



**Draft for Housing and Human
Service Commission review on May 23, 2012**

Date: July 17, 2012

SUBJECT: Consider Adding Criminal Background Checks to Below Market Rate (BMR) Program Qualification Process (Study Issue 12-11)

REPORT IN BRIEF

Study Issue CDD 12-11 (Attachment A) was prepared at the request of City Council in January 2012 to study the City's ability to require prospective BMR home buyers to undergo a criminal background check prior to being permitted to buy or rent a BMR home or apartment. The issue arose from a local resident's complaint about a neighbor who purchased a BMR home and was later arrested and charged with committing a crime.

Sunnyvale Municipal Code ("SMC") Chapter 19.66 requires residential developers to provide 12.5% of the new homes in developments of 9 or more homes at prices affordable to moderate-income households. These homes are created as a result of local land use regulations known as inclusionary zoning requirements. The BMR Program is not a subsidized housing program governed by the U.S. Department of Housing and Urban Development ("HUD") or any other state or federal agency. Moreover, the City's Housing Division is not a public housing authority ("PHA"), organized under federal statutes and regulated by HUD. Although many California cities and counties have local housing authorities, they are separate agencies distinct from the municipality itself.

The California Penal Code allows certain governmental agencies to perform criminal background checks for specific purposes, such as public agency employment, certification and licensing. Although the Penal Code gives authority to housing authorities to access certain criminal background data collected by the state Department of Justice ("DOJ"), it does not give the same authority to municipal housing departments that administer affordable housing programs developed pursuant to an inclusionary zoning ordinance.

Given the statutory restrictions on accessing criminal background information, as well as the significant fair housing, privacy rights and equal protection concerns, the City is essentially precluded from performing background checks on perspective applicants for BMR homebuyers, and could incur significant legal risks if it implemented this requirement.

The City does not own or operate any BMR rental housing. BMR rental units are scattered throughout ten privately owned rental properties developed during the years when BMR rental requirements were in effect: 1980 through July 2009. The city delegated the eligibility screening process for BMR rental units to the property owners/managers of these properties, subject to annual compliance monitoring by staff. The City does not require property owners to perform background checks on BMR applicants. However, the City does require that property management apply tenant screening policies equally to all prospective tenants - BMR and market rate. Staff has contacted several BMR property managers who have reported screening prospective tenants using private background screening services, primarily to determine a tenant's credit history, as described further in the Discussion section of this report.

BACKGROUND

In 1980, Council adopted Sunnyvale Municipal Code (SMC) Chapter 19.66: Affordable Housing and Single Room Occupancies (“the Ordinance”), which established the parameters of the Below Market Rate (BMR) Housing Program. The BMR Program has been an important tool for providing affordable housing opportunities for Sunnyvale's lower and moderate-income households. By March 2012, the BMR Program had produced 380 BMR homes and 639 rental apartments. Of those, 318 homes and 202 rental apartments are still subject to the BMR program requirements, while the BMR restrictions on the remaining units have expired and those units have converted to market rate. In FY 12/13, an additional 46 BMR rental units will be added to the inventory. Staff anticipates approximately 130 new BMR homes to be created in the coming three years.

The BMR Rental Program is administered by each property owner/manager. BMR rental apartments are available to households with incomes of up to 70% Area Median Income (AMI), subject to landlord approval. Each year, households must recertify their continued eligibility for the program.

First-time homebuyers with incomes up to 120% of AMI are eligible to buy a BMR home if they can qualify for a first mortgage and provide a down payment of at least 5% of the BMR purchase price. City Housing staff is responsible for administering the application process to determine program eligibility of prospective buyers. In addition, each applicant/co-applicant(s) must obtain a mortgage from a lender, which involves an extensive review. Just as with any private purchase of property, lenders do not require any borrower to undergo a criminal background check to obtain a loan. Loans are underwritten to determine the borrower's ability to repay the debt. This review includes review of credit history, verification of employment, employment history, debts, income and other criteria.

The City does not develop, sell or own BMR homes. All proceeds of the sale of these homes go to the developer. BMR owners, like all the other market rate owners in the development, are bound by the same Homeowner Association (“HOA”) Covenants, Conditions and Restrictions (“CCRs”) and must pay all applicable HOA dues, property taxes and special assessments when due. The BMR program restrictions also require BMR homeowners to maintain adequate homeowner’s insurance, maintain the property in good condition, abide by the program’s resale and occupancy restrictions, and occupy the home as their primary residence.

EXISTING POLICY
HOUSING AND COMMUNITY REVITALIZATION SUB-ELEMENT

Goal A: Assist in the provision of adequate housing to meet the diverse needs of Sunnyvale’s households of all income levels.

Policy A.3 – Utilize the Below Market Rate (BMR) Housing requirements as a tool to integrate affordable units within market rate developments, and increase the availability of affordable housing throughout the community. Preserve Sunnyvale’s mobile home parks as an affordable housing option. Maintain at least 400 acres of mobile home park zoning.

Goal E: Promote equal housing opportunities for all residents, including Sunnyvale’s special needs populations, so that residents can reside in the housing of their choice.

Policy E.2 – Implement City ordinances regarding prohibition of discrimination in housing.

DISCUSSION

Study Issue CDD 12-11

This study issue originated from a resident’s complaint about a neighbor who purchased a BMR home, and was subsequently arrested and charged with committing a crime. The BMR homeowner has not been convicted of any crime at this point, and awaits trial.

In developments with a HOA, minor nuisances, neighbor disputes and CC&R violations are primarily handled by the HOA. More severe public nuisance, blight and health and safety concerns may be handled by the appropriate City department or division (e.g. DPS Patrol, Neighborhood Preservation, Building Division, etc.). There are also civil remedies under state law that residents may pursue when disputes arise between two private parties, such as between

neighbors (e.g. boundary fence repairs, adjacent tree issues, lot line disputes, etc.).

Difference between City and Public Housing Authority

BMR homes and apartments are developed by private developers pursuant to land use regulations (inclusionary zoning) and without any HUD funds or other financial assistance from the City.

In contrast, a Public Housing Authority is defined by HUD as “...a State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) authorized to engage in or assist in the *development* of or *operation* of low-income housing” (emphasis added). A PHA is funded primarily by HUD to operate Section 8 and other public housing programs. Section 8 programs involve subsidies, and are strictly regulated by HUD.

The Housing Authority of the County of Santa Clara (“HACSC”) is the only PHA in Santa Clara County. They provide rental subsidies and develop and operate affordable housing for low income families, seniors and persons with disabilities living in Santa Clara County. The HACSC would be entitled to apply for and receive criminal offender history in accordance with the Penal Code. However, given the strict controls the state legislature has imposed on criminal offender history, any tenant or applicant background information that the HACSC has compiled cannot be shared with other agencies such as the City’s Housing Division.

The City’s Housing Division is not a PHA organized under the federal statutes and regulated by HUD. The City does not own or manage federal housing developments nor administer programs funded by HUD, such as federal Section 8 housing vouchers or public housing developments. In Sunnyvale, the BMR homes for sale are affordable to moderate income home buyers, while the BMR rental apartments are affordable to low income tenants. Moreover, the BMR rental apartments are mixed-income private rental properties which do not qualify as “low-income housing” as defined by HUD federal laws.

Legal Obstacles to Conducting Criminal Background Checks on Prospective BMR Home Buyers or Tenants

Statutory Authority

The California Penal Code regulates governmental access to official criminal background information compiled by the Department of Justice and has preempted the field of regulation. These statutes give express authority to certain governmental agencies to perform criminal background checks for employment, certification and licensing purposes. Although the statutes give authority to PHAs, this authority is not granted to municipal housing

departments that administer local developer land use requirements pursuant to an inclusionary zoning ordinance.

The regulations limiting access to criminal background information are contained in several provisions of the Penal Code. For example, Penal Code section 11076 states that “[c]riminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute.” Additionally, Penal Code section 11081 states that “[n]othing in this article shall be construed to authorize access of any person or public agency to individual criminal offender record information unless such access is otherwise authorized by law.” Therefore, only authorized individuals within an agency may access the criminal background information.

The main grant of authority is in Penal Code section 11105(b), which states that “[t]he Attorney General shall furnish state summary criminal history information to any of the following, if needed in the course of their duties....

(11) Any city or county ... or any officer or official thereof if access is needed in order to assist that agency, officer, or official *in fulfilling employment, certification, or licensing duties* (emphasis added), and if the access is specifically authorized by the city council, board of supervisors, or governing board of the city, county, or district if the criminal history information is required to implement a statute, ordinance, or regulation that expressly refers to specific criminal conduct applicable to the subject person of the state summary criminal history information, and contains requirements or exclusions, or both, expressly based upon that specified criminal conduct....”

According to this provision, city officials may only access criminal history information for purposes of “employment, certification or licensing”. Review of a BMR housing application is not related to City employment or the issuance of a license (e.g. a local massage therapist license), therefore the only provision that the Housing Division might qualify under would be the “certification” of BMR applicants. However, court decisions and subsequent legislative amendments have clarified that criminal background information is available only to certain housing agencies and only in limited circumstances.

The Special Case of Public Housing Authorities

In 1990, a California appellate court denied the Housing Authority of Sacramento access to criminal history records and found that non-disclosure of criminal records is the general rule under Penal Code section 11105 and that exceptions to non-disclosure must be narrowly construed. (See *Housing Authority of the City of Sacramento v. Van de Kamp* (1990) 223 Cal.App.3d 109.)

In the *Van de Kamp* case, the Housing Authority of Sacramento had petitioned the court for a writ of mandate directing the California Attorney General to furnish criminal records of applicants for public housing under the theory that the tenants were being “certified” for eligibility. (*Id.* at 111.) However, the court held that “certification” within the meaning of the statute referred only to occupational and employment certification; therefore, criminal background access was not granted. (*Id.* at 116.)

In 1994, the California Legislature modified the Penal Code to expressly give “public housing authorities” the ability to access criminal background history. The legislative history suggests that this change was made to give express authority to these agencies since they were federally mandated by HUD to screen tenants for criminal history who participated in HUD programs or lived in public housing developments owned and managed by the housing authority. This change is reflected in Penal Code section 11105.03, which reads in part:

- (a) Subject to the requirements and conditions set forth in this section and Section 11105, local law enforcement agencies are hereby authorized to provide state criminal summary history information obtained through CLETS for the purpose of screening prospective participants and prospective and current staff of a regional, county, city, or other local public housing authority (emphasis added), at the request of the chief executive officer of the authority or his or her designee, upon a showing by that authority that the authority manages a Section 8 housing program pursuant to federal law (U.S. Housing Act of 1937), or operates housing at which children under the age of 18 years reside or operates housing for persons categorized as aged, blind, or disabled.

For informational purposes, the Code of Federal Regulations (“CFR”) 24 CFR 960 sets forth tenant eligibility requirements for admission to, and occupancy of public housing developments. For example, section 960.204 states that a tenant applicant may be denied admission for public housing if: (1) an individual was evicted for drug related criminal activity; (2) members of the household are currently engaging in illegal use of a drug; (3) an individual was convicted of methamphetamine production; and (4) if an individual is subject to sex offender registration requirements. However, this code has no bearing on affordable housing developed by private developers pursuant to municipal inclusionary zoning requirements, nor does the CFR override California statutory law which precludes municipalities from accessing DOJ records needed to screen tenants for these criminal history records.

Additional Legal Issues

Notwithstanding the statutory difficulties in accessing this information from the DOJ, there are other legal considerations that complicate the analysis. For instance, there is no applicable California statute that allows criminal convictions to be used to disqualify prospective BMR home buyers, and consequently there are no relevant cases that discuss which disqualifying convictions would be legally supportable. This raises a myriad of policy questions that could also trigger fair housing concerns (i.e., disparate impacts on certain demographic populations), privacy rights and equal protection issues. One problematic policy concern is whether lower and moderate income homeowners should be subjected to stricter background checks than market-rate buyers within the same development.

Fair Housing Issues

Discussions with the Silicon Valley Law Foundation (SVLF) have raised some fair housing concerns. They contend that there should be evidence that prospective BMR buyers as a group cause a disproportionate amount of criminal activity relative to the general population within the community. Staff is unaware that any such findings have been made. In fact, staff is unaware of any specific concerns regarding criminal behavior of BMR occupants in the 30-plus year history of the program.

SVLF has submitted an analysis of concerns associated with conducting criminal background checks on prospective BMR applicants. The analysis notes that both the Federal Housing Amendments Act and California's Fair Employment and Housing Act prohibit discrimination in housing based on race, gender, national origin, and other protected categories (42 U.S.C. § 360, *et seq.*; Government Code § 12900, *et seq.*) They note that prohibitions include not only overt, intentional discrimination, but also facially neutral policies and practices that have a disproportionate impact on certain groups (Title VIII of the Civil Rights Act of 1968). Using arrest and conviction records to screen for housing is an example of the kind of neutral selection criteria that invites scrutiny.

Additional analysis from the SVLF stated that if criminal background checks are performed only for prospective purchasers of BMR homes, and not for market rate homes, there would likely be a disparate impact on lower-income people of color who are more likely to live in and/or own BMR units.

Megan's Law

In the course of completing this study issue, staff also investigated whether California's "Megan's Law" provided the City with any ability to conduct background checks on BMR housing applicants. Megan's Law provides the public with certain information on the whereabouts of sex offenders, through

an online database provided by the Department of Justice, so that members of local communities may protect themselves and their children. The law is not intended to punish the offender, and specifically prohibits using the information to harass or commit any crime against an offender. This law requires persons convicted of specified sex crimes to register as sex offenders with a local law enforcement agency, and to update their information annually. The information provided in the Megan's Law database can only be used to protect a person at risk. Except to protect a person at risk, or as authorized under any other law, use of any information disclosed on this web site for purposes relating to housing or accommodations is prohibited by California Penal Code § 290.4 *et seq.*

Jessica's Law

In the course of completing this study issue, staff also investigated whether California's "Jessica's Law" also known as Proposition 83 provided the City with any ability to conduct background checks on BMR housing applicants. Jessica's Law prohibits convicted sex offenders from living within 2,000 feet of a school or any place where children gather. It requires registered sex offenders who have been convicted of a felony sex offense to be monitored by GPS devices while on parole and for the remainder of their lives. A violation of this provision would be a misdemeanor offense, as well as a parole violation for parolees. The California Department of Corrections and Rehabilitation is responsible for ensuring compliance with this law.

Survey Results

Staff contacted surrounding cities with BMR programs, including Santa Clara, San Jose, Cupertino, Milpitas, Palo Alto and Mountain View to find out if any of their program requirements include criminal background checks. None of these jurisdictions require applicants to submit to a criminal background check as a condition of buying or renting an affordable housing unit.

Staff also contacted property management executives at two of the Bay Area's largest non-profit housing providers with properties in Sunnyvale. Their tenant screening process is primarily focused on an applicant's credit history. However, they both indicated that criminal background checks are conducted for all potential tenants using a third-party provider which pulls criminal background data from local public records, as they cannot access the official DOJ records. Generally, a felony conviction within the last 7 to 10 years will prohibit a potential tenant from renting a unit in one of their developments.

Staff also contacted managers of several market-rate apartment complexes which include BMR rental apartments in Sunnyvale. The managers reported that they do not conduct criminal background checks. They screen all potential applicants with a financial background reporting service, which

includes a credit check, rental payment history and check writing history. All of the complexes surveyed use third-party data providers to verify the information.

Some of these third-party data providers have generated scrutiny by consumer groups. A recent report released on April 11, 2012 by the National Consumer Law Center (Attachment B) stated that criminal background screening companies' reports routinely mismatch people, omit crucial information about a case, reveal sealed or expunged information, provide misleading information and misclassify offenses. Moreover, these commercial entities are not governed by Penal Code requirements governing the use, control, timeliness and veracity of information records; rather, they are governed by the Fair Credit Reporting Act, which also governs commercial credit reporting agencies and are known for numerous reporting errors. As a governmental agency, it would put the City at risk to rely on unofficial criminal background information that is not regulated by the relevant Penal Code statutes.

FISCAL IMPACT

No fiscal impact would occur if the staff recommendation is approved by Council. A decision to require criminal background checks would likely create both operational and fiscal impacts as well as potential litigation risks which could be quite costly.

PUBLIC CONTACT

Staff held a First Time Homebuyer Workshop in March 2012 and a member of the public inquired whether applicants had to submit to a criminal background check. Several of the attendees voiced an objection to City staff even considering this requirement. Attendees commented that it appeared that the City was presuming that lower and moderate income households were more likely to commit a crime than other households in Sunnyvale. One attendee stated that they felt this requirement would be discriminatory.

Public Contact was made through posting of the Housing and Human Services Commission agenda on the City's official-notice bulletin board, on the City's Web site, and the availability of the agenda and report in the Office of the City Clerk.

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

ALTERNATIVES

Because this City is legally precluded from performing criminal background checks, staff has identified only one alternative for Council action.

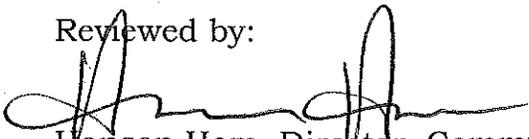
1. Do not add criminal background checks to the BMR Program qualification process.

RECOMMENDATION

Alternative 1: Do not add criminal background checks to the BMR Program qualification process.

The City is not a PHA organized under the federal statutes and regulated by HUD, nor does the City provide Section 8 vouchers or own and operate public housing. The City is not the seller of the BMR homes nor is the City the property owner/manager of BMR rentals. The units provided in the BMR Program are a result of local land use regulations. The statutory and case law review has determined that the City's Housing Division is precluded from performing background checks on prospective BMR homebuyers or tenants. The DOJ limits access to criminal history information only to agencies expressly enumerated in the statute. Currently, only PHAs that administer Section 8 vouchers or operate housing for minors or persons categorized as aged, blind or disabled have been granted this access, and only certain types of criminal history records can be used to deny tenancy to PHA rental program applicants.

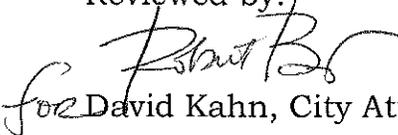
Reviewed by:



Hanson Hom, Director, Community Development
Suzanne Isé, Housing Officer

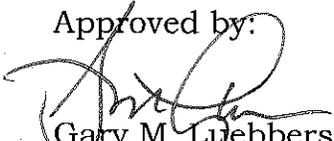
Prepared by: Ernie DeFrenchi, Affordable Housing Manager

Reviewed by:



for David Kahn, City Attorney

Approved by:



Gary M. Luebbers
City Manager

Attachments

- A. Study Issue CDD 12-11
- B. National Consumer Law Center Press Release

Attachment A
Study Issue CDD 12-11

2012 Council Study Issue

CDD 12-11 Consider Adding Criminal Background Checks to Below Market Rate (BMR) Program Qualification Process

Lead Department Community Development

History **1 year ago** None **2 years ago** None

1. What are the key elements of the issue? What precipitated it?

This study will evaluate the City's ability to require applicants to the City's Below Market Rate (BMR) Housing Programs to undergo a criminal background check at the time their initial BMR eligibility application is submitted for City approval. This issue arose when an individual who purchased a BMR home was arrested and charged with committing a crime some time after their purchase of the BMR home. Other than this extreme example, criminal activity has not been an issue for the BMR program during its 30-year history. Extensive screening of BMR applicants is currently conducted, although the focus is on applicants' ability to obtain a mortgage, and their household and income eligibility pursuant to the BMR program eligibility guidelines. Lending institutions also screen applicants for good credit history, adequate income, and a solid employment history prior to approving mortgage loans for BMR (and market-rate) home buyers.

This issue will require more in-depth research from City Attorney and Community Development staff to explore the legality and viability of requiring background checks for BMR Program participants. Additionally, the study will assess possible fair housing legal challenges and general City litigation risk associated with denying applicants from the program due to their criminal record, if any.

The City's initial statutory and case law review has determined that the City's Housing Division is most likely precluded from performing background checks on BMR applicants. California Penal Code section 11081 and 11105 et. seq., limits access to Department of Justice criminal history information only to limited agencies expressly enumerated in the statute. Currently, only Public Housing Authorities that administer Section 8 housing programs or operate housing for minors or persons categorized as aged, blind or disabled have been granted this access. The City's Housing Division is not a Public Housing Authority for purposes of this statute and therefore would not have access under these provisions.

If Council directs staff to move forward with the criminal background check Study Issue, staff will need to identify funding for each inquiry, adjust staff priorities to administer this new requirement and manage dispute resolution.

The study will include researching various state and federal laws and cases and reviewing other policies from surrounding jurisdictions to determine the legality of performing criminal background checks for BMR Programs. The ability to deny access to a BMR unit based on this information would also be analyzed.

2. How does this relate to the General Plan or existing City Policy?

Housing and Community Revitalization Sub-element:

Equal Housing Opportunities and Special Needs

Goal E - Promote equal housing opportunities for all residents, including Sunnyvale's special needs populations, so that residents can reside in the housing of their choice.

Policy E.1 Support the provision of fair housing services and tenant/landlord mediation to residents.

Policy E.2 Implement City ordinances regarding prohibition of discrimination in housing.

3. Origin of issue

Council Member(s) Whittum, Davis

4. Staff effort required to conduct study Moderate

Briefly explain the level of staff effort required

This issue will require research and policy planning from City staff (OCA and CDD) to determine the legal issues surrounding the City's ability to require criminal background checks for local housing programs, potential Fair Housing issues as a result of disqualification determinations, and a dispute resolution policy.

5. Multiple Year Project? No Planned Completion Year 2012

6. Expected participation involved in the study issue process?

Does Council need to approve a work plan? No
Does this issue require review by a Board/Commission? Yes
If so, which? Housing and Human Services Commission
Is a Council Study Session anticipated? Yes

7. Briefly explain if a budget modification will be required to study this issue

Amount of budget modification required 0

Explanation

NA

8. Briefly explain potential costs of implementing study results, note estimated capital and operating costs, as well as estimated revenue/savings, include dollar amounts

Are there costs of implementation? Yes

Explanation

Costs associated with performing the initial background check, reviewing report results and administering applicant inquiries as a result of the findings.

9. Staff Recommendation

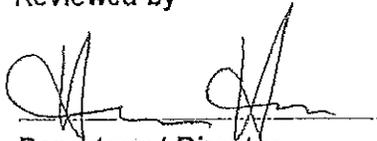
Staff Recommendation Drop

If 'Support', 'Drop' or 'Defer', explain

Based on the City's initial review of the relevant statutes and cases as described in Section 1, it is highly unlikely that the City's Housing Division would have the authority under the California Penal Code to access Department of Justice records to perform criminal background checks for purposes of applicant screening. The Housing Division is not expressly authorized to access that information under the Penal Code. Moreover, the Legislature has statutory jurisdiction over the field of regulation for criminal background checks for governmental entities. It is highly doubtful that the City could enact its own ordinance allowing Housing Division access to such information.

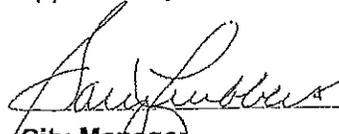
information under the Penal Code. Moreover, the Legislature has statutory jurisdiction over the field of regulation for criminal background checks for governmental entities. It is highly doubtful that the City could enact its own ordinance allowing Housing Division access to such information.

Reviewed by


Department Director

1/19/12
Date

Approved by


City Manager

1-20-12
Date

Attachment B
National Consumer Law Center Article

Download the full report, including examples of how real people have been harmed:
<http://www.nclc.org/issues/broken-records.html>

CRIMINAL BACKGROUND CHECKS: RAMPANT ERRORS COST WORKERS' JOBS AND SKIRT FEDERAL LAW

The National Consumer Law Center Urges Action to Hold Companies Accountable

BOSTON, Mass.—Since September 11, 2001, there's been an explosion in criminal background checks for job applicants by employers, yet many reports are riddled with errors. *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses*, a report from the National Consumer Law Center (NCLC), also finds an industry-wide lack of accountability and incentives to cut corners mean that tens of millions of workers may pay for these third-party errors with their jobs while employers waste money and miss out on hiring qualified employees.

"Background screening companies routinely cut corners to improve their profits and then they wipe their hands of any responsibility for producing an inaccurate or misleading report that can cost a worker his or her job," says National Consumer Law Center Staff Attorney Persis Yu and co-author of the report. "Federal regulatory agencies and states should rein in the Wild West of the background screening industry by holding companies accountable."

NCLC's research reveals that criminal background screening companies' reports *routinely*:

Mismatch people (i.e. a person with no criminal background with someone who has a record, which is especially problematic for people with common names);
Omit crucial information about a case, (i.e. a person is arrested but then found innocent);
Reveal sealed or expunged information (i.e. a juvenile offense);
Provide misleading information, (i.e. a single charge listed multiple times); and/or
Misclassify offenses (i.e. reporting a misdemeanor as a felony).

Many of these errors can be attributed to common practices by background screening companies, such as:

- Retrieving information through bulk record disseminations and failing to routinely update their databases;
- Failing to verify information obtained through subcontractors and other faulty sources;
- Using unsophisticated matching criteria;
- Failing to use all available information to prevent a false positive match; and
- Lacking understanding about state specific criminal justice procedures.

About 93% of employers conduct criminal background checks on some applicants, while 73% of employers conduct checks on all applicants, according to a 2010 survey by the Society for Human Resource Management. Yet there are *no* licensing requirements and there is *no* system for registration for background checking companies. Anyone with a computer and access to records can start a business; the total number of companies is unknown.

The National Association of Professional Background Screeners (the industry trade organization) has a voluntary accreditation program that contains some simple procedures (many of which are legally required) that background checking companies can take to enhance the quality of their information. Unfortunately, few companies actually are willing to commit to even the limited recommendations of their own trade association.

“Working without adequate federal supervision, many commercial background screening companies have produced poor quality reports that, in the most extreme cases, have shut people from their careers,” notes co-author Sharon Dietrich, who is managing attorney in Community Legal Services of Philadelphia’s Employment and Public Benefits Units.

RECOMMENDATIONS

The National Consumer Law Center report recommends that federal regulatory agencies and states use their authority to clean up industry-wide problems. For example, the **Consumer Financial Protection Bureau** could issue regulations under the Fair Credit Reporting Act (enacted in 1970 by Congress to protect the privacy of consumers) to ensure greater accuracy of background checks and to require consumer reporting agencies to register so consumers can correct inaccurate and misleading information. **The Federal Trade Commission** can investigate major commercial background screening companies for common FCRA violations and investigate major, nationwide employers for compliance with the FCRA requirements for users of consumer reports for employment purposes.

State legislatures and courts also have a role. They can require companies that receive bulk data from court databases to promptly delete sealed and expunged criminal records and routinely update their records. States can also audit companies and if not in compliance, states can revoke the companies’ receipt of data.

“Background screening companies generate billions of dollars in revenue for producing sloppy work while consumers are left handcuffed with little recourse to challenge and correct misleading or incorrect personal information,” says National Consumer Law Center attorney Persis Yu. “Where’s the justice in that?”

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Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and disadvantaged people, including older adults, in the United States. NCLC advances economic fairness through policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices and help financially stressed consumers build and retain wealth.