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COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, SS. **SUPERIOR COURT**
CIVIL ACTION
NO. 04-1751-F

EDWARD BLAND, JENNIFER SZALL, and JOHN CASEY, individually and on behalf of all other similarly situated persons,

Plaintiffs,

v.

EDWARD A. FLYNN, Secretary of the Executive Office of Public Safety, CRIMINAL HISTORY SYSTEMS BOARD, and BARRY J. LACROIX, Executive Director/ General Counsel of the Criminal History Systems Board,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs in this action are wrongfully associated with criminal records belonging to persons who have misused their identities. Since 1993, defendant Criminal History Systems Board (CHSB) has had a policy and practice of disseminating as an individual's record the criminal history of any person who has misused the individual's identifying information. Plaintiffs have been denied employment or housing because of this wrongful CHSB policy and practice.

Plaintiffs challenge this wrongful policy and practice on the grounds that it (1) vitiates the CHSB's obligations at G.L. c. 6, § § 171, 175, to assure the accuracy of criminal records; (2) violates the CHSB's regulations at 803 CMR § 7.01(2) to ensure a high degree of certainty that a criminal record is correctly identified with the individual to whom it pertains; (3) substantially interferes with the Plaintiffs' rights of privacy in violation of G.L. c. 214, §1B; and (4) deprives them of their rights to due process of law in derogation of the Massachusetts Declaration of Rights, Part, 1, Articles 1, 10, and 12, and the Fourteenth Amendment to the United States Constitution.

Plaintiffs move for partial summary judgment seeking a declaration that the CHSB's policy and practice violate their rights and an injunction[1] prohibiting the Defendants from continuing to disseminate as their records the criminal histories of persons who have misused their identities and requiring that the Defendants establish a procedure for the Plaintiffs to follow to disassociate them from the records of those persons. Summary judgment is appropriate because there are no genuine issues as to any material fact and the Plaintiffs are entitled to judgment as a matter of law. Mass. R.Civ. P. 56(c); Doe v. Liberty Mutual Insurance Co., 423 Mass. 333, 368 (1996).

II. FACTS

A. Plaintiffs

[1] Plaintiffs in this motion seek summary judgment only as to the named Plaintiffs, not the class, because the Plaintiffs motion for class certification is currently pending. In addition, the Plaintiffs assume that "public officials will act in accordance with their judicially defined duties, even when the individuals involved are other than the plaintiffs in the original action." Doe v. Registrar of Motor Vehicles, 26 Mass.App.Ct. 415, 425 n. 18 (1988).

Edward Bland

Edward Bland, a 26 year-old Springfield resident, plans to enroll at Mount Holyoke Community College paralegal training program. After four years of sporadic and intermittent employment because the CHSB disseminates as his record the criminal history of a Donald Fowler, who unlawfully used Edward's identity, Edward recently secured a fulltime job. Affidavit of Edward Bland, (Bland Aff.) ¶¶ . Since age 17, Edward has been linked to Fowler's criminal history. In May 1996, Fowler claimed to be Edward Bland when police stopped him. Also, at about the same time, Fowler had an outstanding warrant for his arrest. Mistaken for Fowler, Edward was picked up on the warrant and jailed. At a court appearance scheduled soon thereafter, Edward was released when it was determined that his mug shot and fingerprints did not match Fowler's. Bland Aff., ¶¶. Notwithstanding that he had been cleared of any wrongdoing, Edward's name and date-of-birth are listed under the alias field on Fowler's Criminal Offender Record Information (CORI). Bland Aff. ¶ .

Edward has lost numerous jobs, a foster-care license, and housing opportunities because the CHSB has consistently disseminated Fowler's CORI report as his record. On 9/18/2002, 10/31/2002, 6/4/2003, 6/9/2003, and 5/10/2004, the CHSB processed and sent Fowler's criminal record to the United States Postal Service in response to CORI checks on Edward. Defendants' Answers to Plaintiffs' First Set of Interrogatories, (Answer No. 9), attached herein as Plaintiffs' Exhibit A. In 2002, the USPS, suspended Edward, without pay, from his position as a mail clerk, but re-hired him two years later after it received satisfactory verification of his wrongful association with Fowler's CORI report. Similarly, Edward's application for a housing voucher was initially rejected, but later

reversed on appeal, because the Springfield Housing Authority received Fowler's criminal record as Edward's CORI report. Bland Aff. ¶. The CHSB disseminated Fowler's criminal record to the Housing Authority on 6/12/2003. Plaintiffs' Exhibit A (Answer No. 9). Although Edward has his own record consisting of a case that was *nolle prossed* because he had been misidentified, and three dismissed charges, the Housing Authority is prohibited by G.L. c. 6, § 168, ¶ 3, from accessing the record because there are no convictions or pending charges on Edward's own record. Bland Aff. ¶ . Like housing authorities, most employers, unless specifically authorized by statute, are denied access to dismissed charges. Employers that have received Fowler's criminal history as Edward's CORI report have, oftentimes, turned him down.

Edward has taken many steps to stop the dissemination of Fowler's CORI report as his record. In October 2002, Chief Probation Officer Michael S. Ghazil of the Hampden Superior Court filed, on Edward's behalf, a motion, which was denied, to disassociate his identifiers from Fowler's CORI. Bland Aff. ¶. Thereafter, Edward sought help from the District Attorney's Office. In a letter dated November 18, 2002, Assistant District Attorney Patrick S. Sabbs concluded that the "Commonwealth has determined through fingerprint examination that Edward Bland is not [Fowler] and that [Fowler had] used Mr. Bland's name and date of birth when arrested." Bland Aff. ¶ . The CHSB conceded that by letters dated August 13, 2003, January 5, 2004, and June 3, 2004, Edward apprised it of its wrongful dissemination of Fowler's CORI report as his record, sought administrative review, and requested that it cease its unlawful practice. Defendants' Responses to Plaintiffs' First Set of Requests for Production of Documents (Response No. 1), attached herein as Plaintiffs' Exhibit B; Bland Aff. ¶ .

The CHSB has failed, under its purported administrative review process, to find a prima facie basis for a complaint, schedule a hearing, or stop its unlawful practice. Bland Aff. ¶. In fact, as recent as September 2004, the CHSB disseminated Fowler's criminal record to an employer seeking to hire Edward. Plaintiffs' Exhibit A (Answer No. 9). The CHSB's practice of disseminating Fowler's criminal history as Edward's CORI report will continue to undermine Edward's job prospects.

Jennifer Szall

Jennifer Szall, a 26 year-old Lowell resident, is a certified healthcare technician. Her efforts to secure work in the medical field have been hindered by the CHSB's dissemination of a Sarah Williams's CORI report as her record. Jennifer Szall Affidavit (Szall Aff.) ¶ . Jennifer's name and date-of-birth became associated with Williams's CORI on or about August 29, 2000. At that time, when Williams was arrested by Worcester Police Officer David O'Rourke, she falsely gave Jennifer's identifiers. By fingerprints identification, however, Williams's falsehood was uncovered. Williams was later charged with violating G.L. c. 268,§ 34A, which prohibits furnishing a false name to law enforcement official. Szall Aff. ¶ .

In spite of law enforcement determination that Jennifer's identifiers were unlawfully used, the CHSB has disseminated Williams's CORI report as Jennifer's record to several employers. The Lawrence General Hospital, for example, received Williams's CORI report and declined to hire Jennifer. The CHSB also processed and sent Williams's CORI report to Jennifer's former employer, Winchester Hospital. Plaintiffs' Exhibit A (Answer No. 10); Szall Aff. ¶. Upon receipt of the CORI report,

Winchester Hospital placed Jennifer on administrative leave and ultimately terminated her employment.

In December 2003, Jennifer began taking steps to stop the wrongful dissemination of Williams's CORI report as her record. She filed, at the Lowell Police Department, an incident report stating that her identity had been misused. Officer Heather Koller, who took the report, advised Jennifer to have her fingerprints and photo taken by the Lowell Police Department Identification Bureau, and to bring them to the Worcester District Court, where Williams had been previously arraigned for wrongfully using Jennifer's identifiers. By a report dated February 2, 2004, a probation officer in the Worcester District Court verified that Jennifer was "not the same person [as Williams]" and directed that Jennifer's "name, [be] delete[d] from [Williams's record], PCF#2039644." Szall Aff. ¶ ¶

While it appeared that the CHSB did obey the directive having disseminated only Jennifer's record in response to a CORI check in April 2004, it has, however, reverted to its usual practice. Plaintiffs' Exhibit A (Answer No. 10). In December 2004, eight months after Jennifer successfully obtained the court directive, the CHSB processed and disseminated Williams's CORI report to National Data Verification Services in response to a CORI check on Jennifer. Id. Jennifer's written and oral complaints to the CHSB to cease its wrongful practice have not been heeded. The CHSB's continued dissemination of Williams's criminal records as Jennifer's would impede her chances of obtaining gainful employment. Szall Aff. ¶.

John Casey

John Casey's brother, David, misused John's name and date-of-birth in May 1989 when he was arrested. Since then, John has been listed as an alias on David's CORI. For many years, John was unaware that he was listed on his brother's CORI. In June 2003, when John's request to renew his Massachusetts driver's license was rejected, he learned that he was being held responsible for offenses committed by his brother in the State of Arizona. Affidavit of John Casey, (John Aff.) ¶ ¶. Thereafter, John had his fingerprints taken and sent to the Arizona Department of Public Safety (ADPS). By a letter dated April 16, 2004, the ADPS determined based on "fingerprints comparison search of [its] system that [John had] no criminal record in the State of Arizona [and] that [John is] n*ot the same person as any other person who may be using* [his] name and date-of-birth." (Emphasis in original). John Aff. ¶. On May 3, 2004, the Massachusetts Registry of Motor Vehicles reinstated John's driver's license.

John's proof has not, however, deterred the CHSB from continuing to disseminate his brother's CORI report as his record. In spite of complaints to the CHSB, on 5/11/04, 5/17/04, and 6/02/04, the CHSB disseminated David's CORI report to Work Inc., and to the Office of Child Care Services, both employers that sought to hire John. Plaintiffs' Exhibit A (Answer No. 11); John Aff. ¶. The Office of Child Care Services, like other employers that John had encountered, rejected him. However, Work Inc. eventually hired him in June 2004, after it received a copy of the court complaint filed in this case. John Aff. ¶.

In addition to having his fingerprints compared to his brother's, at the CHSB's request, following a written request for an administrative review, John filed, at the

Cambridge District Court, a motion to purge his identifiers from David's CORI. A judge allowed John's motion. John Aff. ¶ . By letter dated July 27, 2004, John provided the CHSB with a copy of the court order and requested that it confirm that it would cease disseminating David's CORI report as his record. Almost ten months later, the CHSB has failed to respond. John Aff. ¶. John, a former student with a learning disability, wants to help children with special needs. The CHSB's practice of disseminating his brother's criminal record as his CORI report would undermine John's ability to obtain a job caring for disabled children.

B. The CHSB's policy and practice of disseminating as an individual's CORI the criminal history of any person who has misused the individual's identity

Pursuant to G.L. c. 6, § 168, the CHSB is charged with the "collection, storage, access, content, dissemination, and use of criminal offender record information." The CHSB maintains over 2.8 million records, provides access to, and disseminates criminal histories to employers, housing providers and other entities that have been certified or statutorily granted access to CORI. In responding to a CORI check, the CHSB disseminates any criminal history for which there is a "name and date of birth" match in its data system. Plaintiffs' Exhibit A (Answer No. 2.)

An individual whose name and date-of-birth has been used by another person is listed as an alias on the impostor's CORI. For such an individual (hereinafter "alias subject"), in response to a CORI check on him or her, the CHSB's policy and practice, since October 1993, is to retrieve and disseminate as the alias subject's CORI report the criminal history of the impostor on whose record the alias subject is listed. Prior to disseminating such a record, however, nothing in the CHSB's policy and practice

requires that it notify the alias subject that he or she could be wrongfully associated with an impostor's criminal history. The CHSB's data system has, at least, 212,708 alias subjects. Plaintiffs' Exhibit A (Answers Nos. 2, 4); Defendants' Answers to Plaintiffs' Requests for Admissions (Answer No. 4), attached herein as Plaintiffs' Exhibit C.

Although the CHSB's statutes and regulations appearing at G.L. c. 6, § § 171, 175, and 803 CMR § § 6.07, 7.01(2), require it to ensure that CORI is correctly identified with the individual to whom it pertains, assure CORI accuracy, and promptly purge or modify inaccurate or misleading records, the CHSB has refused to stop disseminating as the Plaintiffs' CORI reports the criminal histories of persons who have misused their identifiers. The CHSB also has refused to establish a procedure for the Plaintiffs and the class they represent to follow to demonstrate that they are wrongfully associated with other people's criminal histories. The CHSB's policy and practice adversely impacts more than two hundred thousand alias subjects causing them to lose jobs, housing opportunities and other benefits for which CORI checks are required. Plaintiffs' Exhibit A, (Answer No. 2); Affidavits of Worcester Police Officer James E. Harrington, ¶ 2; and Christine J. O'Neill.

III. ARGUMENT

A. The CHSB's policy and practice of disseminating as the Plaintiffs' CORI reports the criminal histories of persons who have misused their identities violates its duties to assure accuracy and ensure that CORI is correctly identified with the individual to whom it pertains.

1. The CHSB's policy and practice violates its duty to assure accuracy.

At G.L. c. 6, § §171, 175, the CHSB is mandated to "creat[e]a continuing program of data ... verification to assure the accuracy of criminal offender record

information" and order any record "found to be inaccurate or misleading, ...be appropriately purged [or] modified..." At 803 CMR § 6.07,[2] the regulations impose similar obligations on the CHSB. The Supreme Judicial Court has directed administrative agencies, like the CHSB, charged with maintaining and disseminating criminal records to "place a high premium on the accuracy of its records to avoid damage to innocent persons." Roe v. Attorney General, 434 Mass. 418, 430, n. 20 (2001). The Court further declared that it would be "grave harm" for an individual "innocent of any offense" to be "publicly misidentified" as having a criminal record. Id. Such public misidentification, the Court noted, would constitute a violation of the agency's duty to disseminate accurate records. The SJC also has recognized that an individual unfairly associated with a record can take steps to correct inaccurate and misleading information. Commonwealth v. Gavin G. 437 Mass. 470, 483 (2002).

Well before these principles were pronounced, the Appeals Court affirmed an order allowing an individual publicly misidentified with a criminal record to purge the record from the CHSB's data system. Commonwealth v. S.M.F., 40 Mass.App.Ct. 42, 46 (1996). In that case, someone stole S.M.F.'s identifying information and misused them when arrested. When S.M.F. discovered the deception, she successfully petitioned to have her identifiers deleted from criminal records databases including the CHSB's data system. The state appealed. Finding "no utility in records that are false and misleading," the Appeals Court upheld S.M.F.'s successful petition. S.M.F. 40 Mass.App.Ct. at 46. The court also found that S.M.F. had not been prosecuted for the offense committed by the impostor but that the state's record belie that fact "giv[ing] the impression that

[2] The CHSB's proposed regulations for which a public hearing was held on April 15, 2005, propose to change § 6.07 to § 6.08. This brief would refer to the section currently in effect.

S.M.F.—not a person using that name as an alias—was arrested, arraigned and tried." Id. Moreover, the court reasoned that "no rational public policy favors the preservation of a fictitious record" and that these records "do considerable mischief." Id. For decisions finding that those associated with criminal records suffer "considerable mischief", see e.g., Commonwealth v. Doe, 420 Mass. 142, 152 (1995) (recognizing that "opportunities for schooling, employment or professional license may be restricted or non-existence as a consequence of having a criminal" record). Because the court determined that "nobody who is entirely disconnected from a criminal episode should be subjected to such [mischief]", the court held that the CHSB's statute, which permits the purging of erroneous criminal records, empowered the lower court to expunge the record wrongfully associated with S.M.F. S.M.F., 40 Mass.App.Ct. at 45-46.

Here, the Plaintiffs fit squarely within the S.M.F. framework. First, like S.M.F., the Plaintiffs' identities were misappropriated and misused when their impostors were arrested. Second, also like S.M.F., the Plaintiffs have been determined to be innocent of the crimes committed by their impostors. Indeed, they too are "entirely disconnected from the criminal episode[s]" of their impostors, but the CHSB's wrongful policy and practice belie those facts "giv[ing] the impression" to CORI recipients that the Plaintiffs are somehow connected to the crimes of their impostors simply because their identities, like S.M.F.'s were used as aliases. S.M.F. 40 Mass.App.Ct. at 46. Third, here, as in S.M.F., the Plaintiffs have suffered considerable harm. They have lost many jobs or have been provisionally hired until they disproved their wrongful association with their impostors' criminal histories. Fourth, here, as in S.M.F., there is "no utility [in disseminating] misleading" records. Id. Indeed, employers that have obtained the

criminal histories of the Plaintiffs' impostors have often been misled to draw baseless adverse inferences about the Plaintiffs.[3] Surely, S.M.F. dictates that the CHSB stop its misleading and unlawful policy and practice. S.M.F., 40 Mass.App.Ct. at 46.[4] Because the CHSB must "place a high premium" on its responsibilities to disseminate accurate CORI reports, not furnish misleading reports, and affirmatively correct misleading information, this court should order the CHSB to cease disseminating as the Plaintiffs' CORI reports the criminal histories of their impostors.[5] Roe, 434 Mass. at 430; S.M.F., 40 Mass.App.Ct. at 45-46.

2. The CHSB policy and practice fails to ensure a high degree of certainty that CORI is correctly identified with the individual to whom it pertains.

The CHSB's policy and practice is also not in accordance with its own regulations. As mandated by 803 CMR § 7.01(2), "the CHSB shall adopt procedures to ensure a high degree of certainty that CORI maintained ... is correctly identified with the individual to whom it pertains." Courts interpret administrative agency regulations in the same manner as statutes and accord them their usual, plain and unambiguous meaning. Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 549 (1991). A court will not hesitate to reject an agency's interpretation or policy and practice where it is arbitrary, unreasonable or inconsistent with the plain terms of its regulations. See

[3] With respect to Plaintiff Edward Bland, however, the CHSB does maintain a charge on his record that is wrongfully attributed to him. In 1998, Edward was falsely charged with "Operating After Suspended License" but the offense was *nolle prossed* when the Commonwealth determined that the wrong defendant had been charged. Bland Aff. ¶ . Edward requests that this court order the CHSB pursuant to its purging provision , G.L. c. 6, § 171, 175, to expunge that charge from his record. S.M.F., 40 Mass.App.Ct. at 46.

[4] Any purported claim that the CHSB has not created separate fictitious records in the names of the Plaintiffs is simply unavailing. The Plaintiffs need not wait for such conduct to correct information that is wrongfully attributed to them and is clearly misleading. See Gavin G., 437 Mass. at 483.

[5] The Federal criminal history repository similarly has a duty to take reasonable precautions to prevent dissemination of inaccurate criminal information. See Tarlton v. Saxbe, 507 F.2d 1116, 1129 (D.C. Cir. 1974) (imposing responsibility to safeguard accuracy of criminal information on the FBI).

Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 651 (2000); Manor v. Superintendent, Mass. Correctional Institutions, 416 Mass. 820, 823 (1994); Warcewicz, 410 Mass. at 552.

The CHSB regulation imposes on the agency two concomitant obligations: a) assure to a high degree of certainty that CORI relates to the right individual, and b) adopt proper procedures to assure that degree of certainty. The CHSB has failed in two material respects to meet its duties. See Cobble v. Commissioner of Department of Social Services, 430 Mass. 385, 395 (1999); Drayton v. Commissioner of Corrections, 52 Mass.App.Ct. 135, 140 (2001). First, the impostors' criminal histories do not factually pertain to the Plaintiffs. There is no doubt that the CORI reports of Fowler, Williams, and David Casey—the impostors—do not belong to the Plaintiffs. Indeed, the CHSB concedes that they—the impostors—are the primary record owners of the CORI reports bearing their names and identifying information but on which the Plaintiffs are listed as aliases. Furthermore, there is no suggestion that the Plaintiffs are responsible for the crimes on their impostors' records nor is there any determination by law enforcement that they authorized the misuse of their identities. Surely, the mere listing of Plaintiffs as aliases do not make those records factually theirs.

Plainly, the regulation requires that only the records for which the Plaintiffs were rightfully processed through the criminal justice system be disseminated, where statutorily permitted, not records to which they are associated through no fault of theirs. By attributing to the Plaintiffs, and disseminating as their CORI reports, criminal histories for which the Plaintiffs were neither prosecuted nor authorized the creation in their names, the CHSB simply fails to relate criminal records to the right individuals let

alone obey its enormous legal duty to "assure a high degree of certainty" that CORI reports "are correctly identified with [those] to whom [they] pertain." 803 CMR § 7.01(2). Because the CHSB's policy and practice negates the plain and unambiguous meaning of its regulation, it should be declared unlawful.

Second, the CHSB has no procedures in place to safeguard the misidentification of the Plaintiffs with the criminal histories of their impostors. Nothing in the CHSB's policy and practice afford the Plaintiffs with notice that they are associated with criminal histories that do not pertain to them nor are they provided with an opportunity, prior to dissemination, to contest the distribution of those CORI reports as their records. Instead, the CHSB unilaterally and arbitrarily adopted the policy and practice of retrieving and disseminating as Plaintiffs' CORI reports criminal histories that are factually unrelated to them. The CHSB's failure to afford the Plaintiffs with notice and an opportunity to demonstrate that CORI maintained or disseminated is incorrectly attributed to them violates its obligation to "adopt procedures" ensuring that CORI correctly relates to the right individual.[6] Id. Because the CHSB's policy and practice vitiates the mandates of its

[6] In the analogous consumer report context, courts have held credit reporting agencies charged under the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681(b), with maintaining and disseminating accurate consumer reports, and more specifically, "follow[ing] reasonable procedures to assure maximum possible accuracy [that] information [furnished] concern the individual about whom [a] report relates", § 1681e(b), responsible for improper procedures. See e.g. Watson v. Trans Union Credit Bureau, 2005 WL 995687, *9, (denying motion to dismiss where consumer reporting agency improperly furnished credit to an impostor using the plaintiff's identity and falsely attributed fraudulent debt to the plaintiff); Richardson v. Fleet Bank of Massachusetts, 190 F.Supp.2d 81, 86 (D.Mass. 2001) (denying summary judgment where agency dissemination of information it had reason to know was inaccurate constituted unreasonable procedure); Graham v. CSC Credit Services, Inc. 306 F.Supp.2d 873, 881 (D.Minn 2004) (stating that rising incidence of identity theft should cause reporting agencies to update their procedures to assure accuracy of information disseminated); Dalton v. Capital Associated Industries Inc., 257 F.3d 409, 416 (4th Cir. 2001) (reversing grant of summary judgment where agency report was misleading); Philbin v. Trans Union Corp., 101 F.3d 957, 965-966 (3rd Cir. 1996) (summary judgment reversed where agency falsely attributed information belonging to another individual to plaintiff); Koropoulous v. Credit Bureau, Inc., 734 F.2d 37, 42 (D.C.,Cir 1984) (finding that factually true consumer report but misleading to recipients is inaccurate).

own regulations, this court should not hesitate to reject it as arbitrary, unreasonable and unlawful. Warcewicz, 410 Mass. at 552; Drayton, 52 Mass.App.Ct. at 140.

B. The CHSB's policy and practice of disseminating misleading criminal histories as the Plaintiffs' CORI substantially interferes with their rights of privacy without furthering any rational public interest.

G.L. c. 214, § 1B, provides that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." In bringing a claim under this statute, Plaintiffs must demonstrate both that the Defendants' actions were unreasonable and that the conduct amount to either a substantial or serious interference with their privacy. Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 409 Mass. 514, 517-18 (1991). Section 1B's proscriptions are, however, tempered if legitimate public concerns require disclosure, Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 612 (2000), although the public also has an equally important interest in safeguarding the Plaintiffs' rights to be free of unreasonable intrusion. Commonwealth v. Doe, 400 Mass. 764, 771 (1990). State agencies are subject to the strictures of section 1B. O'Connor v. Police Commission of Boston, 408 Mass. 324, 330 (1990); Wagner v. City of Holyoke, 241 F.Supp.2d 81, 100 (D.Mass. 2003).

The Restatement (Second) of Torts § 652A recognizes four distinct conducts that would give rise to an invasion of privacy claim including, public dissemination of information that places a plaintiff in false light. See Restatement (Second) of Torts 6A, 28A GM (1981 App.); Selleck v. Globe International, Inc., 166 Cal.App.3d 1123, 1134 (1985); Goodrich v. Waterbury Republican-American Inc., 188 Conn. 107, 126-28

(1982); Nelson v. Maine Times, 373 A.2d 1221, 1223 (Me. 1977).[7] To prevail on a false-light claim, the Plaintiffs have to satisfy two elements: a) the CHSB placed them in a false light that would be highly offensive to a reasonable person, and b) the CHSB had knowledge of or acted in reckless disregard as to the falsity of the publicized criminal histories and the false light in which the Plaintiffs were placed. § 652E. To the extent that information published is unimportant or true, the claim will fail. The essential element of the claim is the portrayal of Plaintiffs that creates a false impression. Id; Goldbehere v. Phoenix Newspapers, Inc., 162 Ariz. 335, 340-41 (1989). To illustrate a false-light claim, the Restatement 2d of Torts provides a scenario where an individual wrongfully accused of a crime and jailed was subsequently released but the police include him in a "rogues gallery" of convicted persons. The wrongfully accused individual, the Restatement states, has an actionable false-light claim. § 652E (Illustration No.7).

Here, as demonstrated in the preceding section, the CHSB concedes that the CORI reports at issue do not belong to the Plaintiffs nor do they pertain to charges lawfully prosecuted against them. Yet, the CHSB's dissemination of those CORI reports insinuates to employers and other power-holders that the Plaintiffs have somehow authorized the misuse of their names or engaged in the crimes enumerated on their impostors' CORI reports. Moreover, the CHSB is well aware of the false light in which its actions place the Plaintiffs. Its disregard of lawful determinations demonstrating that

[7] While 30 states recognize the false-light claim, see Denver Pub. Co. v. Bueno, 54 P.3d 883, 897 (Colo. 2002), the Supreme Judicial Court has yet to adopt this category of the invasion of privacy claim. Ayash v. Dana-Farber Cancer Institute, 443 Mass. 367, 382 (2005). The category typically invoked in this state—public disclosure of highly personal but true facts—is inapplicable here as the CHSB disseminates misleading and inaccurate information about the Plaintiffs. Nothing in Ayash, however, precludes this court from recognizing the claim in the circumstances of the present case, particularly given the harm—loss of employment and other benefits—that the Plaintiffs continue to endure. See Itzkovitch v. Whitaker, 115 La. 479 (1905).

the Plaintiffs have distinct and separate identities from their impostors as well as its continued dissemination of the impostors' CORI reports despite almost two years notice that they are wrongfully attributed to the Plaintiffs clearly evince the CHSB's utter disregard of the false light in which the misleading CORI reports place the Plaintiffs. Because no rational public policy is furthered by the CHSB's dissemination of misleading CORI reports and its actions substantially interferes with the Plaintiffs' rights to be free from mischaracterization and unreasonable intrusion, this court should order the CHSB to cease its unlawful policy and practice.[8] See S.M.F, 40 Mass.App.Ct. at 46 (finding dissemination of misleading record serves no legitimate public purpose); Jobes v. Evangelista, 849 A.2d 186, 195 (N.J., 2004) (holding government official liable for false-light invasion of privacy where Plaintiffs were falsely portrayed as criminal elements).[9]

C. By attributing to the Plaintiffs the criminal histories of persons who have misused their identities, without affording them with an opportunity to demonstrate that their identities were misappropriated, the CHSB interferes with the Plaintiffs' ability to earn a living and unreasonably brands them as risks depriving them of their liberty and privacy interests without due process of law in derogation of the Massachusetts Declaration of Rights, Part 1, Articles 1, 10, and 12, and the Fourteenth Amendment to the United States Constitution.

[8] While the listing of the Plaintiffs as aliases on the records of their impostors are in the public domain, see McCormack v. Oklahoma Pub. Co., 613 P.2d 737, 742 (1980) (stating that Plaintiff's accurate criminal record is open to public inspection), the CORI statute insures that only certified and statutorily authorized persons have access to CORI. Wagner, 241 F.Supp.2d at 86. Thus, the CHSB's policy and practice affords employers access to misleading CORI reports that they would otherwise not obtain. An employer searching court docket entries for the Plaintiffs' records would retrieve, where appropriate, their own records of charges, not their impostors' records. The CHSB's policy and practice is injurious to the Plaintiffs and should be stopped.

[9] See also Galligan v. Edward D. Jones & Co., 2000 WL 1785041 * 9 (Conn. Super.) (denying defendant's summary judgment motion where plaintiff was put in a false light by false accusation that he had a criminal record which in fact had had been expunged).

1. Plaintiffs have a liberty and privacy interest in being able to earn a living and in not being unreasonably branded as risks to employers.

The Fourteenth Amendment to the United States Constitution guarantees to an individual a "liberty" interest "to contract [and] to engage in any of the common occupations of life." Myers v. Nebraska, 262 U.S. 390, 399 (1923). Where a deprivation of that interest is coupled with the stigma resulting from a denial based on an applicant's purported propensity for future criminality and foreclosure from a significant number of jobs, the applicant has a constitutionally protected liberty interest. Board of Regents v. Roth, 408 U.S. 564, 572-574 (1972). Under the Massachusetts Declaration of Rights as well, the right to choose one's calling and earn a living has long been recognized as constitutionally protected liberty and property interests. Commonwealth v. Beaulieu, 213 Mass. 138, 141 (1912); McMurdo v. Getter, 298 Mass. 363, 365-366 (1937).

The Massachusetts Declaration of Rights zealously protects matters of personal liberty against incursion, often more so, than does the Federal Constitution. Goodridge v. Dept. of Public Health, 440 Mass. 309, 328 (2003). Under the state constitution, a convicted sex offender whose criminal record is otherwise available to the public has constitutionally protected liberty and privacy interests precluding the state, without proper procedures, from requiring him to register as a sex offender and publicly disseminating information about him. Doe v. Attorney General, 426 Mass. 136, 143-146 (1997) (Doe [No. 3]).[10] The Supreme Judicial Court found these constitutionally protected interests predicated upon factors such as (a) the possible harm to the offender's

[10] As the SJC noted in Doe, however, nothing in its analysis of the Massachusetts Declaration of Rights "should be understood to say that a similar result would not obtain for similar reasons under the due process provisions of the Fourteenth Amendment." Doe, 426 Mass. at 144.

earning capacity; (b) the harm to his reputation; and most important, (c) the branding of him as public danger. Doe, 426 Mass. at 144.

Here, the Plaintiffs who are wrongfully associated with the criminal histories of their impostors have even stronger claims for constitutional protections. Unlike the Doe plaintiff who potentially risked losing his source of livelihood, here, the Plaintiffs have suffered real employment losses. They have been rejected, fired, or suspended until they could disprove their association with their impostors' criminal histories. Moreover, Plaintiffs' reputations have been tarnished as recipients of the records at issue have assumed that they are their impostors or are wittingly connected to those records. Most importantly, the CHSB's disclosure of the impostors' criminal histories as the Plaintiffs' CORI reports signals to employers that the Plaintiffs are undesirable elements with extensive criminal histories who pose a danger to their clientele. This is particularly injurious to those Plaintiffs whose records consist entirely of dismissed charges that are otherwise inaccessible to employers. Because the Plaintiffs have suffered actual losses to their earning capacities and are unreasonably labeled as risks, the CHSB's policy and practice impinges on their constitutionally protected liberty and privacy interests.

2. Plaintiffs are entitled to notice and an opportunity to demonstrate that their identities have been misappropriated prior to the CHSB branding them as risks to employers.

Procedural due process protection is trigged when governmental action interferes with liberty interests. Roe, 434 Mass. at 427. Due process analysis requires a balancing of the constitutionally protected interest at stake against the risk of erroneous deprivation through the governmental procedures used and the state's interest in achieving its goals. Doe at 426 Mass. at 140. Finding that the state's interest in registering a sex offender or

notifying the public that he posed a danger did not outweigh the offender's constitutionally protected interests, the SJC ordered the defendants to provide the Doe plaintiff with a pre-deprivation hearing. Id at 145-146.

Here, the CHSB has not articulated any legitimate public policy that is furthered by providing employers with inaccurate and misleading criminal histories nor can it provide any. See S.M.F., 40 Mass.App.Ct. at 46. Additionally, the CHSB has not adopted any procedure to enable the Plaintiffs to show that they are not responsible for their impostors' criminal histories.[11] As the SJC observed in Doe, "[c]ondemnation and a judgment of guilt are the hallmarks of the criminal law. Punishment is visited on those who knowingly transgress norms and limits imposed by law." Doe, 426 Mass. at 147. Even so, former offenders cannot be barred from employment by reason of their prior convictions without an opportunity to rebut their present dangerousness. Id. at 145-146. Surely, the Plaintiffs here cannot be denied jobs because of their impostors' criminal histories without a determination that they were adjudged guilty of the transgressions on those records or permitted the misuse of their identifiers. Because the CHSB's policy and practice improperly ascribes to the Plaintiffs their impostors' criminal histories—and by implication their conduct—without due process of law, this court should declare it unconstitutional. Id.[12]

IV. CONCLUSION

[11] To the extent that the CHSB's purported purpose is to forewarn employers that the Plaintiffs' identities have been misused, the CHSB may not do so in a manner that confuses and misleads employers while unfairly branding the Plaintiffs as risks. Additionally, the CHSB's ill-defined process which requires the Plaintiffs to seek post-dissemination relief either through the department of probation or by filing an unspecified motion in court prior to requesting agency review is not only circular but does not comport with due process concepts. Doe, 426 Mass. at 145.

[12] See also Cronin v. O'Leary, 2001 WL 919969 *4, *6 (Mass.Super.) (holding that former offenders have a constitutionally protected liberty interest in not being denied human services jobs without a determination that they pose a threat to vulnerable populations).

For the foregoing reasons, Plaintiffs respectfully request that summary judgment be granted for the Plaintiffs and that the court declare the CHSB's policy and practice unlawful and permanently enjoin the Defendants from continuing to apply it to them.

Respectfully submitted,
On behalf of Plaintiffs,

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Dated: May ___, 2005

CERTIFICATE OF SERVICE

I, Francisca D. Fajana, hereby certify that on this ____ day of _____, 2005, I served on Maite Parsi, Esq., counsel for the Defendants, Office of the Attorney General, One Ashburton Place, Room 2019, Boston, MA 02108, first class mail postage prepaid, the foregoing Plaintiffs' Motion for Partial Summary Judgment, attached affidavits, attached Exhibits, Statement of Facts and Law in Support of Plaintiffs' Motion for Partial Summary Judgment, and Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment.

Date

Francisca D. Fajana