

Pursuant to the authority vested in the Public Health Council by sections 225(5)(p) and 225(5)(q) of the Public Health Law and in the Commissioner of Health by section 201(1)(r), of the Public Health Law, Part 16 of the State Sanitary Code, contained in Chapter I of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended by adding a new section 16.112, to be effective upon filing with the Department of State, to read as follows:

#### Section 16.112 Fingerprinting and criminal background check requirements

##### (a) Applicability.

This section applies to any licensee who possesses, or is authorized to possess, radioactive material that is: (1) listed in Table 1 (“Radionuclides of Concern”) of this Section and (2) in a quantity equal to or exceeding that listed in Table 1.

##### (b) Definitions

- (1) Trustworthiness and Reliability (T&R) Official – means an individual appointed by the licensee who is responsible for determining the trustworthiness and reliability of another individual requiring unescorted access to one or more radioactive materials identified in Table 1 of this section.
- (2) “Affected individual” means an individual who has or is seeking unescorted access to radioactive material identified in Table 1 of this section in a quantity equal to or exceeding that listed in Table 1.

(3) “Unescorted access” means access without an escort to radioactive material identified in Table 1 of this section which is in a quantity equal to or exceeding that listed in Table 1.

(c) Licensees shall, within ninety (90) days of the effective date of this section, establish and maintain a fingerprinting program that meets the requirements of this section for individuals who require unescorted access. Licensees shall implement this program in conformance with the following scheduled:

(1) Within sixty (60) days of the effective date of this section, the Licensee shall provide under oath or affirmation a certification that the Licensee’s T & R Official is deemed trustworthy and reliable by the Licensee as required by subdivision (e) of this section.

(2) The Licensee shall, in writing, within thirty (30) days of the effective date of this section, notify the Department (1) if it is unable to comply with any of the requirements of this section, (2) if compliance with any of these requirements is unnecessary in its specific circumstances, or (3) if implementation of any of these requirements would cause the Licensee to be in violation of the provisions of any Department regulation or its license. The notification shall provide the Licensee’s justification for seeking relief from or variation of any specific requirement. Such justification must explain the necessity for the relief and alternative actions to be taken. The Department may accept the justification if it determines that the action

to be taken in lieu of compliance with the requirement is consistent with public health and is necessary to avoid undue financial hardship for the licensee.

(3) The Licensee shall complete implementation of the program established in accordance with subdivision (j) of this section within 90 days from the effective date of this section. In addition to the notifications in paragraphs 1 and 2 above, the Licensee shall notify the Department, in writing, within twenty-five (25) days after it has achieved full compliance with the requirements of this section. If within 60 days from the effective date of this section, the Licensee is unable to complete implementation of one or more requirements of this section, the Licensee shall submit a written request to the Department explaining the need for an extension of time to implement those requirements and providing a justification for the additional time for compliance that it seeks. The Department may grant such request if it determines that the requested extension of time will not jeopardize public health and is necessary to avoid undue financial hardship for the licensee.

(4) Licensees shall notify the Department and the United States Nuclear Regulatory Commission (NRC) Headquarters Operations Office by telephone within 24 hours if the results from a criminal history records check indicate an individual is listed on the Federal Bureau of Investigation (FBI) Terrorist Screening Data Base.

(d) Except as provided in subdivision (h) for individuals who are currently approved for

unescorted access, the Licensee shall grant access to radioactive material in Table 1 in accordance with the requirements of its Increased Controls license conditions and the requirements of this Section.

(e) The T&R Official, if he/she does not require unescorted access, must be deemed trustworthy and reliable by the Licensee in accordance with its Increased Controls license conditions before making a determination regarding the trustworthiness and reliability of another individual. If the T&R Official requires unescorted access, the Licensee must consider the results of the FBI identification and criminal history records check before approving a T&R Official.

(f) Prior to requesting fingerprints from any individual, the Licensee shall provide a copy of this section to that person.

(g) Upon receipt of the results of FBI identification and criminal history records checks, the Licensee shall control such information as specified in subdivision (m) of this section and its Increased Controls license conditions.

(h) The Licensee shall make determinations on continued unescorted access for persons currently granted unescorted access, within 90 days from the effective date of this section, based upon the results of the fingerprinting and FBI identification and criminal history records check. The Licensee may allow any individual who currently has

unescorted access to certain radioactive material in accordance with its Increased Controls license conditions to continue to have unescorted access, pending a decision by the T&R Official as to whether that individual should continue to have such access. After 90 days from the effective date of this section, no individual may have unescorted access to any radioactive material listed in Table 1 of this section and in a quantity equal to or exceeding that listed in Table 1, without a determination by the T&R Official (based upon fingerprinting, an FBI identification and criminal history records check and a previous trustworthiness and reliability determination) that the individual may have unescorted access to such materials.

(i) Licensee responses to subdivisions (c)(1), (c)(2), (c)(3) and (c)(4) shall be submitted in writing to the Department. Licensee responses shall be marked as “Confidential - Security-Related Information”.

(j) Specific Requirements Pertaining to Fingerprinting and Criminal History Records Checks

(1) Each Licensee subject to the provisions of this section shall fingerprint each affected individual.

(2) For affected individuals employed by the licensee for three years or less, and for affected individuals who are nonlicensee personnel, such as physicians, physicists, house-keeping personnel, and security personnel under contract, trustworthiness and reliability

shall be determined, at a minimum, by verifying employment history, education, personal references, and fingerprinting and the review of an FBI identification and criminal history records check.

(3) The licensee shall also, obtain independent information to corroborate that provided by the employee (e.g. seeking references not supplied by the individual). For affected individuals employed by the licensee for longer than three years, trustworthiness and reliability shall be determined, at a minimum, by a review of the employees' employment history with the licensee and fingerprinting and an FBI identification and criminal history records check.

(4) Service provider licensee employees who are affected individuals shall be escorted unless they are determined to be trustworthy and reliable by a NRC-required background investigation. Written verification attesting to or certifying the person's trustworthiness and reliability shall be obtained by the licensee from the licensee providing the service.

(5) The licensee must submit one completed, legible standard FBI fingerprint card (Form FD-258,ORIMDNRCOOOZ)<sup>1</sup> for each affected individual, to the NRC's Division of Facilities and Security. The name and address of the individual (T&R Official) to whom the criminal history records should be returned must be included with the submission.

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1. Copies of these forms may be obtained from NRC. The Licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards. Licensees must have fingerprints taken by local law enforcement (or a private entity authorized to take fingerprints) because an authorized official must certify the identity of the person being fingerprinted. If the FBI advises the fingerprints are unclassifiable based on conditions other than poor quality, the Licensee must submit a request to NRC for alternatives. When those search results are received from the FBI, no further search is necessary. The NRC will receive and forward to the submitting Licensee all data from the FBI as a result of the Licensee's application(s) for criminal history records checks, including the FBI fingerprint record(s).

(6) The Licensee shall review and use the information received from the FBI identification and criminal history records check as part of its trustworthiness and reliability determination required by its Increased Controls license conditions.

(7) The Licensee shall notify each affected individual that his/her fingerprints will be used to secure a review of his/her criminal history record and inform the affected individual of the procedures for revising the record or including an explanation in the record, as specified in subdivision (k) "Right to Correct and Complete Information."

(8) Fingerprints for unescorted access need not be taken if an employed individual (e.g., a Licensee employee, contractor, manufacturer, or supplier) is:

(i) An employee of the US Nuclear Regulatory Commission or of the Executive Branch of the U.S. Government who has undergone fingerprinting for a prior U.S. Government criminal history check;

(ii) A Member of Congress;

(iii) An employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history check;

(iv) The Governor or his or her designated State employee representative;

(v) Federal, State, or local law enforcement personnel;

(vi) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;

(vii) Representatives of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who have been certified by the NRC; or

(viii) documentation is provided which demonstrates that the employed individual has been favorably-decided by a U.S. Government program involving fingerprinting and an FBI identification and criminal history records check within the last five calendar years of the effective date of this regulation, or documentation is provided which demonstrates that any person has an active security clearance (provided in the later two cases they make available the appropriate documentation). Written confirmation from the agency/employer which granted the federal security clearance or reviewed the FBI criminal history records results based upon a fingerprint identification check must be provided. The Licensee must retain this documentation for a period of three (3) years from the date the employed individual no longer requires unescorted access associated with the Licensee's activities.

(9) All fingerprints obtained by the Licensee pursuant to this section must be submitted to the NRC.

(10) The Licensee shall review and use the information received from the FBI identification and criminal history records check and consider it as part of its trustworthiness and reliability determination, in conjunction with the trustworthiness and reliability requirements set forth in its Increased Controls license conditions, in making a determination whether to grant an affected individual unescorted access. The Licensee

shall use any information obtained from a criminal history records check solely for the purpose of determining an affected individual's suitability for unescorted access.

(11) The Licensee shall document the basis for its determination whether to grant, or continue to allow, an affected individual unescorted access.

(k) Prohibitions

(1) A Licensee shall not base a final determination to deny an affected individual unescorted access solely on the basis of information received from the FBI involving:

(i) an arrest more than one (1) year old for which there is no information regarding the disposition of the case, or

(ii) an arrest that resulted in dismissal of the charge or an acquittal.

(2) A Licensee shall not use information received from a criminal history records check obtained pursuant to this section in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States or Article 1 of the New York State Constitution, nor shall the Licensee use the information in any way which would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

### (l) Right to Correct and Complete Information

Prior to any final adverse determination, the Licensee shall make available to the affected individual the contents of any criminal records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the Licensee for a period of one (1) year from the date of the notification. If, after reviewing the record, an affected individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either a direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the FBI Identification Division.<sup>2</sup> The Licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of a FBI criminal history records check after the record is made available for his/her review. The Licensee may make a final unescorted access determination based upon an individual's criminal history record only upon receipt of the FBI's confirmation or correction of the record. Upon a final adverse determination on unescorted access the Licensee shall provide the individual its documented basis for denial. Unescorted access shall not be granted to an individual during the review process.

### (m) Protection of Information

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<sup>2</sup> In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that

(1) Each Licensee who obtains a criminal history record on an affected individual pursuant to this section shall establish and maintain a system of files and procedures for protecting the record and the personal information in the record from unauthorized disclosure.

(2) The Licensee may not disclose the record or personal information collected and maintained to persons other than the affected individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining unescorted access. No individual authorized to have access to the information may disseminate the information to any other individual who does not have a need-to-know.

(3) The personal information obtained on an affected individual from a criminal history record check may be transferred to another Licensee if the Licensee holding the criminal history record check receives the affected individual's written request to provide the information contained in his/her file, and the receiving Licensee verifies information such as the affected individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

(4) The Licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the Department to determine compliance with this section.

(5) The Licensee shall retain all fingerprint and criminal history records from the FBI, or a copy if the affected individual's file has been transferred, for three (3) years after termination of employment or determination of unescorted access (whether unescorted access was approved or denied). After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.

Table 1: Radionuclides of Concern

Radionuclide	Quantity of Concern <sup>1</sup> (TBq)	Quantity of Concern <sup>2</sup> (Ci)
Am-241	0.6	16
Am-241/Be	0.6	16
Cf-252	0.2	5.4
Cm-244	0.5	14
Co-60	0.3	8.1
Cs-137	1	27
Gd-153	10	270
Ir-192	0.8	22
Pm-147	400	11,000
Pu-238	0.6	16
Pu-239/Be	0.6	16
Ra-226	0.4	11
Se-75	2	54
Sr-90 (Y-90)	10	270
Tm-170	200	5,400
Yb-169	3	81
Combinations of radioactive materials listed above <sup>3</sup>	See Footnote Below <sup>4</sup>	

<sup>1</sup> The aggregate activity of multiple, collocated sources of the same radionuclide should be included when the total activity equals or exceeds the quantity of concern.

<sup>2</sup> The primary values used for compliance with this Order are tera becquerel (TBq).

<sup>3</sup> Radioactive materials are to be considered aggregated or co-located if breaching a common physical security barrier (e.g., a locked door at the entrance to a storage room) would allow access to the radioactive material or devices containing the radioactive material.

<sup>4</sup> If several radionuclides are aggregated, the sum of the ratios of the activity of each source,  $i$  of radionuclide,  $n$ ,  $A_{(i,n)}$ , to the quantity of concern for radionuclide  $n$ ,  $Q_{(n)}$ , listed for that radionuclide equals or exceeds one. That is:

$$\sum_n \left\{ \sum_i \frac{A_{i,n}}{Q_n} \right\} \geq 1$$