

The Criminal Record:

Where It's Found and How It Gets There

When it comes to pre-employment screening, perhaps the most commonly misunderstood subject is the criminal record retrieval process. Contrary to what many people believe, there is no central source, database or repository from which criminal court record information can be accessed as needed.

Most criminal records must actually be tracked through the court system of the county in which the crime took place. Unfortunately, given the complex nature of the judicial process, this can be a tedious task.

Compounding the problem, is the existence of a diverse collection of marketers who sell employers criminal record data from sources that may be outdated and incomplete.

For employers seeking to conduct thorough background checks on prospective employees, a simple understanding of the criminal record process is necessary to lessen confusion on where the most accurate criminal record information is compiled and kept.



The Criminal Record Process In Brief

Confusion regarding the criminal record process comes from the extended system of checks and balances built into the law enforcement and judicial process systems to prevent wrongful accusation, heavy handed police governance, and cruel and unusual punishment.

No one can be arrested, tried and convicted of an offense by one single government agency. Police officers make the arrest, the district attorney decides if there is enough evidence to charge the person with a crime, and then must prove guilt by presenting the evidence to a judge or jury that determines the outcome of the case.

Further, jury decisions are subject to an appeal process by either the accuser or the accused. Also, judges and attorneys can work together to bargain for what conviction and penalty will be assigned in return for an admission of guilt. Finally, parole boards and judges can determine the disposition of any surviving record.

Different Records in Different Places

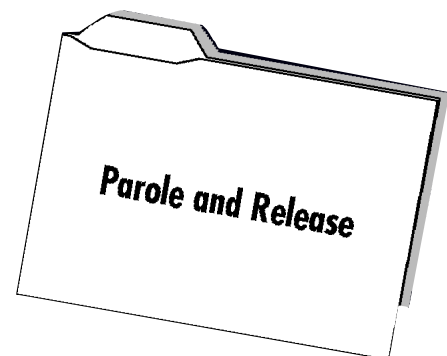
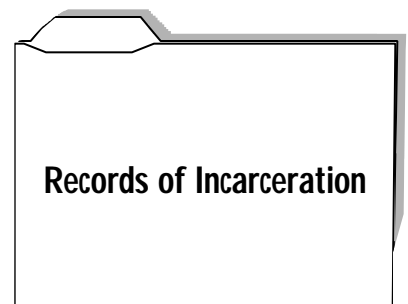
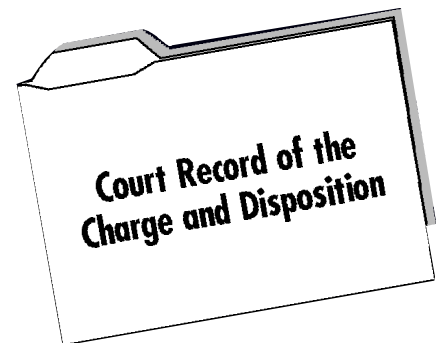
The end result is confusion in the creation and maintenance of the criminal record. In fact, for one person, there can actually be several different records floating around in different agencies at any given time: a police record of arrest, a court record of the charge and disposition, and records of incarceration, parole and release. All of these may or may not be forwarded to a statewide criminal repository.

As noted earlier, law enforcement agencies responsible for criminal investigations and arrests are separate entities from the courts that try cases and assign penalties. Records created by law enforcement do not serve the same purpose as those created by the courts.

Generally, the purpose of law enforcement records is to provide accurate identification of the suspect and documentation of the events surrounding the arrest. If a person was arrested but never prosecuted, there may be no record at the court level.

Court records document charges made, evidence presented and the disposition, or final result, of the case. Both law enforcement records and court records stand-alone, and no attempt is made to update law enforcement records with the eventual charges and dispositions of the cases.

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Consolidators: Single Purpose Databases

Adding to the confusion are groups that consolidate certain records to serve a specific purpose. Some states consolidate records into a central state repository. The purpose of a state repository is to assist law enforcement officers in identifying repeat offenders and fugitives from justice. Although counties are supposed to forward their criminal records to the state level, not all of them do so in a timely manner. Counties that do send records may send incomplete information. In addition, county court felony crimes can be plea-bargained down to misdemeanors that don't get forwarded to the state.

Other consolidators include state public safety departments, education departments, and health and human services departments. The purpose of these repositories is usually to carry out legislation requiring certification or screening of certain types of workers.

The two most common examples are the requirements in many states to check backgrounds of teachers and healthcare workers. Often the legislation is specific to certain kinds of prior behavior such as child abuse or sexual harassment. Also, depending on the law, arrest information may be disclosed in some cases. Legislation often requires the database to be created and maintained by a designated state agency.

Other types of repositories legislated by states are databases of released or paroled felons of certain types of crimes of violence. The two most common repositories are those that track the whereabouts of prior convicted sex offenders and child abusers. These repositories are maintained by various state agencies for single-purpose use as mandated by each individual state law. This information is provided by correctional institutions, parole officers and law enforcement agencies. Again, because they are single purpose, these repositories will not include any convictions for offenses not identified in the legislation. Also, access to this information may be limited to specific groups or agencies with a need for this information.

The only nationwide central repository of law enforcement information resides with the Federal Bureau of Investigation (FBI). Records are sent directly from various courts and police departments to the FBI National Crime Information Center. The FBI maintains such information to assist in carrying out its responsibility to pursue perpetrators of federal crimes such as kidnapping, terrorism and drug trafficking. Only law enforcement officials can access this information.

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Many of these consolidators get their information from the central state repository. Because the information called for is specific to certain kinds of offenses, it usually does not include felony convictions for non-identified offenses. Also, because the information is usually obtained from the central law enforcement repository it may not contain county court information about the charge and disposition of the offense.

Sources of Criminal Record Data for Employment Purposes

There are three main sources available to employers for criminal record information.

1. **County court records from over 3,100 county courts**
2. **State repositories of records from counties and law enforcement agencies**
3. **Tape or disk copies of state repositories**

The difference between these sources is largely a function of how current and relevant the information is to an employer.

County records are the most current and accurate because, as discussed earlier, the charge and disposition of charge originates at the county courthouse. County records are also easily sorted between felony and misdemeanor crimes, which is an important consideration when using criminal record information in the hiring decision.

State repositories lag county court records in accuracy because of the time it takes to collect records from each county court and update the repository. In some states this can be several months. State repositories also include arrest information, which may not be applicable for use in the hiring process.

Tape and disk copies of state repository information came into being as a way to reduce the time states spend on requests for information.

Additionally, because tape and disk information is usually sold through a re-marketer, the information can be several releases behind data that the state has provided.

All three types of records are available to employers who want to perform background checks as part of their hiring process. However, careful thought and consideration must be given when employers are deciding which source will best serve their needs.

It is important to remember that marketers of court record information do not usually volunteer the source of their information. Also, many marketers are not familiar with laws and regulations governing the use of criminal record information in the hiring process and many employers do not think to ask about the source of records and the appropriate use of such information.

Note: One source of criminal record information not focused on in this paper is the federal criminal court system, which is a distinct and separate system from individual state governments. There are 94 U.S. District Courts, where federal crimes are recorded. Most records at the federal level are not available through counties or state repositories. The primary actions recorded at this level involve crimes of immigration, mail fraud, weapons, interstate drug crimes and civil rights violations.

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These copies of state repositories are the least current and accurate because they lag the state repository by several months. Most states do not provide updates more than four times a year.

County Searches vs. State Repositories

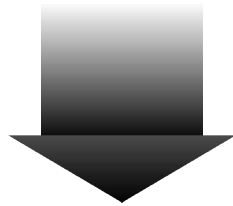
Arrest
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Arraignment
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Trial, Conviction and Sentencing

County Record

These records contain the most complete information available.

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Most counties forward all or part of this information to a state repository.

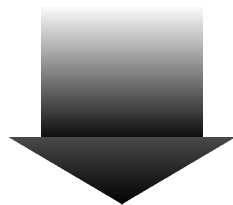


State Repository

Sometimes this information is only available to certain state agencies for specific purposes.

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Some states make tape and disk copies of records, which then can be sold to re-marketers.



Re-marketers

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Some re-marketers sell this information to employers rather than conduct live searches at the source.

Strengths

Accuracy and completeness: County courts often offer more complete data pertaining to a particular case than the state repository (particularly because of problems created at the state level by time lag, staff shortages, and legislative restrictions). The end result is that in most states the counties are the best source of current, accurate and complete records.

Turnaround: County courthouses offer quicker turnaround on searches than centralized state repositories. No state repository currently processes phone requests. However, many counties across the country allow phone searches.

Weaknesses

Decentralization: To do a thorough check, each county that may have had jurisdiction over the person should be searched. An incomplete history of the locations with which the individual has had contact, increases the risk of conducting an incomplete county-by-county search.

Strengths

Convenience: Instead of searching every county in which an applicant may have been associated, the researcher contacts only one state office. This is particularly helpful if an individual has lived or worked in several locations throughout the state.

Full-state coverage: A repository should hold records from throughout the state. So, if you have an incomplete history of an individual's residences, and places of employment within a state, you can still end up with a fairly thorough investigation. In fact, the repository may be helpful in revealing locations in which the individual has had past connections, thus providing the counties you should be searching.

Weaknesses

Accuracy and completeness: No state repository has a database that is 100% accurate and complete.

Time lag: May occur between the entry of a record by a court or other criminal justice agency and its appearance in the repository. It might take weeks, months or even years before a conviction shows up in the state repository files.

Single-purpose use: In some states, the repository is only open to selected groups to use for a specified purpose. For example, a state might open up the files only to government agencies, school districts, banks, and child care agencies. Employers and interested parties not falling into these classifications are denied access.

Dissemination criteria: Varies by state. For example, some states only release conviction information and won't release information on pending cases.

Laws Regulating Access and Use of Criminal Records

Laws and regulations at the federal and state level affect how employers may use criminal records in the hiring process. The two most important federal laws are the Civil Rights Act of 1964 and the Fair Credit Reporting Act of 1970, amended in 1996.

The Equal Opportunities Commission administers the Civil Rights Act of 1964. The objective of this legislation is to eliminate discrimination in the hiring process and provide equal opportunity for affected classes. The employer must be consistent in the use of criminal records for all applicants in any given job category. The use of arrest information is usually considered discriminatory by the EEOC because of a disproportionate percentage of arrests to convictions in many minority populations.*

The FCRA requires employers to only use the most current and accurate information available in the hiring process. The law also requires employers to obtain a signed release from the applicant that discloses the use of background information and provide a summary of rights to the applicant along with a copy of any information discovered that may have an adverse impact on the applicant's employment probability.**

We have already discussed several state statutes that mandate the use of criminal background checks for certain types of employees and professions. Other types of state laws revise and extend the provisions of the Civil Rights Act. Since 1964 most states have adopted more specific regulations regarding employment discrimination. For example, several states have specifically excluded the use of arrest information in the hiring process.

In response to several high profile lawsuits, many states have now adopted laws that hold employers responsible for negligent hiring practices.

In response to several high profile lawsuits, many states have now adopted laws that hold employers responsible for negligent hiring practices. The majority of states have adopted legislation that mandates employers could be held liable for issuing positive recommendations of former employees while failing to disclose information that could lead to another party being physically harmed.

The Fair Credit Reporting Act (FCRA), is administered by the Federal Trade Commission (FTC). Although the original intent of the law was to regulate the availability and use of credit information, the law covers all consumer reports containing personal information on an individual. Therefore, public record information, such as criminal reports, is covered under the FCRA. The law recognizes the legitimate use of background reports for employment purposes. In 1996, congress amended the FCRA by adding provisions to improve the accuracy of the information and to protect the privacy of individuals by ensuring the ethical use of the information.

Balancing Your Right to Know vs. Your Need to Know

Business is about balancing risk. Employers must balance the risk of a bad hire versus the risk of using an inept hiring process. These risks can be quantified. A typical negligent hiring lawsuit can easily result in an award of damages over \$1 million. The possibility of experiencing an incident of negligence in the hiring process rises as unemployment rates fall.

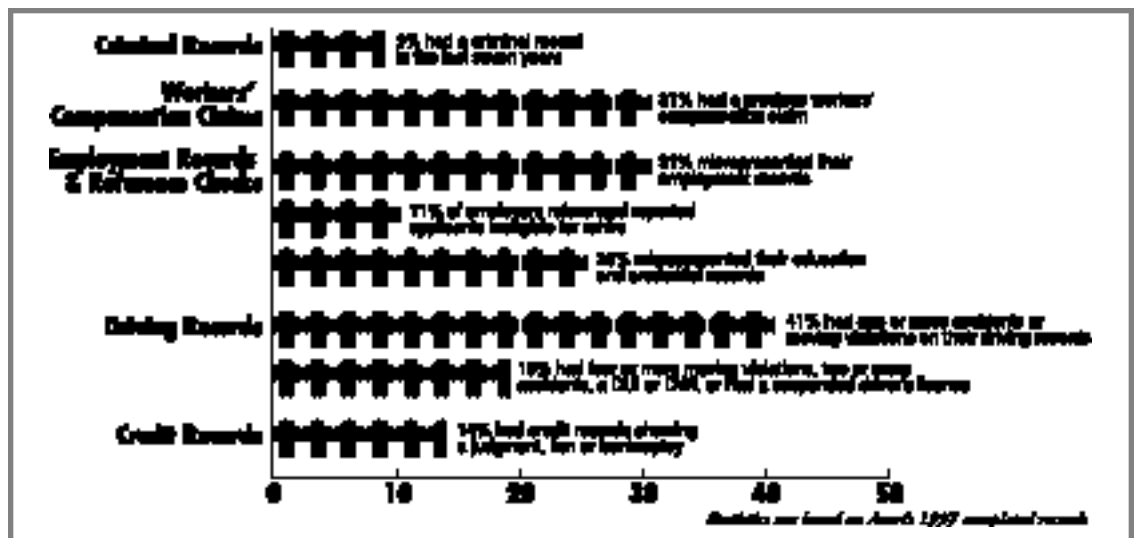
The risk of significant business loss through employee theft is also a quantifiable risk. "Fraud and other employee crimes cost employers more than \$400 billion a year (averaging \$9.00 per day per worker)," according to the April 1997 issue of Nation's Business. Balanced against these risks is the risk of unlawful hiring practices. As we have seen, using criminal history information in the hiring process is governed by various laws and regulations. Employers may find themselves charged with discrimination or with violations of the Fair Credit Reporting Act.

Employers can control the probability of the discrimination risk with sound policies and procedures, a well thought-out application form, job descriptions that define the essential functions of the job, good interview techniques and assistance with compliance questions.

Employers can control the risk of a bad hire by thoroughly checking applicant backgrounds and utilizing an accurate and compliant screening service.



The GIN Hiring Index



Glossary of Terms

Arrest

To detain someone in legal custody.

Arraignment

The formal appearance of an accused person to hear, and to receive a copy of, the charges against him or her, in the presence of a judge, and to then enter a plea of guilty or not guilty. The arraignment is the final preparatory step before the criminal trial.

Consolidator

Unites or combines information or systems into one system or whole.

Conviction

The formal decision of a criminal trial which finds the accused guilty. It is the finding of a judge or jury, on behalf of the state, that a person has, beyond reasonable doubt, committed the crime for which he, or she, has been accused.

Disposition

The final outcome of a court case, or criminal proceeding.

Federal Crime

A crime against the federal government – includes mail fraud, civil rights violations and interstate drug trafficking.

Felony

A serious crime punishable by death or imprisonment in a state penal institution.

Indictment

A formal accusation returned by a grand jury, that charges a person with a serious crime. It is on the basis of an indictment that an accused person must stand trial.

Misdemeanor

Less serious criminal offense punishable by a sentence of one or two years.

National Crime Information Center

FBI national database in which police and court records information is made available to law enforcement officials only.

Prosecute

To bring judicial proceedings against a person and to administer them until the conclusion of the court proceedings.

Re-marketer

As used in this paper, refers to a source that buys information, usually in tape or disk form, and resells it to customers.

Repository

A containment or storage facility for specific or confidential information.