

# NEW YORK—ON THE RECORD: CRIMINAL HISTORY INFORMATION AND ITS ACCURACY



July 2012

**YOUTH REPRESENT**  
JUSTICE FROM COURTROOM TO COMMUNITY

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**Youth Represent** is the only youth defense and advocacy not-for-profit working solely with individuals age 24 and under in New York City who are or have been involved in the criminal justice system. Our goal is to ensure that youth from under-served and over-policed neighborhoods have access to the fundamental cornerstones of stability—including housing, employment, and education—both during and after involvement with the justice system. Youth Represent provides ongoing representation to our clients in order to preserve their basic human rights and lift the legal barriers that often prevent a successful journey from courtroom to community. We strongly believe that community lawyering is essential to working with youth. Therefore, we form partnerships with community-based organizations to build relationships with youth and ensure early identification and intervention into the legal issues they face as they struggle to move forward from criminal justice system involvement.

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## EXECUTIVE SUMMARY

In 2011, Youth Represent taught “Know Your Rights” workshops to almost 800 youth who had some previous contact with the criminal justice system. At these workshops, we explained how a criminal record affects employment and teach youth about their rights and responsibilities. In particular, we stress the importance of fully understanding their record and of being truthful in the application process because the law provides no protection to those who lie about their criminal record. Unfortunately, even a mistake, or an omission, in revealing a criminal record will often be perceived as a lie.

Inevitably, the youth with whom we work want to know, “what will appear in my criminal background check for an employer or job license?” It is impossible to give a clear answer to this question. We do obtain an official copy of a client’s criminal history from New York States criminal record repository. We discuss what convictions they are legally obligated to reveal to employers. However, we are not able to tell clients if those same convictions will appear on any given background check. Dissatisfied, we undertook to better understand the sources of criminal justice information in New York, how it is accessed by private background screening companies, and its accuracy.

The information contained in any background check depends on several factors, including: the entity initiating the background check, the entity from whom the background check is obtained, and the source of the information for the background check. Intertwined with these factors are the numerous state and federal laws governing the sealing and availability of criminal records, the limitations on reporting criminal records, and the limitations on use of criminal records. Of course, all of this information varies by jurisdiction; apart from federal laws, all of the factors vary depending on the law of the state.

This report focuses solely on New York State and is the cumulative result of our investigation, providing a broad view of the use, sources, and accuracy of criminal history information. Part 1 of the report discusses the federal and New York State laws that apply to those disseminating background checks and those using background checks. Part 2 discusses the sources of criminal history information, including the costs and ease of access. Part 3 analyzes the accuracy of criminal history data obtained

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by Youth Represent on behalf of youth who had past contact with the criminal justice system from both government and private, fee-based sources.

Ultimately, all sources of New York criminal history information either contained errors, or were prone to misuse or misidentification. In records we obtained on behalf of 398 youth from the New York State Division of Criminal Justice Services (DCJS), we found an error rate of 22%. DCJS records are used by state agency and licensing bodies, but these records are not accessible by the public.

The sole source of criminal records information that most background screening companies use is the Department of Corrections and Community Supervision's (DOCCS) Inmate Finder Search, which is free and online. However, DOCCS is not the official state repository of criminal records, nor are they a keeper of court records. Thus, the widespread, singular use of DOCCS Inmate Finder for background screening checks results in drastically unequal reporting of conviction records based solely on the sentence, not on the crime of conviction. In a fee-based "National Criminal History Search" from one of the largest background screening companies, we found that for the records we obtained on behalf of 100 youth, 66% contained errors. The largest problem in the accuracy of the reports was underreporting because screening companies rely only on the DOCCS Inmate Finder. When a background screening company underreports a criminal history, the discrepancy between what the applicant reported and the screening report could lead an employer to believe that the applicant lied.

On the background screenings that did report a criminal history, one-third contained errors. Those errors all made a person's criminal history appear worse—reporting dismissed charges, reporting violations of probation as separate cases, and reporting a youthful offender adjudication. Disturbingly, in these reports, any time a criminal history was found the report labelled it a "discrepancy," suggesting that the mere existence of a criminal record is a problem. This reporting language is misleading, and also violates state and federal laws concerning employment of persons with criminal histories.

Finally, we performed a fee-based sex offender search for those same 100 youth and found that 35% matched the name of a sex offender, though none actually had any sex offense convictions. In addition, there were a total of 149 name matches where the registry did not include a date of birth, which is one of the easiest ways to

match identities. The potential for misidentification based on sex offender registries is startling.

Based on those results, we recommend:

- LIMITING INFORMATION ON DOCCS INMATE FINDER TO LIST ONLY CURRENT INMATES AND CREATING ACCESS LIMITATIONS REQUIRING USERS TO AFFIRM THAT THEY ARE NOT SELLING THE INFORMATION OR USING IT FOR EMPLOYMENT PURPOSES.
- NEW YORK SHOULD REQUIRE ALL BACKGROUND SCREENING COMPANIES TO CLEARLY STATE THE SOURCE OF EACH CRIMINAL RECORD FOUND AND INCLUDE A COPY OF ARTICLE 23-A WITH ALL CRIMINAL HISTORY REPORTS THAT ARE GOVERNED BY THE NEW YORK FAIR CREDIT REPORTING ACT.
- AMEND FEDERAL LAW TO REQUIRE STATES TO INCLUDE STANDARD IDENTIFYING INFORMATION IN ALL PUBLIC SEX OFFENDER REGISTRIES.

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## INTRODUCTION

Criminal background checks have become a ubiquitous part of the hiring process. Over 93% of companies surveyed by the Society for Human Resources Professionals perform background checks for some prospective employees and 73% perform background checks on all applicants.<sup>1</sup> Employers are not the only ones doing background searches. According to a survey by the Center for Community Alternatives, over 60% of higher education institutions surveyed performed background checks on prospective students.<sup>2</sup> While only 20% admitted to using background checks in their admission process, this appears to be a growing trend.

An employer seeking to run a background check has many options and many sources: credit history, driving records, employment history, address records and Social Security verification. Employers also have many options when it comes to background screening reports: national criminal database searches, federal criminal searches, county-level searches, and sex offender searches. Background checks have a wide range of costs, depending on the provider. Large credit-reporting agencies market “nationwide criminal database search” for as little as ten dollars a search, while the same company will market a “county level criminal search” for \$65 dollars or more. Yet the differences between these options are not made apparent.

In addition, the pervasive use of background checks raises questions regarding accuracy. Every state has different laws regarding the availability of criminal justice information. The differences in these laws causes extreme differences in the amount and quality of criminal justice information obtained and sold by the background checking industry.

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Employment Law Project, 65 million Americans have criminal records, which is over one-quarter of the total working age population.<sup>3</sup> Indiscriminate use of criminal records in hiring practices it can result in a substantial portion of the workforce being excluded from employment. Competing and compelling interests are at stake. Employment is widely considered to be one the most important pieces of the reentry process and an essential component of reducing recidivism.<sup>4</sup> At the same time, employers bear the burden of maintaining a safe workplace and have an interest in hiring responsible employees. Given the prevalent use of background checks in the hiring process, the balance of these concerns is heavily contingent upon the information contained in criminal background checks.

This report focuses on criminal history records in New York State, explaining the sources of criminal history information and how private companies who sell criminal background checks access these sources. This report describes:

- ❑ The federal and New York State laws governing the use of background checks
- ❑ Anecdotal experience from our contact with criminal background check sellers to obtain reports
- ❑ The sources of criminal history information in New York
- ❑ The accuracy of criminal history information obtained from both a New York government source and private companies
- ❑ Recommendations to improve accuracy of reports.

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## I. THE USE OF CRIMINAL BACKGROUND CHECKS

Several federal and New York State laws govern the use of criminal background checks for employment purposes. Legislators passed some of these laws as protections for consumers, while others were intended to promote the employment and reentry of people with criminal convictions and prohibit discrimination based on criminal records. The laws described below govern the dissemination and use of criminal records for employment purposes, but do not include laws specific to certain jobs, such as law enforcement positions.

### A. New York and Federal Laws Governing Use of Background Checks

The federal **Fair Credit Reporting Act (FCRA)**<sup>5</sup> imposes requirements upon entities that gather and issue consumer reports and users of these reports. FCRA applies to all consumer reporting agencies,<sup>6</sup> which includes companies that gather and issue criminal history information and other “background screening” information. FCRA requires background screening companies to have “reasonable procedures” to ensure the “maximum accuracy” of the information provided. Employers using a background report in a hiring decision must provide a clear written notice to the job applicant that it may obtain a consumer report<sup>7</sup> and obtain written permission from the job applicant before obtaining the report.<sup>8</sup>

Before taking any adverse action—not hiring, promoting, reassigning, or firing—based on information contained in the background check, employers must provide the applicant or employee with a copy of the report and a notice of rights under FCRA before the action is taken.<sup>9</sup> The employer must give the applicant or employee a reasonable amount of time to dispute any errors.<sup>10</sup>

FCRA also sets conditions for background screening companies for providing reports for employment purposes. The reporting company must obtain a certification from the user of the report that they will comply with the authorization, disclosure, and pre-adverse action procedures described above.<sup>11</sup>

The **New York State Fair Credit Reporting Act**<sup>12</sup> precludes background check companies from including information in reports regarding arrests that did not lead to criminal convictions. If the individual is being considered for employment at an annual salary of less than \$25,000 then background check companies cannot report records of conviction for crimes that are more than seven years old, calculated from the date of disposition, release, or parole.<sup>13</sup> Like the federal FCRA, it requires background check companies to maintain reasonable procedures designed to assure maximum possible accuracy of information reported.<sup>14</sup> Background check companies must have reasonable procedures to ensure those to whom they are furnishing consumer reports are using them for legal purposes and they must verify the identity of new prospective users of reports.<sup>15</sup> The law is enforceable by civil action to recover actual damages and attorney's fees for negligent noncompliance, plus punitive damages for willful noncompliance.<sup>16</sup>

**Employment Screening Companies Operating In Disguise**

Recently, there have been a number of new businesses that advertise that they provide “background checks,” “criminal history checks,” or “public criminal checks,” but have disclaimers on their website saying that the reports should not be used for employment or other FCRA purposes. The disclaimers are an attempt by these businesses to circumvent the costs of FCRA compliance and potential liability for failing to conform to the law. The FTC has sent warning letters to several of these businesses reminding them that they must comply with FCRA if they have reason to believe that their reports are being used for employment or other FCRA purposes.<sup>17</sup> Despite disclaimers, if the company's advertising placement or customer lists indicate that they had reason to believe that their products would be used for such purposes, they can be held liable for failing to follow FCRA's requirements.

**Article 23-A** of the New York Corrections Law defines how employers and employment licensing agencies can consider criminal histories in employment decisions. Employers can refuse to hire a person based on their criminal record only when: (1) there is a “direct relationship” between the job or the license sought, or (2) the hiring or licensing of the individual “would involve an unreasonable risk to property or to the safety or welfare of specific individuals

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or the general public.” In determining whether either of those situations exist, employers and licensing agencies must consider eight factors:

- The public policy of New York State to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- The specific duties and responsibilities of the employee or licensee.
- The bearing, if any, of the conviction on the applicant’s fitness or ability to perform the duties or responsibilities of the job.
- The amount of time that has elapsed since the conviction.
- The age of the person at the time of conviction.
- The seriousness of the offense or offenses.
- Any evidence of rehabilitation and good conduct provided by the applicant or by anyone on behalf of the applicant.
- The legitimate interest of the public agency or private employer in protecting property and the safety and welfare of specific individuals or the general public.

Article 23-A requires employers to give a written explanation of the job or license denial within 30 days when requested by the candidate. The New York State Employer Education Act of 2008 further requires that when an employer runs a criminal background check during the hiring process, they must provide a copy of Article 23-A to the individual.<sup>18</sup> Employers must also prominently post Article 23-A in the workplace.<sup>19</sup>

The **New York State Human Rights Law**<sup>20</sup> and **New York City Human Rights Law**<sup>21</sup> prohibit employers and licensing agencies from inquiring about arrests that did not lead to convictions, sealed convictions, or youthful offender adjudications. It further prohibits employers and licensing agencies from taking any adverse action against applicants based on arrests that did not lead to convictions, sealed convictions, or youthful offender adjudications. These laws are enforced by the New York State Division of Human Rights and the New York City Human Rights Commission, or through civil action.

**New York Criminal Procedure Law section 160.60** governs the effect of a termination of a criminal action in favor of the accused, also referred to as favorable dispositions. “Termination in favor of the accused” describes cases

that were resolved by: acquittal, dismissal by the grand jury, dismissal in the interests of justice, dismissal of the accusatory instrument, adjournment in contemplation of dismissal (ACD), decline to prosecute by district attorney, decline to file accusatory instrument by police, order setting aside the verdict, order vacating a judgment, habeas appeal, and convictions for PL 221.05 (unlawful possession of marijuana) three years after the conviction.<sup>22</sup> Under section 160.60, when a criminal action terminates in favor of the accused, the arrest and prosecution are deemed a nullity and the accused is restored, in contemplation of the law, to the status he occupied before the arrest and prosecution. It further states that the arrest or prosecution shall not operate as a disqualification to pursue or engage in any lawful activity, occupation, profession, or calling, except where specifically required or permitted by statute. Going even further, the law states that no person is required to divulge information pertaining to the arrest or prosecution.

The **Equal Employment Opportunity Commission (EEOC)** is charged with enforcing **Title VII** of the **Federal Civil Rights Act of 1964** and has found that employment disqualification based on criminal records can have a disproportionate impact on minorities. On April 25, 2012, the EEOC issued revised guidance on the application of Title VII to criminal records.<sup>23</sup> The guidance has always recognized four important principles:

- Criminal records policies have a disparate impact based on race and national origin for purposes of EEOC investigations of criminal records-based charges.
- Employers cannot exclude applicants with criminal records unless they establish that there is a “business necessity” that takes into account three factors: the time elapsed since the offense, the seriousness of the offense, and the relationship to the job.<sup>24</sup>
- Across-the-board exclusions of categories of criminal records will usually violate Title VII.
- Employers cannot consider arrests that have not led to convictions.

The new guidance reaffirms these principles while providing enhanced guidance to the public, including illustrative examples, best practices and compliant policy design principles, relevant social science, and legal research. In addition, the new policy expressly addresses the ways employers should consider an applicant’s individual circumstances, including an endorsement of

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“ban the box” policies in which reserve inquiry into criminal for later in the hiring process.

**New York City** recently enacted a “**Ban the Box**” policy that prohibits city agencies and city contractors from inquiring into an applicant’s criminal record before or during the applicant’s first interview.<sup>25</sup> This policy was part of the Mayor’s Office Young Men’s Initiative, an effort to tackle the broad disparities slowing the advancement of black and Latino young men in New York City. Some agencies, such as law enforcement, are exempt from the policy.

## **B. Process of Purchasing Criminal Background Checks**

### **PURCHASING SCREENING SERVICES AND NEW USER AUDITING**

The process of purchasing a criminal background check or signing up for a background check service varies widely depending on the company. NY FCRA requires screening companies to “verify the identity of a new prospective user” prior to furnishing a consumer report.<sup>26</sup> In preparing this report, several background screening companies were approached to obtain services. The application process variation was astounding—ranging from little more than an email or fax verification of the business to a full-scale audit.

The audited screening process was a requirement of one of the largest consumer reporting agencies. The auditor was an independent contractor who worked with several credit reporting agencies. She revealed that the requirements of her audit were different for each company. For this screening company, she spent approximately one hour in our office interviewing the author. She asked questions about the use of the reports, the business activities, and staffing. She reviewed the physical security of cabinets where reports would be kept and the computers where reports would be accessed online. She took photos of the office, locks on doors and file cabinets, and business signs.

The application process of another large background screening company was dependent on the level of services sought. For companies seeking to conduct a large volume of reports, where the background screening company would provide some volume discounting, the screening process required an audit.

However, if the company chose an “express” version of services, no audit was required. The difference between these two services was not the content of reports—the databases being searched and the information provided are the same. The difference is in the extra services provided and the volume discounting. For the enhanced services, the company provides FCRA consent form and notices to the user that are pre-populated with job applicant’s information. The user can also choose to pay extra to have the company send out FCRA-required forms on the user’s behalf. For the “express” services, FCRA forms are readily available, but have to be filled out and sent manually. Upon submitting an application for “express” service, the screening company indicated that they would call the main company number during business hours to confirm its existence. To the authors knowledge, no phone call was ever made. It is unclear whether this procedure is sufficient to meet the verification requirement under NY FCRA. It is also incongruous that some screening companies require stricter auditing process for services in which FCRA-compliance is easiest because it is handled by the screening company, while the services that leave FCRA compliance largely in the hands of the user are minimally verified by the screening company.

As described on page 9, some background screening companies disclaim that they are credit reporting agencies as defined by FCRA. The application process for these entities involves little more than entry of a credit card and business information; passwords to login to the database are emailed or faxed within hours.

FCRA imposes an obligation on background screening companies providing reports for employment purposes to obtain a certification from the user of the report that the user will comply with the authorization, disclosure, and pre-adverse action procedures described above. The steps that background screening companies take to insure that users actually read and understand these requirements vary greatly. Some require signed documents to be faxed or emailed, others merely require a checkbox to be marked at the time of purchase.

### MARKETING

The background screening business is a high-profit industry<sup>27</sup> and screening companies market their services to increase these profits. Companies use inflammatory and unattributed statistics about risk to market their products,

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while hiding the unreliability of the data they sell. Few companies are honest or upfront about the gaps in their data.

One exception is a screening company whose website outlines what is included in their “Multi (50) State Criminal Record & Sex Offender” database search, explaining:

*We only offer this search addition to a normal county or statewide criminal check (depending on the location) because there are too many gaps in the data and it would be negligent if one were to rely solely on the database for a criminal check.*

*A prime example of the gaps is that in most states, the only names that show up are those from the Department of Corrections (DOC) files of those persons who were sentenced to serve MORE than 1-year in state prison.*

*If a defendant's case resulted in probation or a fine, the chances are close to 100% that the name will NOT show up in DOC files.<sup>28</sup>*

However, most companies obfuscate this information in fine print, or simply state that their records come from state department of corrections, without further explanation. In general, the marketing of background screening services seems designed to hide the limitations of the data provided.

## II. SOURCES OF AND ACCESS TO CRIMINAL HISTORY INFORMATION IN NEW YORK

Given the prevalence of use of criminal history information, questions inevitably rise about the source of criminal history information. Nationwide, background screening is a big and profitable industry.<sup>29</sup> There are no licensing requirements to become a background screening company, thus the number of companies operating in this field is unknown.<sup>30</sup> Given the legal requirements to maintain procedures to ensure the accuracy of the information they report and the practical realities, all criminal history information originates from government or judicial sources. However, after the information is obtained from the original government source, it is bought and sold between screening agencies.<sup>31</sup>

The extent and ease of obtaining criminal history information from official government sources is wholly dependent on the state in which the criminal justice system contact occurred. Courts in every state have different laws governing the availability of criminal justice system records. Criminal record information can come from the courts, law enforcement, or corrections departments. Some states have it online, while others require submission of a form. Furthermore, states vary in their laws governing the confidentiality of the records and availability of sealing or expungement.

Beyond the law, cost is a driving factor in the availability of criminal record information. Many states and counties charge fees to access criminal justice information. In turn, background check companies pass these costs onto the consumer as “surcharges” to the cost of searching their database. New York State criminal history information can come from a variety of sources, with varying ease of availability and varying costs, as described below.

## **A. New York State Sources of Criminal History Records**

### ***Department of Corrections and Community Supervision Inmate Population Information Search***

The most widely-used free and public source of criminal record information is the inmate finder provided by the Department of Corrections and Community Supervision (DOCCS). The Inmate Population Information Search<sup>32</sup> is available online, without registration, and without any access restrictions. There is no requirement that a full name be provided for a search; partial name searches are allowed. Therefore, the information can be accessed almost instantaneously by screening companies. Until 2010, the Inmate Lookup service included all inmates housed in a New York State Prison since 1970, excepting youthful offenders. A legislative change in 2010 required removal of those serving sentences for a limited number of non-violent felony convictions five years after their release from incarceration, or from parole or post-release supervision.<sup>33</sup>

Due to the direct or indirect costs of obtaining criminal justice information from any other source, this is the sole source of information that many background check companies use. There are no restrictions on access to the website, therefore it can be accessed by computer programs that can automatically pull

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the information. The result is that those individuals whose information is contained in the DOCCS inmate finder are more likely to be in every background check company database.

The individuals in the Inmate Search are people who served a prison sentence in a state-operated facility, in other words, people who were sentenced to one or more years of incarceration. People who receive a lesser jail sentence or any sentence that does not involve incarceration are not listed in the Inmate Search. Thus, initial inclusion in the Inmate Search is solely dependent on a person's sentence, not on the crime of conviction. There are many felonies, both violent and non-violent, for which the sentencing range can extend from probation or other non-incarceration sentences to sentences of imprisonment of many years.

The result is that if two people are convicted of the exact same felony crime, but one receives a sentence of one year, while the other receives a 5-year probation sentence, only the person who was incarcerated would have their criminal record information available free-of-cost to the public and background screening companies. The arbitrariness of this scheme is troubling. While some may argue that if a person received a prison sentence instead of a probation sentence, then there must have been something "worse" about the crime. That would be an easy simplification. As any attorney working in the criminal courts knows, the ultimate disposition of a person's case is affected far more by arbitrary elements than by the person or crime. In particular, a person's sentence is heavily dependent on the lawyer that is assigned or retained, the judge to whom the case is assigned,<sup>34</sup> and the assistant district attorney who prosecutes the case. All of those factors are determined by arbitrary administrative rules or chance. Furthermore, there is extensive research and scholarship on racial disparities in sentencing.<sup>35</sup> This research shows that minorities receive harsher sentences for the same crimes than whites. As a result, two similarly situated people can have widely different experiences when seeking employment due to the ease of availability of their conviction information based solely on their sentence.

The New York City Department of Corrections (DOCS) also has an Inmate Lookup Service available freely to the public online.<sup>36</sup> This service contains information about those who are being detained pre-trial and those sentenced

to incarceration for a period of one year or less. The information is removed 30 days after the release of the inmate. This information does not include arrest or arraignment charges, thus it is of little use for criminal history screening purposes.<sup>37</sup>

### **Office of Court Administration (OCA)**

The Office of Court Administration (OCA) is the administrative arm of the New York State Unified Court System. As such, they are the keeper of court filings, including criminal case records. OCA provides criminal conviction information to the public in two ways: (1) their fee-based Criminal History Record Search service or (2) access to records at the Courthouse.

#### **CRIMINAL HISTORY RECORD SEARCH (CHRS)**

The New York State Office of Court Administration (OCA) provides a New York Statewide criminal history record search (CHRS) for a fee of \$65.00. This record search is available to any person and there are no limitations on its use. The search is strictly based on exact match of name and date of birth, variations on names or dates of birth are not included. The search covers public records relating to pending cases and convictions of criminal cases originating from County, Supreme, City, Town and Village courts of all 62 New York counties. However, there is no information available from Town and Village courts from 1991 to 2002.<sup>38</sup> As of July 20, 2007, OCA reports that they have stopped including information regarding violations or traffic infractions.<sup>39</sup> Only information for pending criminal cases, misdemeanor convictions, and felony convictions appear in the reports.

A CHRS search can be initiated in several ways. Paper submissions can be mailed or submitted in person to the administrative office in New York City. According to their website, applications that are hand delivered by 11:30 a.m., in most cases are completed by 4:30 p.m. the next business day. The results of the search can be picked up in person, mailed, or emailed. Business entities and corporations can also apply for “Direct Access” service. To be eligible for direct access, an entity must establish that they have previously used CHRS within the last 6 months totaling, at a minimum, 5 to 10 separate search requests. Once accepted for Direct Access, entities can submit CHRS requests online 24 hours a day, 7 days a week. The searches conducted are

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the same, but results are typically provided in 4-5 hours. The cost for “Direct Access” is the same--\$65.00 per search.<sup>40</sup>

As far as our investigation has revealed, OCA does not sell its records in bulk, as do many jurisdictions.<sup>41</sup> OCA charges \$65 for every record that is accessed. This cost provides an innate barrier to criminal court records being used by screening companies. It is certainly not included in ‘national criminal record searches.’

#### COURTHOUSE ACCESS

For any case that has not been sealed or is not governed by any confidentiality statute, the court file remains open to the public for in-person inspection at the courthouse. The clerk’s office in the court where the conviction occurred or where the case is currently pending maintains the original file. Some parts of the court file will not be made available to a member of the public, such as the RAP sheet. However, the complaint, which lists the charges and allegations, is available, as are the notations of the judge from each court date and the notes on the ultimate disposition of the case. Due to the volume of cases in some jurisdictions, such as Kings or Bronx Counties, criminal files that are several years old are held off-site. To get access, a request must be made at the clerk’s office to retrieve the file. In our experience, it can take between one and six weeks for the file to become available, depending on the court.

#### ***New York State Division of Criminal Justice Services (DCJS)***

The New York State Division of Criminal Justice Services (DCJS) is the central repository for New York criminal records. The Division is also responsible for New York’s sex offender database and DNA database. An individual’s criminal history at DCJS consists of a record of all fingerprintable arrests, the charges reported with the arrests, the prosecutorial and judicial actions in disposing the charges, and custodial and supervisory sentence information.<sup>42</sup>

DCJS only releases criminal record information in two circumstances, outside of law enforcement purposes. First, DCJS allows an individual or his/her attorney to obtain a copy of all criminal history information maintained on file at DCJS pertaining to him or her or a response indicating that there is no criminal

history information on file.<sup>43</sup> This report will include every incidence where a person was fingerprinted by law enforcement, including cases that have been sealed or are confidential. Due to the sensitive nature of this information, they will not provide criminal history information to a third-party requestor other than an attorney.<sup>44</sup>

Second, when a person applies for a job that requires an occupational license to perform, they are fingerprinted and their record is provided to the government agency that issues the licenses. Unlike records that are provided upon an individual's request, the criminal records that are provided for occupational licensing purposes do not contain sealed information. There are no laws that authorize DCJS to issue criminal record information to the public. Thus, the records at DCJS are unavailable to background check companies.

According to a 2008 survey administered by the Bureau of Justice Services, DCJS reported that there were 7,049,600 individuals with records on file at DCJS.<sup>45</sup> 88% of arrests in DCJS's database have final dispositions recorded; looking at felony charges alone, 89% have final dispositions recorded.<sup>46</sup> DCJS also provides a criminal history record report where authorized by State, federal, or local law. Generally, this type of access is for employment and licensing purposes. Over 100 occupations in New York State require some kind of licensing or certification by a state agency.<sup>47</sup> In 2008, DCJS processed 569,900 fingerprint requests that were for noncriminal purposes, i.e. for employment and licensing purposes.<sup>48</sup> This figure does not include occupations such as home health care aids, commercial drivers, and civil servants, nor does it include requirements by municipalities or other local laws.

### **Police Records**

Law enforcement agencies collect large amounts of arrest data and there are some ways in which the public can access parts of this data, depending on the jurisdiction. Police records are housed and maintained by individual law enforcement divisions so there is no consistent or broad access. Law enforcement data is typically limited to arrest data, so it is of limited use, particularly because it is illegal in New York for an employer to inquire about arrests or sealed cases and adjudications.<sup>49</sup> Police records are not confidential unless the arrest is resolved in favor of the individual, e.g., there is a decision to not prosecute the person, the case is dismissed or sealed, or the case is disposed with a non-criminal offense or adjudication.<sup>50</sup>

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Several sheriffs' offices in upstate New York sell or provide some criminal history information. Both Ulster County and Syracuse County Police Departments have online listings of individuals with active warrants.<sup>51</sup> The most egregious and illegal use of arrest data is the Criminal History Arrest Incident Reporting System ("CHAIRS") in Onondaga County. The problems with the CHAIRS system were studied and documented by the Center for Community Alternatives (CCA) in March 2011.<sup>52</sup>

Initiated more than three decades ago as a law enforcement investigation tool, the CHAIRS system calls upon the various law enforcement agencies in Onondaga County to enter arrest information into a shared database.<sup>53</sup> Several years after implementing the CHAIRS system, the Sheriff's Department began to make CHAIRS reports available to employers, volunteer organizations, and landlords for a \$10 fee.<sup>54</sup> The Sheriff's Department promoted the use of these reports on its website as criminal "background checks."<sup>55</sup>

The use of these reports in Onondaga County has become ubiquitous and many employers, volunteer organizations, and landlords use the CHAIRS reports to screen applicants for jobs, volunteer opportunities, and housing.<sup>56</sup> The CHAIRS report does not contain complete information about a person's criminal history; it contains only a list of a person's arrests in Onondaga County without any information about whether or not the arrest actually resulted in a criminal conviction.<sup>57</sup> The CHAIRS report includes not only arrests for criminal offenses, but also arrests for a variety of non-criminal activities—traffic infractions, non-criminal infractions such as disorderly conduct or open container violations—regardless of whether the arrest was ultimately dismissed or sealed.<sup>58</sup>

In response to a request from the community, CCA conducted a study to evaluate the types of mistakes that occur on the CHAIRS reports and to determine the prevalence of mistaken information.<sup>59</sup> CCA's study revealed that a significant majority of CHAIRS reports includes information about one or more arrests that are protected from disclosure by New York's sealing statutes, Human Rights Law, and the Fair Credit Reporting Act.<sup>60</sup> More specifically, CCA's study found that "64.3% of the CHAIRS reports reviewed contained at least one arrest that should not be disclosed under New York's Criminal

Procedure Law.”<sup>61</sup> CCA also concluded that “Because there are so many arrests mistakenly listed on the CHAIRS report, those employers who use such reports as a criminal background check are at significant risk of committing an unlawful discriminatory practice.”<sup>62</sup>

The Sheriff of Onondaga County, Kevin E. Walsh, admitted to the *Syracuse Post-Standard* that the CHAIRS reports may erroneously contain arrests that have been sealed.<sup>63</sup> He asserted that “People have to take a little responsibility for themselves,” and seek to correct these mistakes.<sup>64</sup> He further stated that the Sheriff’s Department would remove arrests only when “proof” is provided, in direct contravention of New York’s sealing laws.<sup>65</sup>

## **B. Criminal Background Screening Company Data**

When a background screening company obtains or buys criminal history data, the information becomes part of the company’s internal database. Background screening companies call these their “proprietary” databases.<sup>66</sup> Once a background screening company has conducted an applicant search on behalf of an employer, they retain copies of that data in their proprietary databases. Companies sell their database content to other companies or larger companies purchase smaller companies and subsume the proprietary data. For example, one of the largest players in the background screening industry, LexisNexis, acquired Choicepoint for \$4.1 billion, which was at that point also one of the largest background screening companies.<sup>67</sup> When information is obtained in this manner, the background screening company still has an obligation to follow their procedures to ensure the “maximum accuracy” of the data, but many fail to update the data in databases they have purchased.<sup>68</sup>

## **III. ACCURACY OF CRIMINAL HISTORIES AND BACKGROUND CHECKS IN NEW YORK**

From 2011-2012, Youth Represent undertook documenting the prevalence errors in criminal background checks. Due to the varying sources of criminal history information, and the attendant costs, we ran three distinct types of background checks on different individuals: an official DCJS fingerprint-based history for 398 individuals, a private background screening company “national criminal history search” for 100 individuals,

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and a paid online sex offender search from a non-FCRA entity for 100 individuals. Errors and mismatches were present in every type of search.

Overall, we found a 22% error rate on records from DCJS. The total error rate for the private background screening “national criminal history search” was 66%. Of those private background screenings where a criminal record was identified, 46% contained errors. Finally, we found 35% of individuals we checked, none of which had a sex offense, matched the name of a registered sex offender when we performed a fee-based sex offender search. Of those individuals whose name matched a registered sex offender, there were 149 matches where the sex offender registry did not list a date of birth. Without the date of birth listing, misidentifications can easily occur.

### **A. Errors in Government Criminal Records**

Youth Represent provides legal services to youth age 24 and under in New York City who have had some contact with the criminal justice system. Part of Youth Represent’s legal services include assisting youth to obtain their official RAP Sheet from DCJS, to ensure these youth understand their criminal histories and their corresponding rights and responsibilities when seeking employment and education opportunities. In 2011, Youth Represent obtained rap sheets on behalf of 398 youth. In New York, youth are automatically tried in the adult system at the age of 16, and for some offenses as young as 13. Therefore, although our clients are young, many have adult criminal records.

#### ***Criminal Records from DCJS***

Errors in criminal records can happen from the moment there is police contact until well after disposition. There are four entities that report information to DCJS that is recorded on a person’s criminal history: arresting agency, prosecution, judicial, and corrections. DCJS has an 85-page manual governing the standard practices for fingerprint processing and data reporting for these four entities, but it has little control when these entities fail to follow the manual.<sup>69</sup> The data recording systems do not currently have the quality control checks that would prevent many errors from being created.

In the past year, Youth Represent obtained 398 criminal histories from DCJS on behalf of indigent youth. Because we are attorneys who were requesting the RAP Sheets on behalf of individuals, we have access to the entire record, including dismissed, sealed, and confidential cases. We found errors in 22% of the records we obtained from DCJS. Our office attempts to correct these errors, but part of the difficulty of correcting errors is determining who made the error. In order to correct an error, DCJS must get official documents with the corrected information from the entity responsible for the error.

The errors that we identified can be categorized into three larger issues that can all have significant effects on employment and licensing:

■ **Failure to Seal**

- Failure to seal after decline to prosecute decision by police
- Failure to seal after decline to prosecute decision by District Attorney
- Failure to seal after termination of case in favor of the accused (New York Criminal Procedure Law section 160.50, N.Y. Family Court Act section 375.1)
- Failure to seal termination of case by conviction for non-criminal offense (New York Criminal Procedure Law section 160.55)
- Failure to seal upon conditional sealing order for certain drug offenses (New York Criminal Procedure Law section 160.58)
- Failure to make confidential after youthful offender adjudication (New York Criminal Procedure Law section 720.35)

■ **Duplicate Entries**

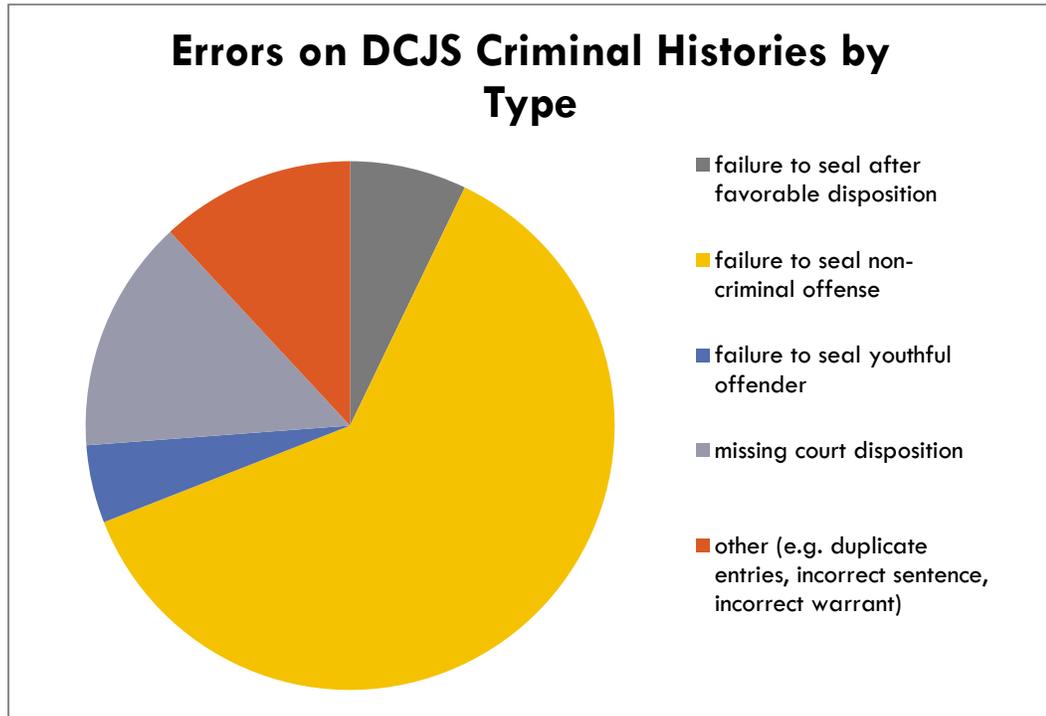
- Reporting one case multiple times
- Multiple fingerprint entries for one course of conduct (police)
- Reporting disposition and sentencing information in separate cycle from arrest charge or court information

■ **Missing Dispositions**

Most of these errors make it appear that a person has a conviction where none actually exists. When cases are missing dispositions, it appears as if the case is still pending. DCJS records only have arrest, arraignment/indictment, disposition, and sentencing information. Thus, a case that has no disposition

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data appears the same as an open case that is still being litigated in court. All of these errors impact a person's employment and licensing prospects.



### **C. Errors in Background Screening Reports**

We took a random subset of 100 youth and used a private background screener to obtain a 'National Criminal History Search.' We compared the results of the national criminal history search to the results of the DCJS background. Because of the 22% rate of error in DCJS records as described above, we had identified errors on some of the DCJS records of the 100 clients and had those errors corrected prior to running a private background report.

We used one of the lower-priced 'National Criminal History Searches' that was available from one of the largest background screening companies in the United States. It was not initially clear from the company what information this searched. After signing up for the service, we were able to learn that it pulled

public information from states and pulled information from their proprietary database. Since our clients were all New York residents, we ultimately uncovered that the search included only the New York DOCCS inmate finder and the company's proprietary database.

Next, we ran a "Sex Offender Search." The sex offender search was a paid search performed through a company that claims it is not an entity covered by FCRA.<sup>70</sup> Their terms of services state that the company "is not a consumer reporting agency and data provided by . . . does not constitute a 'consumer report' as that term is defined in the Fair Credit Reporting Act (FCRA), 15 U.S.C.A. sec 1681 et seq." They further advise users, "Before using any data obtained from any source as a factor in establishing a consumer's eligibility for credit, insurance or employment you should consult with your attorney for uses that might be covered by FCRA."

The problems and inaccuracies contained in these private background searches are described below.

### ***National Criminal History Screening***

In our criminal history screening of 100 youth, we found that overall, 66% were inaccurate. The most common inaccuracy was underreporting of a person's record. This was due solely to the limited nature of the search—because the "national criminal history screening" only covers New York DOCCS Inmate Finder and the company's proprietary database, most convictions were not reported.

Shockingly, for those people for whom one or more convictions were identified, 64% were inaccurate. The errors all made a person's record look worse. In all, we identified five types of errors in the criminal background screenings we performed, including:

- Reporting "Discrepancy" if any record exists
- Underreporting
- Reporting Dismissed Charges
- Reporting Violations of Probation as separate or new convictions
- Reporting Youthful Offender Adjudications.

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**66% of criminal screening reports conducted were inaccurate.**

**“DISCREPANCY” – THE LANGUAGE OF CONVICTION REPORTING**

The first problem with the national criminal history screenings we conducted was the language of reporting. The front page of every report contained a summary box that appeared like this:

<b>Verification</b>	<b>Status</b>	<b>Discrepancy</b>
National Crim Search	Complete	Yes

If there was any criminal history information reported, the “Discrepancy” field indicated a “Yes” in red print. If there was no criminal history reported then the “Discrepancy” field indicated a “No” in black print. This practice is misleading at best, and discriminatory at worst. “Discrepancy” is defined as “a conflict or variation, as between facts, figures, or claims.”<sup>71</sup> At no time did the screening company ask for any parameters or any applicant answers regarding criminal history information. Thus, there are not two or more claims or facts from which a discrepancy can result. The only conclusion is that the screening company assumes that the existence of any criminal history is a discrepancy between the universal preference for workers without any criminal history, though such a preference is illegal.

**UNDERREPORTING**

At first blush, from the point of view of those seeking employment, underreporting of criminal convictions does not seem like a problem. However, if an employer asks about criminal records and the applicant gives a different account of their history than that reported by a background screener, it raises

further questions. If the conviction reporting in a background check is different than the correct conviction charges reported by an applicant, an employer may believe the applicant is lying and could refuse to hire the person on that basis.<sup>72</sup> Employers, who are already unlikely to hire those with criminal records,<sup>73</sup> may not make a further inquiry to have the discrepancy explained.

Even where this limited search found a criminal conviction, 33% of those reports contained inaccuracies. We found three types of inaccuracies:

#### REPORTING DISMISSED CHARGES

Most often, when a person pleads guilty to one charge, the remaining charges are dismissed. If those charges are dismissed, they are sealed. In multiple records, a case listed that either: (1) the person had been convicted of multiple counts when the person was actually only convicted of one, or (2) the remaining charges were dismissed, but it listed the charge with a note that they were dismissed instead of omitting the charges. This error makes it appear as if the person were guilty of more charges and makes the case seem more serious because there are multiple charges showing instead of just the disposition charge.

#### REPORTING VIOLATIONS OF PROBATION AS SEPARATE OR NEW CONVICTIONS

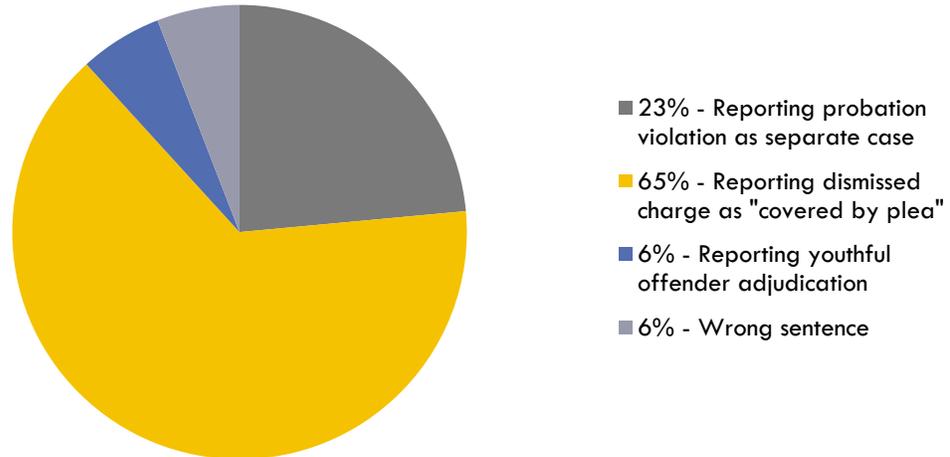
In several instances, the background reports listed violations of probation as separate cases. This makes it appear as if a person has an extra conviction. However, violations of probations, when sustained by the court, usually involve re-sentencing. They are not separate charges or convictions. Interestingly, there was one report where a violation of probation that resulted in resentencing was correctly included in the case listing. Yet, most were listed incorrectly as separate cases.

#### REPORTING YOUTHFUL OFFENDER ADJUDICATIONS

A particularly egregious mistake is the listing of a youthful offender adjudication. Youthful offender adjudications are not convictions,<sup>74</sup> and the records of adjudications are confidential.<sup>75</sup> One record not only listed a youthful offender adjudication and the sentence of five years of probation, but also listed a violation of that probation sentence as a secondary case.

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## Inaccuracies in Reports where Some Conviction History was Reported



### **Sex Offender Search**

The indiscriminate use of sex offender searches can have devastating consequences. Due to the inflammatory nature of the crime charged, employers are wary of hiring a person upon any report that the individual could be a sex offender, even if those reports are based on little data. Sex offender registry data is easily available to background screening companies and the public, and it is passed on to users with little to ensure its accuracy.

All 50 States have online sex offender registries that anyone with internet access can view.<sup>76</sup> As of 2009, all public state sex offender registers are now also included in the Dru Sjodin National Sex Offender Public Website (NSOPW) hosted by the Department of Justice.<sup>77</sup> The NSOPW simply pulls the information from the various state sites into one location. However, the NSOPW disclaims all liability for the accuracy of the information on its website; before accessing a search, a screen appears with the conditions of use that contains the following warning:

*Information from the various Jurisdiction Websites is not hosted by the Department, and the Department has neither responsibility for nor control over the information available for public inspection or search from individual Jurisdiction Websites that are accessible through this Website. The Department does not guarantee the accuracy, completeness, or timeliness of the information contained in Jurisdiction Websites regarding specific offenders or with respect to the omission of information about other offenders who may be residing, working, or attending school in the vicinity of any location that is the subject of any search using this Website. In this regard, the Department accepts no responsibility or liability for damages of any kind resulting from reliance on this information or lack thereof.<sup>78</sup>*

Private background screening companies take this offender registry information, gathered from either individual state websites or the NSOPW and sell it online. Some companies do this as part of an employment screening package or an add-on search to an employment screening package. Other companies maintain the position that they are simply disseminating public data and disclaim that they are covered by FCRA, thus they are not required to ensure its accuracy.

A 21-year-old Youth Represent client, James,<sup>79</sup> was hired to work at a New York organization. After starting work, the organization did a background check. His name came up as matching a sex offender in Virginia, although his name only matched an alias of the offender. The day and month of birth matched James's, but the year of birth was different by seven years. The background screening company included a low quality picture of the offender and it did not look like the client, although their race was the same. Despite the questionable details, the screening report boldly stated that there was a sex offender match. While the organization wanted to keep him on staff, they worried about their liability and intended to discharge the client based on the report unless he could clear it up. James told them he had never lived in or been to Virginia in his life because he had been in foster care in New York since the age of eight. He tried getting documentation to prove that he had been a ward of New York State his entire life, and thus had never lived in Virginia, but was unsuccessful.

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James was lucky and was able to keep his job with our intervention. However, his story illustrates the problems with sex offender registries. Afraid of liability or of having a sex offender on staff, companies make decisions based on scanty details on background screening reports.

We purchased a sex offender public database search; prior to purchasing, the user must click a button that affirms they are not using the data for employment purposes. We searched 100 names on this sex offender database; because we had their official records, we knew that none were registered sex offenses. As one would expect, those people with unique names had no matches. Those with common names had more matches. We further looked to see how many of those with name matches also had a state match, i.e. their current state of residence is the same state as a registered sex offender of the same name. We also checked to see how many name matches had dates of birth within plus or minus four years of their actual date of birth.

The results of our screen reveal the potential for harm when this data is not appropriately checked and vetted. 35% of our data population had a sex offender registry name match. One person had a total of 311 matches to his name. Eight individuals had a name and state match, but there were a total of sixteen matches because there are multiple offenders in some states with the same name. Since New York lists dates of birth on their registry, a person could theoretically weed out name-and-state matches.

However, another 18% had a name match with a state registry that does not include date of birth information; of those 18 individuals, there were a total of 149 name matches without corresponding dates of birth listed. Thus, if an employer or screening company believes that an offender may have moved states or was previously registered in another state, they cannot easily match the information with a date-of-birth. The variability of information and the potential for misidentification are significant.

Each state has different information included in its registry. Unfortunately, the information included on most states registries are focused far more on listing lewd details of the underlying crimes than on ensuring accurate identification of offenders. The controversial Adam Walsh Act of 2006 requires states, among other things, to include certain information in the registration, and justice

program funding is contingent on compliance with this law.<sup>80</sup> While standardization of useful identification information could be an important tool to promote accurate identification given prevalent use in employment screening, the law does not require that standardized information be included in publicly accessible registries. Furthermore, the law had several other troubling measures, such as its retroactive application, removal of statutes of limitations, requiring registration of juveniles as young as 14, and making failure to register a felony offense. Many states have not yet complied and the Act does not standardize the information available to the public, which gets used in employment screening.<sup>81</sup>

Most states include the offender's date of birth, but several large states like Arizona, Illinois, and Maryland do not. While all registries have photographs of offenders, most do not list the date of the photographs. Very few list the first date the offender was registered or the date of conviction. Finally, no state registries include information about states where the offender was registered in the past. The differing details from state-to-state make identification difficult, and this can have a destructive effect on employment.

*35% of people we screened, none of whom had sex offense convictions, matched the name of a registered sex offender registry; one person matched 311 names.*

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## IV. RECOMMENDATIONS

### **LIMIT INFORMATION ON DOCCS INMATE FINDER AND CREATE ACCESS LIMITATIONS**

The wide, free access to the DOCCS Inmate Finder results in exceptionally unequal reporting of felony criminal records. While DOCCS recently limited reporting to five years after completion of sentence for people with some non-violent felony offenders, this does not go far enough. DOCCS is not a state criminal record repository, nor are they the keepers of court records. Yet, the inmate finder has become the *de facto* primary source of criminal record information in New York. DOCCS should:

- remove inmate information upon release;
- require all users to register before using the site and affirm that the information is not being sold or used for employment purposes.

### **NEW YORK SHOULD REQUIRE ALL BACKGROUND SCREENING COMPANIES TO STATE SOURCE OF INFORMATION FOR EACH CRIMINAL RECORD FOUND AND INCLUDE A COPY OF ARTICLE 23-A WITH ALL CRIMINAL HISTORY REPORTS THAT ARE GOVERNED BY THE NEW YORK FAIR CREDIT REPORTING ACT.**

Most background screening companies bury information about the sources of criminal record information. We found that most background screening companies do not go to the official keeper of court records when performing background checks. Not only is this confusing for employers who are seeking services, it is also difficult for a job applicant to determine the sources of inaccuracies that appear on their records. New York should amend its FCRA to require background screening companies to clearly state the source for each criminal record it reports.

The NY FCRA requires employers to provide applicants with a copy of Article 23-A when they run a background check on an applicant. However, many employers contract with background screening company to have the screening company send all of the information to the applicant when a criminal record screen contains negative information. Thus, this step can be easily overlooked. New York should amend the state FCRA to require all consumer screening companies to send a copy of Article 23-A with all reports that contain New

York state information, whether they are being sent to the employer or to the applicant.

**AMEND THE ADAM WALSH ACT TO REQUIRE STATES TO INCLUDE STANDARD IDENTIFYING INFORMATION IN ALL PUBLIC REGISTRIES.**

Misidentification is a serious problem when it comes to sex offender registries. Yet, federal law does not currently mandate information states must include in publicly available registries. The Adam Walsh Act should be amended to require states to include: date of birth, first date of registration, and identifying characteristics that are on all drivers' licenses—height, weight, eye color. These simple items of identifying information would make it easier for screening companies and employers to screen out false matches.

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## ENDNOTES

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<sup>1</sup> Soc. For Human Res. Mgmt., *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010), available at [www.shrm.org/Research/SurveyFindings/Articles/Pages/ConductingReferenceBackgroundChecks.aspx](http://www.shrm.org/Research/SurveyFindings/Articles/Pages/ConductingReferenceBackgroundChecks.aspx).

<sup>2</sup> Center for Community Alternatives, *The Use of Criminal History Records in College Admissions Reconsidered*,

<sup>3</sup> Rodriguez, Michelle Natividad & Maurice Ensellem, *65 Million Need Not Apply*, National Employment Law Project, March 2011 at 3.

<sup>4</sup> Bushway, Shawn D. and Peter Reuter, *In Preventing Crime: What Works, What Doesn't, What's Promising*. A Report to the United States Congress, prepared for the National Institute of Justice, 1997, Chapter 6; Travis, Jeremy, *But They All Come Back: Facing the Challenges of Prisoner Reentry*. Washington D.C., The Urban Institute Press, 2005.

<sup>5</sup> 15 U.S.C. § 1681 et seq.

<sup>6</sup> “The term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engaged in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.” 15 U.S.C. § 1681a(f).

<sup>7</sup> 15 U.S.C. § 1681b(b)(2).

<sup>8</sup> 15 U.S.C. § 1681b(b)(3).

<sup>9</sup> 15 U.S.C. § 1681b(b)(3).

<sup>10</sup> 15 U.S.C. § 1681m(a).

<sup>11</sup> 15 U.S.C. § 1681b(b)(1)-(3).

<sup>12</sup> N.Y. Gen. Bus. Law § 380.

<sup>13</sup> N.Y. Gen. Bus. Law § 380-j(a)(1). “Crime” is defined as a misdemeanor or felony under Penal Law § 10.00(6). Thus, credit reporting agencies cannot report information about violations of the law or traffic infractions.

<sup>14</sup> N.Y. Gen. Bus. L. § 380-j(e).

<sup>15</sup> N.Y. Gen. Bus. L. § 380-k.

<sup>16</sup> N.Y. Gen. Bus. L. § 380-l.

<sup>17</sup> FTC Press Release, *FTC Warns Marketers That Mobile Apps May Violate Fair Credit Reporting Act*, February 7, 2012, at <http://www.ftc.gov/opa/2012/02/mobileapps.shtm>, accessed May 2, 2012.

<sup>18</sup> N.Y. Gen. Bus. L. § 380-g(d).

<sup>19</sup> N.Y. Lab. L. § 201-f.

<sup>20</sup> N.Y. Exec. L. § 296(16).

<sup>21</sup> N.Y.C. Admin. Code § 8-107.

<sup>22</sup> N.Y. Crim. Proc. L. § 160.50(3).

<sup>23</sup> Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e et seq., available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) (accessed May 2, 2012).

<sup>24</sup> These factors are commonly referred to as the “Green Factors” based on the decision in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977).

<sup>25</sup> Consideration of Criminal Convictions in Hiring, New York City Executive Order No. 151, August 4, 2011, available at [http://www.nyc.gov/html/om/pdf/eo/eo\\_151.pdf](http://www.nyc.gov/html/om/pdf/eo/eo_151.pdf) (accessed May 11, 2012).

<sup>26</sup> *Supra* note 15.

<sup>27</sup> Yu, Persis S. & Sharon M. Dietrich, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses*, April 2012, at 8.

<sup>28</sup> [http://www.fidelifacts.com/criminal\\_record\\_sex\\_offender\\_database.asp](http://www.fidelifacts.com/criminal_record_sex_offender_database.asp), accessed May 4, 2012.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Supra* note 27 at 22 (discussing the contract between Equifax and LexisNexis to sell data).

<sup>32</sup> DOCCS Inmate Population Information Search at <http://nysdoccslookup.doccs.ny.gov/> (accessed April 30, 2012).

<sup>33</sup> N.Y. Corr. L. § 9, Access to inmate information via the internet, reads:

Notwithstanding any provision of law to the contrary, any information relating to the conviction of a person, except for a person convicted of an offense that would make such person ineligible for merit time under section eight hundred three of this chapter or an offense for which registration as a sex offender is required as set forth in subdivision two or three of section one hundred sixty-eight-a of this chapter, that is posted on a website maintained by or for the department, under article six of the public officers law, may be posted on such website for a period not to exceed five years after the expiration of such person's sentence of imprisonment and any period of parole or post-release supervision; provided, however, that in the case of a person who has been committed to the department on more than one occasion, the department may post conviction information relating to any prior commitment on such website for a period not to exceed five years after the expiration of such person's sentence of imprisonment and any period of parole or post-release supervision arising from the most recent commitment to the department.

<sup>34</sup> Mosi, Secret, *Wide Sentencing Disparities Found Among U.S. Judges*, NY Times, March 5, 2012.

<sup>35</sup> Kansal, Tushal, *Racial Disparity in Sentencing: A Review of the Literature*, January 2005.

<sup>36</sup> NYC DOCS Inmate Lookup Service at <http://a073-ils-web.nyc.gov/inmatelookup/pages/common/find.jsf> (accessed May 2, 2012).

<sup>37</sup> Even if the NYC DOCS Inmate Lookup service included arrest or arraignment charges it is of limited use because the information is constantly fluctuating—people who are being detained pre-trial can be released at any time. If an individual is released and the case is resolved in favor of the individual or results in a non-criminal disposition, the background check company would be required to update this information or risk liability under both the federal and New York State FCRA's for failure to maintain accuracy of the data.

<sup>38</sup> Office of Court Administration, *Criminal History Record Search – Frequently Asked Questions*, at <http://www.nycourts.gov/apps/chrs/faqs.shtml>, accessed April 10, 2012.

<sup>39</sup> *Id.*

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<sup>40</sup> Office of Court Administration, *Criminal History Record Search – Online Direct Access*, at <http://www.nycourts.gov/apps/chrs/onlineirectaccess.shtml>, accessed May 1, 2012.

<sup>41</sup> *Supra* note 27 at 21.

<sup>42</sup> New York State Division of Criminal Justice Services, *New York State Standard Practices Manual, Processing Fingerprintable Criminal Cases*, September 2001, at 7.

<sup>43</sup> 9 NYCRR Part 6050.1.

<sup>44</sup> Importantly, DCJS will waive the fee for those who demonstrate that they cannot afford to pay. Those with the ability to pay must pay \$50, plus a fee to the third-party vendor who takes and transmits the fingerprints.

<sup>45</sup> Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2008*, at Table 1, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf> (accessed May 4, 2012).

<sup>46</sup> *Id.* The percentage of unreported dispositions that are still being adjudicated in the court system is not reported.

<sup>47</sup> Legal Action Center, *Occupational Licensing Survey, 2006*.

<sup>48</sup> *Supra* Note 38 at Table 1a.

<sup>49</sup> N.Y. Exec. L. § 296(16) (also known as the Human Rights Law); see also New York City Human Rights Law § 8-107(10).

<sup>50</sup> Collectively, these laws are known as New York’s Sealing Laws and are contained in Criminal Procedure Law §§ 160.50, 160.55, 160.58, or 720.35.

<sup>51</sup> Syracuse Police Department Active Warrant Search at <http://www.syracusepolice.org/warrants.asp> (accessed April 30, 2012); Ulster County Sheriff’s Office Active Warrant Search at <http://www.co.ulster.ny.us/sheriff/warrants/> (access April 30, 2012).

<sup>52</sup> Center for Community Alternatives, *A Report to the Alliance of Communities Transforming Syracuse (ACTS): The Use of CHAIRS Reports and Criminal Background Checks [March 2011]* at 4, available at <http://communityalternatives.org/pdf/CHAIRS-FullReport-FINAL-March2011-1.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 5.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> *Id.* at 11.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2.

<sup>63</sup> See Tim Knauss, “Critics say \$10 background checks sold by Onondaga County Sheriff are unreliable, overpriced,” *Syracuse Post-Standard*, December 9, 2009.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See e.g., National Association of Professional Background Screeners, *Criminal Background Checks for Employment Purposes*, at 5, available at <https://www.hrplus.com/LinkClick.aspx?fileticket=Fljnnll-I7A=&tabid=756> (accessed May 4, 2012); LexisNexis National Criminal File Information Sheet, available at

<http://www.lexisnexis.com/risk/downloads/literature/national-criminal-file.pdf> (accessed May 4, 2012); SentryLink Coverage state-by-state description of P.R.I.O.R.S. data, available at <http://www.sentrylink.com/web/ourData.jsp> (accessed May 4, 2012).

<sup>67</sup> Ellen Nakashima and Robert O'Harrow Jr., *LexisNexis Parent Set to Buy ChoicePoint*, Washington Post, February 22, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/21/AR2008022100809.html> (accessed May 2, 2012).

<sup>68</sup> *Supra* note 23, at 11.

<sup>69</sup> The manual is available online at [http://www.criminaljustice.ny.gov/stdpractices/main\\_menu.htm](http://www.criminaljustice.ny.gov/stdpractices/main_menu.htm) (accessed May 9, 2012).

<sup>70</sup> See the the box on *supra* page 7 for more information.

<sup>71</sup> Collins English Dictionary, 2011.

<sup>72</sup> If an applicant lies on a job application, the employer can refuse to hire on that basis. See Completing Employment Applications, National H.I.R.E. Network, [http://www.hirenetwork.org/employment\\_apps.html](http://www.hirenetwork.org/employment_apps.html) (accessed May 11, 2012).

<sup>73</sup> Pager, Devah, *The Mark of a Criminal Record*, AJS Volume 108 Number 5 (March 2003).

<sup>74</sup> N.Y. Crim. Proc. L. § 720.35(1).

<sup>75</sup> N.Y. Crim. Proc. L. § 720.35(2).

<sup>76</sup> Human Rights Watch, *No Easy Answers*, September 2007.

<sup>77</sup> Department of Justice, Dru Sjodin National Sex Offender Public Website, at <http://www.nsopw.gov/Core/About.aspx>

<sup>78</sup> <http://www.nsopw.gov/Core/OffenderSearchCriteria.aspx> (accessed May 9, 2012)

<sup>79</sup> Names and details have been modified to preserve confidentiality.

<sup>80</sup> See generally 42 U.S.C. § 16911. For the list of details that must be included in states' registries, see 42 U.S.C. § 16914.

<sup>81</sup> As of July 28, 2011, 24 states had "substantially" complied. See Office of Justice Programs, Department of Justice, Press Release, *Justice Department Finds 24 Jurisdictions Have Substantially Implemented SORNA Requirements*, July 28, 2011, available at [http://www.ojp.usdoj.gov/newsroom/pressreleases/2011/SMART\\_PR-072811.htm](http://www.ojp.usdoj.gov/newsroom/pressreleases/2011/SMART_PR-072811.htm) (accessed May 10, 2012).