more vulnerable members of the public, RT must enforce this requirement to protect RT Customers.

D. The Concessionaire has Summary Criminal History Information that shows any

criminal conviction or arrest for which the person was incarcerated or released on bail, or on his or her own recognizance pending trial, for offenses involving moral turpitude. Because RT is a public conveyance and the Concessionaire may have unfettered access to unaccompanied minors, the elderly or other more vulnerable members of the public, RT must enforce this requirement to protect RT Customers. RT is further authorized to reject the application of such a prospective Concessionaire based upon California Labor Code section 432.7(l) (1).

V.

AUTHORIZATION TO ACQUIRE PROSPECTIVE CONCESSIONAIRE'S SUMMARY  
CRIMINAL HISTORY INFORMATION

The General Manager/CEO, or her/his designee, is authorized to acquire the fingerprints and or photographs or any other information requested pursuant to *California Penal Code* Sections 11105 and 11105.02 of a prospective Concessionaire requesting a "Certificate to Operate Concession", and to submit said information and/or prints to the Attorney General or any local criminal justice agency to acquire the applicant's Summary Criminal History Information for use in screening the prospective Concessionaires in accordance with the standards set forth in this Ordinance.

VI.

EMPLOYMENT FORMS

RT must not reject an ~~applicant~~ *prospective employee* for employment for failure to disclose, through any written form or verbally, information concerning arrest or detention that did not result in conviction and RT must not use any record of arrest or detention which did not result in conviction as a factor in determining any condition of employment, including hiring, promotion, termination, or any apprenticeship training program, or any other training program, leading to employment.

As used in this Section, a conviction includes a plea, a verdict, or finding of guilt, regardless of whether sentence is imposed by the Court. Nothing in this Section prevents RT from asking an employee or ~~applicant~~ *prospective employee* for employment about an arrest for which the employee or ~~applicant~~ *prospective employee* is out on bail or on his/her own recognizance pending trial.

VII.

NOTIFICATION OF DENIAL OF APPLICATION FOR A "CERTIFICATE TO OPERATE  
A CONCESSION" TO PROSPECTIVE CONCESSIONAIRE AND REVIEW PROCESS  
FOR SUCH DENIAL

If RT denies a prospective Concessionaire's application for a "Certificate to Operate Concession" based upon the Summary Criminal History Information, the General Manager/CEO or her/his designee, must promptly provide a written statement of the denial, the "Notice of Denial". The Concessionaire may request review, only by written notification to the General Manager/CEO or her/his designee, within 10 days of the date of the Notice



of Denial. The prospective Concessionaire will have 90 days from the date of the prospective Concessionaire's request for review to submit a corrected record or other evidence pertaining to the accuracy or completeness of the Summary Criminal History Information. RT will render its decision within 20 days after receipt of any additional evidence timely submitted by the prospective Concessionaire. RT will notify the prospective Concessionaire in writing and this will be the final decision on the prospective Concessionaire's application for a "Certificate to Operate Concession."

## VIII.

### RECORDS SECURITY OFFICER

The General Manager/CEO, or his/her designee, must designate a Records Security Officer who must handle the background screening information and assure that each personnel file which contains such information is arranged so that any background screening information is sealed in an envelope with a notation thereon indicating those persons who are specifically authorized to open the envelope and gain access to the information.

The Records Security Officer will also handle the Summary Criminal History Information for prospective Concessionaires, and must ensure that all copies of the Summary Criminal History Information are destroyed no later than 30 days after the final decision is made on the Concessionaire's application for a "Certificate to Operate Concession".

The Records Security Officer must assure confidentiality, security and proper destruction or disposal of all background screening material, including criminal history information, in accordance with all applicable state and federal laws.

## IX.

### TRAINING OF RECORDS SECURITY OFFICER

The General Manager/CEO or his /her designee ensures that the Records Security Officer receives training in the issues involving and handling of the above-referenced Criminal History Information from the Criminal Records Security Unit, Department of Justice, State of California.

## X.

### COSTS OF ACQUISITION

The General Manager/CEO is hereby authorized to pay all costs associated with the acquisition of Summary Criminal History Information for Concessionaires. The fees or charges are valid expenditures of RT funds.

XI.

FINDING OF NECESSITY-CONCESSIONAIRES

In accordance with the *California Penal Code* sections 11105.02 and 13300(c)(10), this Board finds that access to Summary Criminal History Information is needed in order to assist RT in screening prospective Concessionaires.

XII.

“CERTIFICATE TO OPERATE CONCESSION” DOES NOT CONSTITUTE A  
GUARANTEE, PROMISE OR EXPECTATION OF A CONCESSION LICENSE,  
AGREEMENT OR RIGHT

The fact that a prospective Concessionaire receives a “Certificate to Operate Concession” does not constitute a guarantee, promise or expectation of a concession license, agreement or right. The “Certificate to Operate Concession” allows the prospective concessionaire to be eligible to apply for a concession license, agreement or right to operate at an RT property or properties.

XIII.

ADMINISTRATIVE PROCEDURES AND IMPLEMENTATION

The General Manager/CEO is authorized to prepare administrative procedures and regulations to carry out the intent of this Ordinance and implement the provisions stated herein. The procedures must secure the confidentiality of background screening and Criminal History Information and otherwise ensure the compliance with all applicable federal, state and local laws.

XIV.

SAVINGS CLAUSE

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decisions shall not affect the validity of the remaining portions of this ordinance. The Board of Directors of Sacramento Regional Transit District hereby declares that it adopts this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases or portions be declared invalid or unconstitutional.

**SECTION 3:** This ordinance shall become effective immediately upon its enactment for the reason that vacancies currently exist in positions of services to the public, caused by attrition, and completion of filling said vacancies is pending the availability of background screening information and Summary Criminal History Information.

**SECTION 4:** This Ordinance must be published in the official newspaper in Sacramento County following its passage.

Passed and adopted at a regular meeting of Sacramento Regional Transit District on this \_\_\_\_ day of \_\_\_\_\_, 2015, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

\_\_\_\_\_  
JAY SCHENIRER, CHAIR

A T T E S T:

MICHAEL R. WILEY, Secretary

By: \_\_\_\_\_  
Cindy Brooks, Assistant Secretary