

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

June 6, 2005 Hearing Room 357

8:30 A.M. Tapes 95 - 97

MEMBERS PRESENT: Rep. Bob Ackerman, Chair

Rep. Linda Flores

Rep. Bill Garrard

MEMBER EXCUSED: Rep. Kelley Wirth

GUEST MEMBERS: Rep. Greg Macpherson

Rep. Andy Olson

STAFF PRESENT: Joe O'Leary, Counsel

Sam Sears, Counsel

Louann Rahmig, Committee Assistant

MEASURES/ISSUES HEARD:

HB 2157A – Public Hearing

HB 2693 – Public Hearing

SB 262A – Public Hearing

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

TAPE/# Speaker Comments

TAPE 95, A

003 Chair Ackerman Calls the meeting to order at 8:43 a.m. Announces the order of hearings and that HR 343 is open as an overflow room. Opens a public hearing on HB 2157A.

HB 2157A – PUBLIC HEARING

014 Sam Sears Counsel. Explains HB 2157A which provides some agencies with authority to request nationwide fingerprint-based background checks from the Federal Bureau of Investigation (FBI); authorizes state licensing boards to request these background checks for those applying for a license or certificate; streamlines the process for background checks performed by the Oregon State Police (OSP); requires all agencies to adopt administrative rules that fully address circumstances when nationwide background checks will be required; and directs the FBI and OSP to destroy fingerprint cards and facsimiles following a background check. Refers to the -3 through -13 amendments (**EXHIBITS A THROUGH K**) most of which include different agencies that want to be included in the provisions of the bill. Points out that the -6 and the -8 amendments are cleanup amendments.

030 Chair Ackerman Announces adjournment will be at 10:30 a.m. due to floor session. Urges brevity in oral testimony.

039 Patricia Whitfield OSP. Testifies and submits written testimony in support of HB 2157A (**EXHIBIT L**). Explains that HB 2157A provides a streamlined process for non-criminal justice background fingerprint checks. Continues that HB 2157A cleans up existing statutes and allows agencies with current statutory authority to gain future access through a “read with” statement.

059 Whitfield Indicates that the FBI has approved the language in HB 2157A. Points out that Sections 3 through 68 bring together most of the agencies that are currently doing background checks and include some agencies asking for authority for the first time.

- 083 Rep. Kevin Cameron House District 19. Testifies in support of HB 2157A. Describes the work group efforts. Believes the public served needs to be protected. Has suggested appointing an interim committee to study this complex issue. Raises concern about how to allow local governments to access the nationwide background checks for non-criminal justice purposes and how to make the process user friendly.
- 130 Rep. Cameron Continues that there are independent fingerprinters operating with little oversight. Has reviewed through the -8 amendments.
- 143 Rep. Larry Galizio House District 35. Provides information from the general government work group. Advises that agencies need to adopt administrative rules to describe how the findings will be used and why they are necessary for public safety. Continues that local governments are not included and that language needs to be consistent so agencies are treated equally.
- 182 Rep. Galizio Refers to the Department of Human Services (DHS) which has extensive experience in this type of process. Advises that language was included to assure TriMet meets homeland security requirements, and to direct the Board of Nursing and DHS to share findings to reduce the expense to the applicant. Indicates he has not reviewed the amendments beyond the -8 amendments. Comments it was a challenge to balance public safety and privacy rights. Agrees with Rep. Cameron on the need for an interim work group.
- 213 Chair Ackerman Comments on continuance of the language in the engrossed bill defining a state agency pursuant to ORS 174.111. Offers that statute includes all agencies of three branches of government. Seems that all those agencies would come under the scope of HB 2157A. Asks if all within ORS 174.111 are to be included, or if they should be removed and allowed to opt in.
- 224 Whitfield Responds that the purpose of Section 2 of HB 2157A is to provide the process. Continues there is not a requirement that the agencies mentioned in the definition perform these checks. Advises that individual agency statutes should address the types of checks they want to do.
- 242 Chair Ackerman Indicates if there is a “structural” problem, counsel can look at it. States that it appears all agencies of the Legislative, Executive, and Judicial Branches appear to be authorized. Continues that if that is not intended, a change needs to be made.

254	Rep. Cameron	Responds that the intent was to set up a process for all agencies as they must have the express stated authority to do the background checks. Advises that Section 2 does not do that but only sets up the process once the authority is granted, and the rest of the sections give implicit authority to come under Section 2. Agrees counsel should review.
276	Chair Ackerman	Plans to have counsel review for a possible technical change.
279	Rep. Garrard	Asks if the -5 amendments were reviewed. Inquires about immunity from civil liability for unlawful dissemination of information obtained.
289	Rep. Cameron	Believes that is specific to one agency.
295	Rep. Galizio	Advises this was the TriMet amendment.
301	Chair Ackerman	Asks how people know a background check is being requested.
309	Whitfield	Responds there is a requirement in the process that the applicant must be notified, and advises there is current statute for non-criminal justice checks that also requires applicant notification prior to a background check.
321	Chair Ackerman	Believes the results should also be made known. Reads from HB 2157A that certain items are not subject to challenge through the contested case process. Appears the government's conclusions are conclusive. Asks for the purpose of this language.
347	Rep. Cameron	Replies that there was testimony from DHS that they have an appeals process, and 50 percent are overturned and 50 percent upheld. Explains that each agency must establish an appeals process.
375	Chair Ackerman	States it appears that the documents upon which the determination was made cannot be challenged in a contested case process. Presents a hypothetical case and an actual "Patriot's Act" case based on a faulty fingerprint match.

TAPE 96, A

011	Whitfield	Responds that there is a means for a challenge in statute.
-----	-----------	--

018	Chair Ackerman	Presents hypothetical example of identical first, middle and last names.
023	Rep. Cameron	Believes that those unique situations need to have a process to insure public safety on the broader scale.
036	Chair Ackerman	States if appears that if a subject individual is determined to have a criminal record that would impair employment, the agency can terminate. Seems like the agency should have progressive discipline.
056	Rep. Galizio	Answers that there must be justification that a particular criminal record is relevant. Continues that it is in an agency's interest to protect public safety, but if there is something in a person's background that does not justify termination, judgment must be used.
078	Rep. Cameron	Discusses the fitness determination section of HB 2157A that each agency will establish.
093	Chair Ackerman	Understands the intent but doesn't see the language that incorporates good faith judgment where the agency has the discretion to consider a lesser sanction than termination or revocation. Appears that a background check can be requested for anyone and asks if that was intended or if a narrower approach was intended.
109	Rep. Galizio	Replies that it is difficult in statute to be specific for each agency but doesn't want to be too broad.
125	Chair Ackerman	Comments that it appears an agency can arbitrarily request a background check. Asks if there are parameters.
127	Rep. Cameron	Reiterates that an agency has to set up a process identifying the positions and adopt rules before they can seek authorization to do background checks through OSP or the FBI.
150	Rep. Garrard	Points to the language in HB 2157A stating that those conducting checks are being held harmless from any accountability.
155	Rep. Cameron	Restates that is in the TriMet amendment.
158	Rep. Garrard	Answers it appears to apply to everyone.

162	Rep. Cameron	Clarifies that is for the Metro Transportation District. Assumes they have to follow certain procedures, and if they don't, liabilities are "off the table."
171	Rep. Garrard	Asks about accountability for those who follow the rules and conduct the checks that they don't abuse and misuse that power.
175	Rep. Cameron	Responds if someone abuses power and position, they need to be dealt with in a timely and correct manner.
187	Rep. Garrard	Inquires how the system works to catch an abuser of the system.
191	Rep. Cameron	Replies that they are allowed to challenge denials.
198	Rep. Galizio	Understands that Rep. Garrard is asking who is watching the watchers. Concur there needs to be accountability at all levels.
212	Whitfield	Points to the part of HB 2157A that addresses the issue whether an applicant knows a background check is being conducted.
222	Rep. Cameron	Offers that the -6 and -8 amendments are from the general government committee and encourages adoption.
245	Lisa Zavala	Oregon University System. Testifies in support of HB 2157A. Informs that the university system will be covered in the -7 amendments.
260	Margie Lowe	Oregon Student Assistance Commission. Testifies in support of HB 2157A. Advises that no background checks were required of their employees even though many handle sensitive student records and donor funds held in trust for scholarships.
290	Lowe	Continues that the Department of Administrative Services advised the agency they needed statutory authority. Concludes that the -4 amendments add their agency into HB 2157A.
301	Olivia Clark	Executive Director of Government Affairs, TriMet. Testifies in support of HB 2157A and advises they are included in A-engrossed version which builds on their current authority. Advises that the -5 amendments give expanded background check authority only for prospective employees and prospective contractors.

- 324 Helen Koliner TriMet Attorney. Believes the proposed language on immunity applicable to TriMet is narrower than what is being understood. Explains that existing statute authority grants immunity only from any sort of lawful disclosure related to the processing of criminal records checks.
- 368 Koliner Describes the three narrow circumstances they identified where disclosures would be necessary and the disclosures would be lawful. Refers to providing notice to individual or employer. Continues that federal regulations require them to provide certain information. Concludes that there may be circumstances of employment denial due to a prior conviction linked to a security concern.
- 411 Rep. Garrard Asks for an example of a TriMet project for which a record check would be necessary.
- 414 Koliner Replies with an example of an engineer with intimate information where a system is vulnerable.

TAPE 95, B

- 009 Rep. Macpherson Seems that immunity would not be peculiar to TriMet and believes there should be uniformity in the way the issue is approached.
- 015 Koliner Answers that the specific language proposed was because there is a separate statute for TriMet and it is possible those same issues could arise in other contexts.
- 026 Andrea Meyer American Civil Liberties Union (ACLU). Advises ACLU would support HB 2157A if changes were made. Raises a concern about background checks on individuals not suspected of criminal activity. Provides legislative history of issue. Reads a list of objections from a prepared statement.
- 084 Meyer Focuses on major concerns. Urges that each authorized entity set forth clear and limiting scope of need.
- 123 Meyer Is concerned about scope as some agencies want broad authority in statute. Wants limiting scope in statute rather than left to administrative rule making. Lists the agencies wanting to be included in HB 2157A.

- 177 Meyer Concludes that there may be good reasons to do a check on some people but should limit to positions that have access to vulnerable clients or to give rise to theft, fraud or embezzlement.
- 211 Chair Ackerman Reminds witnesses of the time and encourages brevity.
- 219 Martin Pittioni Board of Psychologist Examiners. Testifies in support of HB 2157A. Seeks authority to verify information the Board is already receiving as part of the application process. Advises that the -8 amendments include their agency.
- 262 Bob Keith Administrator, Appraiser Certification and Licensure Board. Testifies and submits written testimony in support of HB 2157A **(EXHIBIT M)**. Indicates that the -9 amendments include the Board.
- 291 Karen Turnbow Office Manager, Appraiser Certification and Licensure Board. Testifies in support of HB 2157A. Refers to ORS 674.170 that allows the Board to conduct background checks but doesn't include language on fingerprinting. Informs HB 2157A corrects that deficiency.
- 316 Turnbow Cites examples of Oregon licensees who failed to disclose out-of-state felony convictions.
- 353 Vickie Chamberlain Teacher Standards and Practices Commission. Testifies in support of the -6 amendments which was in the original bill but was inadvertently omitted.
- 363 Georgena Carrow DHS. Advises that the Department has been doing criminal background checks since 1997 under ORS 181.537 which gives authority to do national and state checks. Indicates willingness to respond to some of the questions raised during the hearing.

TAPE 96, B

- 004 Rep. Macpherson Asks how often there are misidentified people or people being unfairly tagged with a criminal record that is not theirs.
- 007 Carrow Explains they receive both a state and national criminal history through fingerprints. Advises that maybe one out of 100 records needs additional review to assure all the identifiers match. Continues that if any question of identify, fingerprints are submitted to the FBI.

026 Kevin Neely Department of Justice. Raises a concern that some agencies that already have authority are being pulled into this process. Advises there will be further amendments to assure their status quo.

The following prepared testimony is submitted for the record without public testimony:

Joan Coronas-Havord Human Resources Manager, Oregon Public Utility Commission.
Submits written testimony in support of HB 2157A (**EXHIBIT N**).

035 Chair Ackerman Closes the public hearing on HB 2157A. Lists the outstanding issues needing to be addressed before referring to the full committee.

057 Rep. Flores Concurs that the issues need to be addressed before proceeding.

071 Rep. Macpherson Comments HB 2157A is difficult to deal with. Is open to working with this product but a lot of work is still needed.

082 Chair Ackerman Asks Rep. Macpherson if he believes all executive agencies should be included and then allowed to opt out.

087 Rep. Macpherson Answers yes as agencies are being granted authority to perform background checks, not being required, and they can decide whether they want to exercise that authority.

100 Chair Ackerman Suggests participants for a work group to resolve the issues before coming back to this committee. Requests counsel be informed of the work group participants.

114 Chair Ackerman Opens a public hearing on HB 2693.

HB 2693 – PUBLIC HEARING

116 Sam Sears Counsel. Explains HB 2693 and the -1 amendments (**EXHIBIT O**) provide that having evidence of marijuana in ones system qualifies as medical use of marijuana; provides that employers are not required to accommodate the use of medical marijuana, regardless if it happens at the workplace; provides that nothing in the Oregon Medical Marijuana Act (OMMA) will preclude an employer from establishing or enforcing a policy to achieve or maintain a drug-free workplace. Continues that HB 2693 responds to a recent court appeals decision *Washburn v. Columbia Forest Products, Inc.* Reports on the Supreme Court decision on *Wright v. Ashcroft*.

157	Lisa Trussell	Associated Oregon Industries. Testifies and submits written testimony by Jerry Gjesvold, Serenity Lane, in support of HB 2693 and the -1 amendments (EXHIBIT P). Comments on employers' responsibility to provide a safe workplace under a variety of state and federal laws. Advises there is no requirement under the OMMA for an applicant to be evaluated for abuse or dependency issues prior to obtaining a card.
189	Paula Barran	Attorney, Portland, Oregon. Provides background and history on drug and alcohol testing programs. Advises of the disparity between federal and state law since the Oregon-adopted initiative on medical marijuana. Continues that under federal law, marijuana is a wholly illegal substance and there are no medical exceptions.
234	Barran	Discusses the <i>Wright v. Ashcroft</i> Supreme Court decision which upheld the supremacy of the federal Controlled Substances Act and concluded the states do not have the authority to supersede federal law.
265	Chair Ackerman	Believes the Supreme Court decision is now an overriding legal issue.
296	Henry Snow	Vice-President of Human Resources, Roseburg Forest Products. Testifies in support of HB 2693. Discusses the safety issues and litigation in process.
322	Ken Roelots	TOC Management Services. Testifies in support of HB 2693. Advises of the ease in getting medical marijuana cards. Provides information on a specific case where an individual was able to obtain a card without a doctor's recommendation.
359	Joe Miller	Safety and Loss Control Manager, Associated General Contractors (AGC). Testifies in support of HB 2693. Reads from a prepared statement. Believes amendments are necessary for their members to maintain current drug and alcohol programs.
379	Jessica Adamson	AGC. Testifies in support of HB 2693.

The following prepared testimony is submitted for the record without public testimony:

Madeline Martinez	Resident, Salem, Oregon. Submits written testimony in opposition to HB 2693 (EXHIBIT Q).
-------------------	---

- Richard Bayer MD, FACP, Portland, Oregon. Submits written testimony in opposition to HB 2693 (**EXHIBIT R**).
- 396 Chair Ackerman Closes the public hearing on HB 2693. Asks counsel to analyze the Supreme Court decision and how it impacts HB 2693.
- 433 Chair Ackerman Opens the public hearing on SB 262A.

TAPE 97, A

SB 262A – PUBLIC HEARING

- 005 Joe O’Leary Counsel. Explains SB 262A which extends the sunset for exemption to public records statute for records identifying persons engaged in research on animals at Oregon Health and Sciences University (OHSU). Explains the exemption from public records includes name, home address or location of a person engaged in or providing goods or services for medical research at OHSU that is conducting experiments using animals other than rodents.
- 023 Lesley Hallick Provost, OHSU. Testifies and submits written testimony in support of SB 262A (**EXHIBIT S**). Advises of the animal rights movement activities. Provides examples of Web sites that indicate the level of rhetoric advocated.
- 069 Chair Ackerman Closes the public hearing on SB 262A and adjourns the meeting at 10:38 a.m.

EXHIBIT SUMMARY

- A. **HB 2157, A3 amendments, staff, 1 p**
- B. **HB 2157, A4 amendments, staff, 1 p**
- C. **HB 2157, A5 amendments, staff, 1 p**
- D. **HB 2157, A6 amendments, staff, 1 p**
- E. **HB 2157, A7 amendments, staff, 1 p**
- F. **HB 2157, A8 amendments, staff, 1 p**
- G. **HB 2157, A9 amendments, staff, 3 pp**
- H. **HB 2157, A10 amendments, staff, 4 pp**
- I. **HB 2157, A11 amendments, staff, 1 p**

- J. **HB 2157, A12 amendments, Andrea Meyer, 2 pp**
- K. **HB 2157, A13 amendments, staff, 1 p**
- L. **HB 2157A, written testimony, Patricia Whitfield, 2 pp**
- M. **HB 2157A, written testimony, Bob Keith, 2 pp**
- N. **HB 2157A, written testimony, Joan Coronas-Havord, 2 pp**
- O. **HB 2693, -1 amendments, staff, 3 pp**
- P. **HB 2693, written testimony by Jerry Gjesvold, Paula Barran, 3 pp**
- Q. **HB 2693, written testimony, Madeline Martinez, 1 p**
- R. **HB 2693, written testimony, Richard Bayer, 8 pp**
- S. **SB 262, written testimony, Lesley Hallick, 20 pp**