

Making Pennsylvania Criminal Court Dockets Available on the Internet Will Have Unintended Consequences

By: Community Legal Services, Inc., Philadelphia, PA

The Administrative Office of the Pennsylvania Courts (“AOPC”) is implementing a project to make the Pennsylvania courts’ dockets available to the public on the internet, including criminal court dockets. Prior to this project, some civil dockets were available on the internet, such as the civil dockets for the First Judicial District (the Philadelphia common pleas courts). However, criminal dockets were not available.

Community Legal Services, Inc. (“CLS”) is concerned that the indices of these criminal court dockets will be used as “criminal records” for background checks, and that they will be subject to misuse in ways that will deprive Pennsylvanians of critically important interests, such as employment and housing. As explained below, our concerns are:

- (1) Pennsylvanians would lose jobs and suffer other harm based on arrest records;
- (2) Criminal court records are less likely to be correct than State Police records;
- (3) Use of criminal court records is much more likely to result in the incorrect attribution of a criminal record to an innocent person;
- (4) Use of the criminal court records by background checkers may bring unanticipated heavy traffic to the courts’ website; and
- (5) Ex-offenders will face intensified discrimination based on their criminal records.

Why and how are “criminal records” obtained by the public?

Many thousands of persons and organizations conduct criminal record checks every year, particularly employers screening new job applicants. In some cases, employers are mandated by law to conduct criminal record checks, but in many more cases, employers chose to do so. Similarly, public housing authorities are mandated by law to conduct criminal background checks, whereas many private landlords opt to check criminal records.

Criminal records can be obtained from law enforcement sources, most notably the “Central Repository” maintained by the Pennsylvania State Police (“the State Police”). A State Police criminal record report can be acquired by anyone who knows the name and the date of birth and/or social security number of the person being screened. There is a \$10 fee. A criminal record request can be submitted by the mailing of a form (available on the State Police’s website at

<https://epatch.state.pa.us/help/sp4164.doc>), or by the State Police's internet "PATCH" system, which can be found at: <http://www.psp.state.pa.us/patch/site/default.asp>.

However, some persons performing criminal background checks use the indices to criminal court records, rather than the records generated by the State Police. Notably, many credit reporting agencies currently travel to county court offices to review indices of criminal cases in order to prepare criminal background reports that they sell to employers and other clients.

AOPC's project would make all criminal court dockets from every county in Pennsylvania available for search on the internet. Currently, the AOPC project has placed the criminal docket sheets of around half of the counties in Pennsylvania on line. A search can be performed at the following link: <http://ujspportal.pacourts.us/WebDocketSheets/OtherCriteria.aspx>.

If the criminal dockets from every county across the state are available online, credit reporting agencies are not the only ones which are likely to use the criminal dockets for background checks. Many members of the public would use them as well, particularly because they are free.

Why would the public's use of the criminal dockets available on the internet instead of State Police records have consequences unintended by AOPC?

1. Pennsylvanians would lose jobs and suffer other harm based on arrest records.

In 1980, the Pennsylvania legislature passed the Criminal History Record Information Act ("CHRIA"),¹ which sets standards for the accuracy, correction and dissemination of criminal records. An important provision of CHRIA requires that the State Police eliminate most entries about arrests that did not lead to convictions when responding to a criminal record check by the public.² Doubtless, the legislature's intent was to protect persons who were not convicted from stigma and other negative consequences of criminal charges that were not sustained.

However, this provision prohibiting the reporting of arrests does not apply to the courts.³ Thus, criminal record checkers that examine court records rather than State Police records can learn of arrests, in addition to convictions.

¹ 18 P.S. § 9101 *et seq.*

² An arrest is not reported by the State Police where: (1) three years have elapsed from date of arrest; (2) no conviction has occurred; and (3) no proceedings are pending seeking a conviction. 18 P.S. § 9121(b)(2)(iii).

³ See 18 P.S. § 9104(a) (delineating which provisions of CHRIA apply to the courts).

In the employment context, the consideration of arrests which have not led to convictions is seldom legal. Under Pennsylvania law, even convictions may only be considered in hiring decisions to the extent which they relate to the applicant's suitability for employment for a particular job.⁴ The Pennsylvania Superior Court has read that state law to mean that "any experience with the criminal justice system which falls short of a conviction is not a fair consideration by an employer considering hiring an individual with that experience."⁵

Moreover, because the use of arrest records as an absolute bar to employment has a disparate impact on African Americans and Hispanics, a rejection of a job applicant based on an arrest can constitute race discrimination in violation of Title VII of the Civil Rights Act of 1964. The Guidance of the Equal Employment Opportunity Commission ("the EEOC") on this subject states that "a blanket exclusion of people with arrest records will almost never withstand scrutiny."⁶

Nevertheless, CLS's experience of representing persons with arrest records is that employers routinely turn down such job applicants. While employers usually do not provide a reason for rejecting persons with arrest records, we do encounter many cases in which a denial of employment has been explicitly linked to an arrest. We are among the very few lawyers in the Commonwealth who sometimes represent clients in such cases. If arrest records are made available on the internet, we expect that many Pennsylvania job seekers never found guilty of any crime will lose job opportunities, in violation of employment laws but without any meaningful recourse.

Although some persons can get their arrests expunged (and thus not have them show up in court records), many cannot. Expungements are often discretionary with judges. A much bigger problem is that lawyers are often unavailable to persons who need expungements, as many public defender offices do not represent clients in expungement petitions. Nevertheless, if the criminal court dockets are made available on the internet, a significant increase in the number of expungement petitions filed in the courts can be expected.

⁴ 18 Pa. C.S.A. § 9125(b).

⁵ Cisco v. United Parcel Services, Inc., 476 A.2d 1340, 1343 (Pa. Super. 1984).

⁶ "Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (1982)" (Sept. 7, 1990), contained in Section 604 of the EEOC Compliance Manual, Vol. II.

2. Criminal court records are less likely to be correct than the State Police records.

Although state law requires courts to correct criminal records that are inaccurate and permits persons to challenge the accuracy of their criminal records,⁷ court records are less likely to be accurate than those of the State Police. In CLS's experience, the courts do not have procedures to implement these CHRIA requirements. Moreover, unlike State Police records, court records are not subject to Attorney General audits for accuracy, nor are the courts required to have quality control procedures.⁸

Indeed, court personnel have expressed that they consider their criminal dockets and indices to be case management tools, not criminal records, and that the State Police records should be used for background checks. They do not believe that their records should be held to the same standard of accuracy as "official" criminal records. But as we have said, the reality is that credit reporting agencies and others regularly use these court records for criminal background checks.

3. Background checkers who use criminal court dockets are much more likely to incorrectly attribute a criminal record to an innocent person than the State Police are.

Even now, credit reporting agencies that perform criminal record checks using court records frequently erroneously associate a criminal case with a person who was not the subject of the case. Having a similar name can result in getting some else's record (see the attachment citing examples among CLS's clients).

This problem will doubtless be exacerbated with internet searches of criminal court dockets. Credit reporting agencies performing criminal record checks for employers are subject to the Fair Credit Reporting Act ("FCRA"),⁹ which creates consumer rights on behalf of the subject of the report (most notably, the right to dispute the accuracy of the record). As a result, credit reporting agencies have additional incentive to try to be accurate. But members of the public who perform internet searches of the criminal court dockets will not have FCRA obligations and are less likely to have experience and knowledge that will permit them to distinguish the record of a person with a similar name from that of the person for whom they are conducting the check.

Moreover, the criminal court docket sheets and indices available on the internet do not provide enough information to insure that there is a match between the person being searched and the subject of a case. Unlike the State Police system, the AOPC's court index system searches by name only,

⁷ See 18 P.S. § 9104(a)(scope)(subjecting criminal courts to 18 P.S. §§ 9114 and 9152).

⁸ See 18 P.S. § 9104(a)(scope)(excepting criminal courts from 18 P.S. §§ 9141 and 9142).

⁹ 15 U.S.C. § 1681 *et seq.*

not by date of birth and/or social security number. A common name can result in many “hits” from counties all over the state. (For instance, a search of “Sam Smith” currently generates 44 entries.) An examination of the court docket from the hyperlink to the index for each case reveals the person’s year of birth, but not the date of birth. The lack of date of birth greatly increases the likelihood that an innocent person will suffer from a “false positive” because another person born in the same year has a criminal record. But even providing a date of birth would not be foolproof, because two people can (and occasionally do) share the same name and date of birth. Searching by social security number, or four digits of the number, would be much more reliable.

Finally, victims of “criminal identity theft” are likely to fare badly when internet checks are conducted, unless the courts take steps to correct criminal records falsely attributed to them. Criminal identity theft begins when a person who is arrested gives the name, date of birth, and/or social security number of another person. The person whose name and other information was fraudulently given to law enforcement (the “criminal identity theft victim”) then is linked with the criminal record of the arrests, convictions and bench warrants that belong to the person who was arrested (“the criminal identity thief”).

CLS recently reached a pre-litigation settlement with the State Police over this phenomenon, because the State Police did not sever the link between the record of the criminal identity theft victim and that of the criminal identity thief. That is, the State Police was producing the record of the thief when a background check was done on a victim. Currently, the criminal court records for several of our clients who are criminal identity theft victims are linked to the record of the thief (see attachment for examples). If their criminal court records remain uncorrected and become broadly available to the public, our settlement with the State Police will be undermined, and these innocent persons will continue to be victimized by the identity theft.

4. *The use of the criminal court dockets by background checkers may bring unanticipated heavy traffic to the courts’ website.*

A comparable use of criminal justice system data that was available to the public at no cost on the internet is instructive. Until recently, the database of the Michigan Department of Corrections (“MDOC”) received 120,000 searches a day. In response to this traffic, MDOC purged the files of 215,000 persons who were no longer in the department’s custody or on probation or parole.¹⁰

Similarly and closer to home, the Pennsylvania State Police’s “PATCH” system for conducting criminal records checks by internet has struggled with its traffic in recent months. Background checkers often are informed that based on the number of users, the results of a search cannot immediately be provided. The website also has become sluggish, and sometimes not even accessible. There is a moratorium on new registered users.

¹⁰ “Access to Criminal Records: Hot Issue Around the Country,” National H.I.R.E. Network Newsletter (May 2005), at 6-7.

If the criminal court dockets are available to the public, the courts may find that their website's traffic is similarly problematic, from a technical perspective.

5. *Ex-offenders will face intensified discrimination based on their criminal records.*

Even if a criminal court docket is completely correct, there are still critical reasons to not make it available by internet with no restrictions. Ex-offenders already face a multitude of post-sentence consequences as a result of their criminal records, including loss of employment and inability to obtain housing.¹¹ Even ex-offenders whose offenses are decades old and who have been leading productive, law-abiding lives increasingly have faced such barriers, often as a result of the growing accessibility of criminal background checks. Their hardships will be multiplied if their criminal records are available to anyone and everyone with a few clicks of the mouse. In a society in which reintegration of ex-offenders is a major policy concern, this would be a substantial setback.

The mere fact that court records are public does not mean that they must inevitably be accessible from the internet. The traditional understanding that court records are and should be open was developed in a different world, in which someone interested in public records at least had to travel to a courthouse to examine them. Even now, if someone wants to examine the criminal court records for Philadelphia County, he or she must go to the Criminal Justice Center to view the indices on dedicated computers that are not accessible from off-site. The need to take concerted action to view criminal court records provided some modicum of privacy to the persons whose records were of interest. This balance would be eliminated if criminal court dockets were available from any desktop.

What can be done to avoid these unintended consequences?

The best solution would be to not make the criminal court records available to the public. Attorneys dealing with the criminal system should be permitted access, protected by a password. Persons wanting to perform criminal background checks can and should use State Police records for this purpose.

Short of this solution, at least the following steps should be taken by AOPC to ameliorate the problems discussed in this paper:

- (1) Cases in which a person was arrested but not convicted should not be made available on line.

¹¹ See, e.g., Center on Law and Social Policy and Community Legal Services, Inc., Every Door Closed: Barriers Facing Parents with Criminal Records (2002), available at http://www.clasp.org/publications/every_door_closed.pdf.

- (2) The Pennsylvania courts must create an easy process by which persons can obtain corrections of errors and criminal identity theft.
- (3) The website should require use of name, date of birth and the last four digits of a social security number for a search, so that misidentification can be avoided.

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Public Internet Access to Criminal Court Records: Innocent People Will Be Hurt

The Administrative Office of the Courts plans for internet access by the public to criminal court records. Criminal court records have been available to the public at the county courthouses for years, but they have been examined primarily by credit reporting agencies performing criminal background checks. Even the credit reporting agencies, which have a great deal of experience examining criminal court records, have misinterpreted these records and issued incorrect credit agency reports of criminal activity by innocent people. This problem will increase if the members of the public, untrained with criminal court records, perform their own background checks through the internet.

Community Legal Services, Inc. ("CLS") has handled the cases of many people who have lost jobs because of public misunderstanding of Philadelphia Criminal Justice Center ("CJC") records. A few examples of those cases follow.

In some cases, the court records do not clearly identify the person who is the subject of the case.

Barbara Still came to CLS after being denied badly needed employment by a temp agency which told her that she has a criminal record and an open bench warrant. In fact, CJC records show a finding of contempt of court and an open bench warrant against a Barbara Still, from 1999. However, Ms. Still states that she was never even in a court until recently. Moreover, there is another Barbara Still listed in the Philadelphia telephone book. But the scant information in the CJC record provides almost no information about the Barbara Still who was found in contempt, other than an address. The CJC record does not even contain a date of birth, and there are no fingerprints or photos on file. Ms. Still faces the Kafkaesque prospect of showing that she is not the person who is wanted. And even if she did, the record of the other Barbara Still would remain in the court index, for employers to believe is hers.

In some cases, the court records have been misinterpreted.

Erica Mackie has one minor offense on her criminal record, which is in the process of being expunged. But she was removed from her job when a credit reporting agency produced a report showing a large list of criminal offenses. Ms. Mackie was amazed to find that the credit reporting agency, which had used CJC records, had mixed in the criminal cases of her twin brother Eric with her case. The credit report clearly indicated that all but one of the sets of offenses were attributed to "Eric" and that the remaining set of charges was attributed to "Erica." Despite Ms. Mackie's protestations that the record was wrong and that she should be permitted to continue working, the employer sent Ms. Mackie on a chase around the City with the instruction to "fix" a record that was wrong only because the credit agency misunderstood the CJC records. She was unemployed for three months as a result of this fiasco.

In some cases, the court records are wrongly attributed to a victim of criminal identity theft.

“Criminal identity theft” begins when a person who is arrested gives the name, date of birth, and/or social security number of another person. The person whose name and other information were fraudulently given to law enforcement (the “criminal identity theft victim”) then is saddled with the criminal record of all of the arrests, convictions and bench warrants that belong to the person who was arrested (“the criminal identity thief”).

In the past, the Pennsylvania State Police (“the PSP”) refused to expunge its records in cases where criminal identity theft was proved by comparison of the victim’s fingerprints to those taken from the person who was arrested. Often, the PSP produced the identity thief’s criminal record in response to a request for the record of the victim. CLS, with co-counsel, negotiated a pre-litigation settlement with the PSP, so that it will no longer give incorrect criminal records for criminal identity theft victims. However, some of these clients still face problems if background checkers examine their court records rather than their PSP records.

Jermaine Flood is one of the people whom CLS represented in its negotiations with the PSP. Mr. Flood has never been arrested. He has no criminal record of his own, but he has been the victim of criminal identity theft. This has been conclusively proved, because the PSP compared Mr. Flood’s fingerprints to those taken from the person who was arrested. Mr. Flood’s cousin Amin is the person who has used Jermaine’s identity when arrested. When background checks are done, Amin’s substantial record has been produced repeatedly as though it were Jermaine’s record.

The PSP settlement will not help Mr. Flood if a credit reporting agency searches the criminal court records rather than requesting a PSP record check. Because of Amin’s impersonation of his cousin, a person who searches for Jermaine Flood in the CJC computer will find that Police Photo (“PP”) No. 734605 has been assigned to Jermaine. As a result, when one searches for cases assigned to this PP number, a lengthy report is generated for Jermaine Flood even though it actually reflects the criminal record of his cousin who used Jermaine’s identity.

As a result of his cousin’s record being produced as his, Jermaine has suffered severe employment consequences. He has identified at least seven job opportunities that he lost just in early 2004 because of his cousin’s record being produced as his. He will continue to face these problems if background checkers check his name in the criminal court records.

Prepared by Community Legal Services, Inc., Philadelphia, PA (6/05)