



128 DORRANCE STREET, SUITE 220  
PROVIDENCE, RI 02903  
401.831.7171 (t)  
401.831.7175 (f)  
www.riaclu.org

## **Mitigating the Harm of the NICS Database November 4, 2013**

### **The NICS Index**

Rhode Island's newly-formed Behavioral Health and Firearms Safety Task Force has been tasked with proposing "legislation and recommendations to support the state's full participation in the NICS [National Instant Criminal Background Check System] Index." Maintained by the FBI, the NICS Index contains information on people legally prohibited from possessing a firearm, including those with mental illness or non-criminal drug abuse records.

State and local agencies can submit records to the NICS Index, and are responsible for making any necessary alterations to these records. However, to say that Rhode Island is or is not "compliant" with the NICS Index, as some have stated, is misleading. State participation in the NICS Index is voluntary, and several other states have recognized the pitfalls, from both policy and legal standpoints, of such participation. As of November 2011, Rhode Island was one of 17 states and five U.S. territories that had made fewer than 10 mental health records available to the NICS Index, and one of 44 states that had submitted fewer than ten substance abuse records.

Leaving aside legal concerns, which are described below, there are good reasons for this mixed participation across the country. The NICS Index lacks a nuanced understanding of mental illness or drug addiction, perpetuating the stigma that all with mental illness or drug abuse histories are threats to public safety. Without clear limits on what may be included in the database and by whom, use of the NICS Index may result in the disclosure of confidential health information of individuals posing no risk to the community. Just as importantly, it could serve as a disincentive to many to seek mental health or drug abuse treatment out of concern that they may be denied certain rights or benefits solely because of their mental health status. Any decision by Rhode Island to begin participating in this aspect of the Index should take these concerns into account and be as carefully limited as possible to avoid these consequences.

### **The Federal Standards**

Federal law denies gun ownership to, among others, any individual adjudicated as "a mental defective," defined as

"a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

- (1) is a danger to himself or others; or
- (2) lacks the mental capacity to contract or manage his own affairs.

These terms shall include:

- (1) a finding of insanity by a court in a criminal case; and

- (2) those persons found incompetent to stand trial or found not guilty by reason of lack of responsibility.”

There is confusion even within the federal government itself as to what being a “mental defective” entails, as the term is obsolete and the definition is less than clear. For instance, the Social Security Agency and the Department of Veterans Affairs differ as to whether “adjudication as a mental defective” includes individuals under a financial conservatorship – i.e., people who have been deemed unable to manage their finances – who are otherwise considered capable of managing their other affairs.

Further, individuals are disqualified if they have ever been involuntarily committed to a mental institution by a lawful authority, but individuals hospitalized for observation only or under a voluntary admission are specifically exempt. The NICS Improvement Amendments Act of 2007 further states that no federal department or agency may provide a record to the database if the record has been expunged or “the person has otherwise been fully released or discharged from all mandatory treatment, supervision, or monitoring;” “the person has been found by the court or board to no longer suffer from the condition that was the basis of the adjudication or commitment ... or has otherwise been found to be rehabilitated through any procedure available under law;” or the adjudication or commitment is “based solely on a medical finding of disability,” without opportunity to be heard by a court or board.

These are laudable attempts to limit the circumstances under which people’s names will remain in the Index, but they all require affirmative steps by those entities submitting names to update the information on a regular basis. However, if the NICS Index follows the pattern of similar state and federal databases, it is unlikely this information is updated in any reliable manner. For example, there are estimates that about half of the FBI’s arrest records – similarly submitted by the states and maintained by the federal government – fail to include final information about the disposition of the case. It is all too easy for states to submit names to databases like these and ignore the need to revise the information when necessary. Nor does there appear to be any requirement that this information be purged.

There is little conversation surrounding the inclusion of drug history information, which has only been minimally provided, if at all, by states. The lack of participation is not surprising. This type of non-criminal information generally originates with medical professionals, most of who recognize disclosure of this information to be a conflict with HIPAA and other medical privacy laws.

In 2012, the NICS Index was expanded to allow for the reporting of individuals prohibited from possessing a firearm under state law. In Rhode Island, this includes any person “who is under guardianship or treatment or confinement by virtue of being a mental incompetent, or who has been adjudicated or is under treatment or confinement as a drug addict, or who has been adjudicated or is under treatment or confinement as a habitual drunkard.” Those not deemed “criminally insane” may appeal for reinstatement of their gun rights after five years. (R.I.G.L. 11-47-6.) This statute, which has not been revised in almost 40 years, contains no definitions of its terms. Since “treatment” is undefined, it is unclear if this includes those voluntarily under a doctor or psychologist’s care, although the coupling with “confinement” suggests that the law intends to deny gun ownership to those who are under involuntary, inpatient treatment.

In short, the amorphous standards established by the NICS Index, along with its utter failure to connect the criteria for inclusion in the database with any showing of dangerousness and its lack of mechanisms to ensure information remains up to date, all point to the need for caution before the state commits to participation.

### **Conflicts with Privacy Laws**

Several states currently not participating in the NICS Index cite state privacy laws and HIPAA as barriers to participation in the NICS Index. This includes Massachusetts, which has submitted only one mental health record to the NICS Index since 1999 and has not altered state privacy laws to date. Nine of ten states that saw a recent increase in records submitted to NICS instituted laws requiring or permitting sharing mental health records with NICS.

The legality of such widespread sharing of records with the Index remains unclear. In fact, in recognition of this uncertainty, the U.S. Department of Health and Human Services recently requested comments on addressing these concerns and issues. 78 FR 23872 (April 23, 2013).

The HIPAA Privacy Rule addresses only health records maintained by covered entities, namely medical agencies. The Privacy Rule makes clear allowances for the disclosure of private health records, including to the individual who is the subject of the information, or to HHS officials investigating a potential violation of this rule. The NICS Index meets none of these criteria. Therefore, disclosure of mental health information by medical professionals or facilities to the NICS Index likely violates the HIPAA Privacy Rule, and is almost certainly contrary to state law. See, e.g., R.I.G.L. 40.1-5-26.

Having said that, there is no need for the state to infringe on the privacy of an individual's health records in order to participate in the NICS Index, if it chooses to do so. Court records relating to "mental defectiveness" are not protected under HIPAA. As such, courts are already legally able to transmit this information to the NICS database. Both civil commitment and "adjudication as a mental defective" are legal proceedings, and any individual whose mental illness bars them from possessing a gun would have such court records. Requiring courts to submit – and update – identifying, non-medical information to the NICS Index on a regular basis would allow the State of Rhode Island to participate in the NICS Index without running afoul of the Privacy Rule and other legitimate medical privacy concerns. However, it would be essential to have clear standards in place as to exactly what court proceedings and findings of mental illness qualified to place an individual in the Index.

There is some question nationwide as to whether "involuntary commitment" includes emergency certification, such as a 72-hour psychiatric hold. In these instances, Rhode Island law allows medical professionals to detain a patient against their will for observation. However, a hold cannot extend beyond 72 hours without judicial oversight. Because federal regulation is clear that individuals detained only for "observation" are not denied gun ownership and because judicial oversight must occur before a person can be extensively detained, any rules governing state participation in the Index should clearly delimit the circumstances under which court proceedings qualify for release of records to the database.

Regarding substance abusers, federal regulations define an unlawful user of, or person addicted to, a controlled substance as any “person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician.” As Joe Lindbeck of the Attorney General’s office testified before the Commission on October 17<sup>th</sup>, the Attorney General reports drug-related *criminal* information to the NICS Index.

Involuntary hospitalizations for drug abuse are memorialized in court documents in the same manner as mental health commitments. These two efforts are capable of capturing individuals who meet the federal government’s standard of drug addiction or unlawful use, but attempting to include any other individuals is fraught with peril.

Some states have weighed more intrusive monitoring of all residents in order to capture any other drug use that may not reach the level of criminality or hospitalization. To do so forces states to consider a virtual decimation of privacy rights. For instance, federal regulation suggests – but does not require – reporting of a single positive urine test as evidence of drug addiction. Permitting doctors or other individuals to police their patients’ medical records or behavior for subjective evidence of drug addiction is a clear violation of HIPAA laws, and a disincentive for any drug-addicted person to seek treatment. Additionally, conflicts between state and federal laws regarding certain substances, such as marijuana, raise concerns as to who exactly is deemed an illicit drug user. These are among the reasons that, as of 2011, only 6 states had uploaded more than ten drug records to the NICS Index. Thirty-three states had uploaded no information whatsoever, and we believe there are compelling reasons for Rhode Island to maintain that status quo.

A 2011 Mayors Against Illegal Guns report indicates that the few states that do upload non-criminal substance abuse information to NICS are unclear as to just how they obtain this information, and that they lack the infrastructure to engage in more formal submissions.

### **Recommendations for Mitigating the Harm of the NICS Index**

To date, the GAO is aware of no “best practices” relating to the NICS Index.

As described above, we believe that if Rhode Island were to begin participation in the Index, any dissemination of information should be limited to official court records of mental health findings in clearly defined circumstances, and there must be a concomitant obligation on the state reporter to the database to update information when the person’s status no longer disqualifies them from gun ownership (e.g., when the person has been released from mandatory treatment or supervision.) The “board of relief” required by federal law, allowing a mechanism for the individuals themselves to seek removal from the database, simply is not a sufficient substitute for the state’s own obligation to keep information up to date.

Examining other state efforts, there are a few additional ways to mitigate the harmful effects of the NICS Index if Rhode Island voluntarily chooses to participate in it:

- Alabama law limits disclosure to records of individuals indicating “a history of inappropriate use of firearms or pos[ing] a threat to use firearms inappropriately.”

- Georgia law requires the forwarding of all court records regarding involuntary hospitalization, but also requires this information to be purged after five years.
- California and Kansas do not permit transmission of involuntary confinement records when the patient was held for fewer than 72 hours or 3 months, respectively.

Any state law discussing the use of mental health records for firearm purchaser background checks must include clear and specific definitions. The definitions contained within the Brady Act and other federal firearms background check laws are not sufficiently narrow as to capture only those required to be in the NICS Index, and therefore Rhode Island must do a better job of clarifying terms.

The National Alliance on Mental Illness recommends eliminating the term “adjudicated as mentally defective,” as the term “has been obsolete for close to 40 years.” Further, Rhode Island law must narrowly define commitment to a mental institution to ensure any person temporarily hospitalized who is not a danger to themselves or others will not be contained in the NICS Index. Third, Rhode Island must set limiting language on the circumstances when a conservatorship constitutes sufficient grounds to submit a person’s name to the Index.

We conclude as we began, by emphasizing that mental illness is not a predictor of violence; that turning over confidential medical information in this context may unnecessarily advance some of the inappropriate stigma surrounding mental illness and drug abuse; and, perhaps most importantly, that breaching confidentiality for purposes of populating the federal database may be counter-productive by actually discouraging individuals with mental illness or substance abuse problems from seeking help. We urge the Commission to keep these concerns in mind if it decides that Rhode Island should voluntarily add records of mental illness to the NICS Index.