

**California S.B. 1262, A Rebuttal of the Committee Analysis**

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**Summary**

Committee Analysis	A Rebuttal
<b>SUMMARY:</b> Requires a superior court clerk to permit filtering searches of publicly-accessible electronic court indexes by a defendant's driver's license number, or date of birth, or both.	

**Existing Law**

1) Requires the clerk of the superior court to keep such indexes as will insure ready reference to any action or proceeding filed in the court. There shall be separate indexes of plaintiffs and defendants in civil actions and of defendants in criminal actions. The name of each plaintiff and defendant shall be indexed and there shall appear opposite each name indexed the number of the action or proceeding and the name or names of the adverse litigant or litigants. (Gov. Code, § 69842.)	
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<p>2) Finds and declares that local criminal justice agencies, such as policing agencies and courts, need quick access to accurate criminal offender record information. (Pen. Code, § 13100.)</p>	<p>The Legislature found that criminal justice agencies, the legislature, and policing agencies needed "speedy access" to "accurate and reasonably complete criminal offender record information..." <a href="#">Penal Code § 13100</a>.</p> <p>The private sector should have the same speedy access to the accurate information from court records.</p>
<p>3) Authorizes local criminal justice agencies to compile criminal offender record information, prohibits general access to it, except as specified, and imposes reporting requirements to the Department of Justice (DOJ). (Pen. Code, §§ 13100 et seq.)</p>	<p>The Penal Code limits who can access CORI information. Only those with "<i>expressly authorized by statute.</i>" While the CORI law allows certain people to access the information if they can show a "compelling need."<sup>1</sup> <a href="#">Penal Code §§ 13202, 13300(b)(13)</a>, and 13300(c). "[California] state law provides that only those authorized by statute may obtain access to Department of Justice arrest records." <a href="#">Younger v. Berkeley City Council</a>, 45 Ca. App. 3d 825, 830 (Court of Appeal, First Dist. 1975). It's hard to imagine the state Department of Justice would grant access to its database for background checks.</p>
<p>4) Defines "criminal offender record information" as records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release. (Pen. Code, § 13102.)</p>	
<p>5) Requires specified information be included in criminal offender record information, such as name, sex, height, weight, and date of birth. (Pen. Code, § 13125.)</p>	

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<sup>1</sup> *Id.*, [13300\(c\)](#).

<p>6) Authorizes local criminal justice agencies to furnish criminal offender record information to specified entities if they demonstrate a special need to acquire such information. (Pen. Code, § 13300.)</p>	<p>Nothing in Penal Code or any other part of the California code prohibits an individual from obtaining a copy of a public court record from the courthouse. al, <a href="#">Penal Code § 13200</a> states “Nothing in this chapter shall be construed to affect the right of access of any person or public agency to individual criminal offender record information that is authorized by any other provision of law.”</p>
<p>7) Prohibits any person not authorized by law to receive a record, or information obtained from a record, to knowingly buy, receive, or possess such record or information. (Pen. Code,§13304.)</p>	
<p>8) Authorizes the DOJ to make a complete and systematic record index of all criminal offender record information received. (Pen. Code, § 11104.)</p>	
<p>9) Makes it a misdemeanor for any employee of the DOJ, or any other authorized individual to furnish such information to a person not authorized by law to receive it. (Pen. Code, §§ 11141 &amp; 11142.)</p>	
<p>10) Requires DOJ to furnish state summary criminal history information to specified entities, if needed in the course of their duties, provided that when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any other entity in fulfilling employment, certification, or licensing duties, specified restrictions listed in the Labor Code are followed. (Pen. Code,§ 11105, subd. (b).)</p>	
<p>11) Allows the DOJ to release criminal history information to an official of a city, county, or district if expressly authorized by statute, ordinance or regulation. (Pen. Code, § 11105, subds. (b)(10)-(11). )</p>	

<p>12) Authorizes the DOJ to release criminal history information to specified entities, if they demonstrate a “compelling need” for the information (Pen. Code, § 11105, subd. (c).)</p>	
<p>13) Outlines the amount of criminal offender information the DOJ is allowed to furnish, dependent on who the recipient is. (Pen. Code, § 11105(k)-(p).)</p>	
<p>14) Precludes an employer from asking applicants to disclose information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program, or concerning a conviction that has been dismissed or ordered sealed, and precludes any employer from seeking or utilizing such information as a factor in determining any condition of employment, any record of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or posttrial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law. (Lab. Code, § 432.7 subd. (a)(l).)</p>	
<p>15) Makes certain exemptions for employers hiring peace officers, health facility personnel, and other specified prospective employees. (Lab. Code, § 432.7.)</p>	
<p>16) Requires employers to follow certain procedures prior to considering an applicant’s criminal history as part of the hiring process. (Gov. Code, § 12952.)</p>	<p>16) Precludes an employer from inquiring or considering criminal history information prior to a conditional job offer. But, makes clear that “[t]his section <i>shall not be construed to prevent an employer from conducting a criminal conviction background check</i>” that is not in conflict with this section. (<a href="#">Gov't Code § 12952(b)</a>) (emphasis added).</p>

	17) Prohibits an employer from requiring an applicant produce a rap sheet. ( <a href="#">Penal Code § 11125</a> ).
17) Authorizes consumer reporting agencies to furnish consumer reports only under specified circumstances, including for the purpose of employment. (Civ. Code, § 1786.12.)	18) Consumer consent is required. ( <a href="#">Civ. Code, § 1786.12</a> ).
18) Precludes consumer reporting agencies from making or furnishing any report that contains, among other things, convictions that occurred more than seven years from the date of the report. (Civ. Code, § 1786.18.)	19) Precludes an investigative consumer reporting agency from furnishing an investigative consumer report that includes information that is a matter of public record and that relates to an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished. (Civ. Code, § 1786.18(c)).
	20) The California Consumer Credit Reporting Agencies Act provides substantial consumer rights, imposes significant consumer reporting agency obligations, and offers a body of legal recourse for consumers (Civ. Code, § 1785.1 <i>et seq.</i> )
	21) The California Investigative Consumer Reporting Agencies Act provides substantial consumer rights, imposes significant consumer reporting agency obligations, and offers a body of legal recourse for consumers (Civ. Code, § 1786 <i>et seq.</i> )
	22) All consumer reports containing public record information sold for housing or employment purposes in California are subject to the Investigative Consumer Reporting Agencies Act, found at Cal. Civ. Code 1786 <i>et seq.</i> , and the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, <i>et seq.</i>  ICRAA balances the needs of industry against the individuals' right to privacy about background screening. ("There is a need to insure that

	investigative consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.").
	23) The consumer voluntarily provides the following non-public personal information ("NPI") for the search to be prepared: their name, address, date of birth, social security number, and often a driver's license number, to facilitate this search.
	24) Prior to requesting a background check, employers and housing providers must obtain written consent of the consumer that expressly advises the consumer that the background check will be obtained, and under California law, that the report may contain information related to the individual's character. Cal. Civ. Code § 1786.16; 15 U.S.C. § 1681b(b)(2).
	25) Requires a CRA that furnishes a consumer report for employment purposes and which for that purpose compiles, collects, assembles, evaluates, reports, transmits, transfers, or communicates items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall in addition maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. Cal. Civ. Code §1786.28.

**Existing Federal Law**

<p>1) Authorizes consumer reporting agencies to furnish a consumer report for employment purposes, among other things. (15 U.S.C.S., § 1681b.)</p>	<p>1) Written consent is required for background checks for employment. (<a href="#">15 U.S.C.S., § 1681b(b)</a>).</p>
<p>2) Precludes consumer reporting agencies from making any report that contains, among other things, convictions that occurred more than seven years from the date of the report. (15 U.S.C.S., § 1681c.)</p>	<p>This is an incomplete reading of the law. The section actually reads: “Except as authorized under subsection (b) [concerning positions that pay over \$75k/yr.], no consumer reporting agency may make any consumer report containing any of the following items of information:...(5) Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years”. <a href="#">15 U.S.C., § 1681c(a)</a>.</p>
<p>3) Preempts state laws as they relate to information contained in consumer reports if such state laws are inconsistent with federal law. (15 U.S.C.S., § 1681t.)</p>	<p>This is an incomplete reading of the law. The federal FCRA preempts state laws that are, among other things, (a) inconsistent with federal law, <a href="#">15 U.S.C.S., § 1681t(a)</a>; (b) relate to the subject matter set out in specific sections of federal law, <a href="#">15 U.S.C.S., § 1681t(b)(1)</a>; or (c) respect to the conduct required by the specific provisions of federal law. <a href="#">15 U.S.C.S., § 1681t(b)(5)</a>.</p>
	<p>4) Requires consumer reporting agencies to “maintain reasonable procedures to assure maximum possible accuracy.” <a href="#">15 U.S. Code § 1681e</a>.</p>
	<p>5) Maintains an extensive system of consumer rights to dispute the accuracy of information. <a href="#">15 U.S. Code § 1681e</a>.</p>
	<p>6) Allows consumers to sue in federal or state court and has no cap on class action damages. Further, allows the FTC, the CFPB, and the</p>

	state attorney general the right to sue. <a href="#">15 U.S. Code § § 1681n, 1681o, and 1681s.</a>
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**Fiscal Effect**

Unknown	<p>The bill will have no adverse fiscal impact on the state, and it would likely save court clerks’ time and money.</p> <p>Senate Bill 1262 will return the hiring and volunteer placement process to the status quo, as it existed for approximately 20 years before <i>Hamrick</i>. In that pre- <i>Hamrick</i>, clerk burdens were lower because background check companies could filter for DOBs and DLNs in electronic indexes. Now, without the workload relief afforded by S.B. 1262, clerks must contend with many more public record requestors standing in front of them, making the requests necessary to place people in jobs and volunteer positions.</p> <p>A faster hiring process means less dependency on the state’s unemployment insurance (“UI”) system, and the savings to the state by passing S.B. 1262 could be in the millions.<sup>2</sup> The reduced expenditures of millions of dollars to the state also mean increased revenues for the state. As workers leave the UI rolls as an expense, they enter the workforce and pay taxes, generating hundreds of thousands of dollars for state and local governments.</p> <p>As Sen. Bradford said when he closed the hearing on S.B. 1262, “[a]ll this [bill] does is streamline...that search or background check and</p>
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<sup>2</sup> According to the California Employment Development Department, for March 2022, the Monthly Average Weekly Benefit Amount for the payment of (“UI”) was \$344. That average payment comes from 190,772 claims filed for a total of \$464mm. If 10,000 workers are receiving UI payments and those workers are delayed an average of four week each while waiting for the courts to clear their background checks, that delay would amount to an additional bleed of UI payments of \$3,440,000.

	narrows it..." This streamlined process eases burdens on clerks and allows them to work more efficiently.
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**Comments**

<p><b>1) Author’s Statement:</b> According to the author, “SB 1262 will return public court record access to the status quo by allowing an individual to search and filter results by someone’s date of birth and driver’s license number. This bill is in response to a recent court decision which called for the removal of two identifiers (date of birth and driver’s license number) from public court records. Many courts have since removed the ability to search and filter records based on date of birth and/or driver’s license number.</p>	
<p>The <i>All of Us or None vs Hamrick</i> decision did not prohibit the use of background checks entirely, nor did it prohibit being able to search the court indexes. Companies, nonprofits, apartment owners, and others will continue to perform background check on applicants, regardless of the outcome of this bill. Whether it be for liability or insurance purposes, or an organization wanting to maintain the safest environment, the Hamrick decision does not, change these practices. But by prohibiting the use of these identifiers when searching, we are allowing a delay in that person’s background check being completed and their application accepted, even if the applicant provided those identifiers willingly for the purpose of a background check.”</p>	

### Criminal History Databases in California

<p><b>2) Criminal History Databases in California:</b> Access to person’s summary criminal history information is generally prohibited and only allowed to be disseminated if specifically authorized in statute. “The state constitutional right of privacy extends to protect defendants from unauthorized disclosure of criminal history records. [Citation.] These records are compiled without the consent of the subjects and disseminated without their knowledge. Therefore, ... custodians of the records, have a duty to ‘resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted.’” (Westbrook v. County of Los Angeles (1994) 27 Cal.App.4th 157, 165-66.) “The language of Penal Code section 13300 et seq., demonstrates that the Legislature intended nondisclosure of criminal offender record information to be the general rule.” (Id. at 164.)</p> <p>The DOJ is tasked with maintaining state summary criminal history information and the Attorney General is required to furnish state summary criminal history information only to statutorily specified entities or individuals for employment, licensing, volunteering etc. (Pen. Code, § 11105.) In addition to the specified entities authorized to receive state summary criminal history information, DOJ may furnish state summary criminal history information to other specified employers upon a showing of compelling need for the information and to any person or entity when they are required by statute to conduct a criminal background check. (Pen. Code, § 11105, subds. (a)(13) &amp; (c).) The DOJ is required to release specific information depending on who is requesting the information and for what purpose. For example, if a criminal justice agency wants background information for a peace officer, the DOJ must release not only convictions, but successfully diverted cases and every arrest or</p>	<p>Public records are intended to be public. The issue in S.B. 1262 is not a state criminal record database, like CORI or CalGang. The information involved in S.B. 1262 is not a database, it is information directly from a court record. Consumer Reporting Agencies search and rely on records from the court, as opposed to a database, because court records have been determined to include the most complete and up-to-date case information.</p> <p>The reference to <i>Westbrook</i> is a spurious argument because there is nothing in common with S.B. 1262 and <i>Westbrook</i>. <i>Westbrook</i> involves a claim by an individual who wanted to obtain bulk criminal record data – not individualized searches of specific court records at a terminal in a courthouse with consent of the consumer.</p> <p>In particular, the plaintiff, Robert Westbrook, wanted to obtain computer tapes containing all criminal record information generated by the municipal courts of Los Angeles County on a monthly basis. The Court of Appeal noted that the bulk data requested contained information “far beyond that which would routinely be found in a minute order, court file or public index of criminal cases... including “name, aliases, monikers, address, race, sex, date of birth, place of birth, height, weight, hair color, eye color, CII number, FBI number, social security number, California operating license number, arresting agency, booking number, date of arrest, offenses charged, police disposition, county and court name, date complaint filed, original charges and disposition.”<sup>3</sup></p> <p>The issue at hand in S.B. 1262 could not be more different than that in in the <i>Westbrook</i> decision. Senate Bill 1262 is about restoring back</p>
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<sup>3</sup> *Id.* at 383-384.

detention that did not result in exoneration, among other things. (Pen. Code, § 11105, subd. (k).) For other specified entities, the DOJ can only release convictions that have not had relief granted, and are not able to release information regarding successfully diverted cases. (Pen. Code, § 11105, subd. (p).) Unauthorized release or dissemination of such information is a misdemeanor. (Pen. Code, §§ 11141 & 11142.)

to the status quo, court record access rights that existed for at least about 20 years prior to the 4<sup>th</sup> Appellate Division’s decision in 2021 in [All of Us or None of Us - Riverside Chapter v. Hamrick](#).<sup>4</sup> The court record access rights at hand in S.B. 1262 involve searching, one-by-one, criminal information for purposes permitted by and protected under federal and state law, where, in most cases, a consumer provides consent to the search and in those cases where consent is not required by law, it is often requested as a matter of course.

In fact, the Court in *Westbrook* explained that it is the very distinction between the nature of the aggregated/bulk data versus the review of an individual case information that creates the privacy concern. The Court said:

There is a qualitative difference between obtaining information from a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending in the municipal court. If the information were not compiled in MCI, respondent would have no pecuniary motive (and presumably no interest) in obtaining it. It is the aggregate nature of the information which makes it valuable to respondent; it is that same quality which makes its dissemination constitutionally dangerous.

*Westbrook*, 32 Cal. Rptr. 2d at 165 (*emphasis added*).

The Court of Appeal also made clear that “[t]he statutory restrictions on dissemination of the information do not affect any right of access to *individual* criminal offender record information authorized by any other law. (Pen.Code, § 13200.)” *Id.* at 163.

<sup>4</sup> [All of Us or None of Us - Riverside Chapter v. Hamrick](#), 64 Cal.App.5th 751 [279 Cal.Rptr.3d 422] (“*Hamrick*”).

<p>Local summary criminal history refers to the master record of information compiled by any local criminal justice agency pertaining to the identification and criminal history of any person such as name, date of birth, physical description, dates of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about the person. (Pen. Code, § 13300, subd. (a).) Local criminal justice agencies are not allowed to furnish this information except to those specifically authorized in statute. (Pen. Code, § 13300, subd. (b).) Allowing or procuring unauthorized access to such records is prohibited and punishable as a misdemeanor. (Pen. Code, §§ 13302, 13304.)</p> <p>However, because court records are publicly available (Gov. Code, § 69842), an individual or a company can bypass the DOJ and local criminal justice agencies to gather a great amount of information and create, in essence, their own summary criminal history database. The Rules of Court specify the manner by which electronic trial court records are to be made available to the public. The rules provide that a court maintaining civil case records in electronic form must provide electronic access to them, both remotely and at the courthouse, to</p>	<p>Finally, as a matter of public policy, the California Supreme Court explained that <i>Westbrook</i> stands for the proposition that ". . . although the public was entitled to access individual court files, providing electronic access in the form of the court's information system would permit the compilation and distribution of criminal histories, in violation of the statute." <i>Int'l. Fed. Of Prof. &amp; Tech. Eng., Local 21, AFL-CIO v. Superior Court of Alameda County</i>, 42 Ca. 4<sup>th</sup> 319 (2007) (citing <i>Westbrook</i>, supra at pp. 163-165, 32 Cal.Rptr.2<sup>nd</sup> 382.</p> <p>Employers, landlords, charities, religious institutions, and volunteer organizations are not permitted to access state databases.</p> <p>Unlike the substantial protection offered to applicants when a private background check is conducted (see above on federal and state law), state databases offer no consumer protection. Unlike the accuracy obligations for CRAs under federal and state law, there is no accuracy obligations on the state. Under federal and state law, any aggrieved applicant can sue a CRA in federal or state court and there is no cap on class action damages. None of these protections are afforded consumers in a state database search.</p> <p>The state database is a fingerprint database. By saying an applicant must undergo a state database criminal check, one is suggesting that job and apartment applicants must now take an additional step of going to a police station to submit prints to start the background check process. Essentially, opponents are asking applicant (who may have access to transportation issues, time constraints, or general unease with providing biometric information to the government due to immigration status) to go to a police station (where they may have access to justice issues) to apply for a job or an apartment.</p>
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the extent it is feasible to do so. (Cal. Rules of Court, Rule 2.503(b).) As to criminal records, the rule states that a court that maintains the criminal case records in electronic form must provide electronic access to them at the courthouse, to the extent it is feasible to do so, but may not provide public remote access. (Cal. Rules of Court, Rule 2.503(c)(5).) Additionally, the rules specify the information to be included in, and excluded from, electronic court indexes, as well as court calendars and registers of action. The contents that must be included in electronically accessible court indexes are case title (unless made confidential by law), party names (unless made confidential by law), party type, date on which the case was filed, and case number. (Cal. Rules of Court, Rule 2.507(b).) The information that must be excluded in electronically accessible court indexes are social security numbers, any financial information, arrest warrant information, search warrant information, victim and witness information, ethnicity, age, gender, government-issued identification card numbers, driver's license numbers, and dates of birth. (Cal. Rules of Court, Rule 2.507(c).)

This bill would require courts to filter searches by date of birth or driver's license number, thus potentially making each county superior court index a local summary criminal history database. Previously, many county superior court websites had allowed such searches in contravention of Rule 2.507 until recent case law prohibited it.

Until the *Hamrick* decision in May 2021, criminal background checks were being conducted with legal efficiency intended to provide complete information in a timely manner to get people into jobs, apartments, volunteer positions, etc. The system, at least two decades old, worked well until the 4<sup>th</sup> Appellate Division wrongly decided *Hamrick*.

**Recent Case Law Triggering This Bill**

**3) Recent Case Law Triggering This Bill:** In *All of Us or None - Riverside Chapter vs. Hamrick* (2021) 64 Cal.App.5th 751, (*Hamrick*) plaintiffs alleged that the Riverside County Superior Court improperly maintained the court’s records in criminal cases in various ways, one of which was allowing the public to search the court’s electronic index on the court’s website by a defendant’s date of birth and driver’s license number, in violation of California Rules of Court, rule 2.507 (*Id.* at p. 759.) The court agreed with plaintiffs that based on the clear language in Rule 2.507, the Riverside County Superior Court improperly authorized public access to electronic indexes of criminal cases by allowing the user to filter searches by an individual’s date of birth or driver’s license number. (*Id.* at 803.) In reaching its holding, the court also examined the history and documents regarding the creation of Rule 2.507 and its predecessor, former Rule 2077. (*Id.* at 774.) The court noted that the Judicial Council, through its advisory and administrative committees, expressly considered and rejected including date of birth and driver’s licenses as a search filters. (*Id.* At 771, 775.) As a matter of fact, the Judicial Council, as one of the reasons for excluding such search filters stated,

“ ... In an electronic database, the date of birth is a confidential field in criminal cases. In *Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4<sup>th</sup> 157 [32 Cal. Rptr. 2d 382], the court held that the municipal court’s electronic case management system was confidential as access would allow the compilation of a local criminal history summary in violation of ... section 13300. *Under the same reasoning, the court should not allow narrowing the register of actions by [date of birth] as doing so would essentially be creating a local criminal history.*”

(*Id.* at 775.)

Court of Appeal’s opinion is premised on an incorrect interpretation of Rule of Court 2.507(c). The rule prohibits a superior court from displaying date of birth and driver’s license numbers in certain documents, such as calendars. But nothing in the rule’s text bars *searches* that employ these identifiers as *filters*. The Court of Appeal misread the rule by collapsing the crucial distinction between displaying and searching, which has resulted in a blanket ban on search fields for date of birth and driver’s license number in many counties across the State.

When conducting a search for criminal records, the background screening company uses identifiers provided by the consumer (like date of birth) as an indispensable tool to identify records that pertain to the consumer applicant, and eliminate records of other persons with the same name. So, contrary to the Court of Appeal’s conclusion, the superior court is not affirmatively *disclosing* any new information merely by offering these identifiers as a filtering option. The opinion simply got this wrong—and the consequences are deeply problematic for people looking to start a new job, obtain an apartment, or take a volunteer position.

The court then examined the Judicial Council’s purpose for restricting such filters. (*Id.*) The court noted that the Judicial Council, when drafting the rule, “ ... did not intend simply to maximize the public’s access to information. Rather, the drafters sought to balance the public’s access to court records with the privacy concerns of those involved in criminal proceedings.” (*Id.* at 777.) The court then cited a report from the Judicial Council wherein the Judicial Council addressed its balancing concerns,

“‘In adopting this rule, the council recognized that the ‘practical obscurity’ of most court records provides individuals with some protection against the broad dissemination of private information that may be contained in public court records. Although court records are publicly available, most people do not go to the courthouse to search through records for private information, and in most cases that information is not widely disseminated. In contrast, if records are available over the Internet, they can be easily obtained by people all over the world.’ “

(*Id.* at 777.)

The court followed that line of reasoning and stated that to allow the public to search court indexes by individual date of birth and driver’s license information could eliminate the “practical obscurity” of criminal court records. (*Id.*) It went on to mention that without such personally identifying information linking an individual to court index information, the public would generally, “not be able to use a court index to determine whether a particular individual has a criminal record with the court (given the possibility of two defendants having the same name).” (*Id.* at 777-78.) Again, the Judicial Council struck such a balance in order to comply with the mandate imposed by

To ameliorate the risk of the aggregation of court data, the Court Technology Advisory Committee (CTAC) proposed access to court records on a case by case basis, and allowed the trial court discretion to determine whether to authorize bulk access.

Reading Rule 2.507(c) in context with the concerns identified by the Committee in adopting the rules, it is clear that Rule 2.507(c) was intended to protect individual privacy by preventing the court from disclosing (i.e., by not “including”) such information in its calendars, indexes, and registers of action. In other words, what CTAC was attempting to prevent was a publication or disclosure of this information by the court. The Rule does not prevent, nor should it be construed to prevent, the use of such information to locate specific case file information.

Practical obscurity is a bug, and not a feature. It is a consequence of public records remaining hidden from public view. Background check companies have, through the court indexing system, been able to speed people into jobs, apartments, and volunteer opportunities. The courts’ technology has enabled court records to finally see daylight, as intended by a society that favors open government.

<p>Government Code section 69842 (requiring court to publish publicly available indexes), while wanting to “ensur[e] that [criminal] records remain practically obscure.” (<i>Id.</i> at 778.)</p> <p>This bill would tip that balance. The purpose of making court records accessible is to ensure transparency in governmental operations, while at the same time maintaining the privacy interests of an individual about whom the Government has compiled information. (<i>United States DOJ v. Reporters Comm. for Freedom of Press</i> (1989) 489 U.S. 749, 780 [stating, “The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government’s control as a compilation, rather than as a record of ‘what the Government is up to,’ the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.”].) The information being sought in this bill is not designed for purposes of finding out “what the government is up to” but rather what information the government has compiled.</p>	<p>Senate Bill 1262 maintains the delicate balance of interests. It is important to understand here that the search results, alone, do not affirmatively constitute any particular person’s criminal history; instead, the search results constitute a list of court records that require additional review to determine if they pertain to the particular consumer applicant. In short, it directs the researcher where to go to find potentially relevant records. It is not a list of that particular individual’s criminal activity, especially where the person has a common name.</p>
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**Policy Considerations**

<p><b>4) Policy Considerations:</b> Of the many practical considerations raised by both the bill’s proponents and opposition, one of the primary policy questions is deciding what entities should be able to access, compile, and disseminate criminal history information. Criminal history information is quite compelling in the sense that it could influence employers in hiring decisions, and landlords in granting rental applications, among other things.</p> <p>Managing these databases is integral to ensuring the information they furnish is accurate and maintained properly. California has</p>	
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<p>recent experience with some of the issues that can arise with databases, namely, CalGang, which was a law enforcement database pertaining to gangs that was overseen by two entities functioning independently from the State. (<i>The Ca/Gang Criminal System: As the Result of Its Weak Oversight Structure, It Contains Questionable Information That May Violate Individuals' Privacy Rights</i>. California State Auditor. (2016) &lt;<a href="https://www.auditor.ca.gov/reports/search">https://www.auditor.ca.gov/reports/search</a> results&gt; at 1.) The report found that although there were assertions of compliance with federal regulations and state guidelines, there was scant evidence to suggest those standards were met. (<i>Id.</i> at 1.) The report found numerous instances where information was either unreliable, inaccurate, and used inappropriately. (<i>Id.</i> at 1-2.) As a result, the Legislature transferred management of the database to the DOJ and set policies, procedures, and oversight for the future use of shared gang databases. (See AB 90 (Weber) Chapter 695, Statutes of 2017; Pen. Code, § 186.34 et seq.)</p>	<p>Some opponents of S.B. 1262 have cited problems with the <a href="#">CalGang database</a> and used those problems as a stand-in for perceived problems with the information obtained by background check companies from court records. This is a spurious argument. The CalGang database is, essentially, a tips and leads database for law enforcement, with limited or no due process. Unlike the tips and leads in the CalGang database, the criminal records subject to S.B. 1262 are adjudicated criminal case files maintained by California from courts.<sup>5</sup> The CalGang database does not typically contain adjudicated information by a court.</p> <p>Unlike the CalGang database, by law, consumer reporting agencies have accuracy obligations imposed on them by federal and state law. <a href="#">Cal. Civ. Code Sec. 1785.14(b)</a>, <a href="#">1786.19(c)</a>, and <a href="#">15 U.S. Code § 1681e(b)</a></p> <p>Unlike the CalGang database, by law, consumers who allege a violation of the federal or state laws governing background checks can sue a consumer reporting agency. For alleged violations of federal law, there is no cap on class action damages.</p> <p>Consumer reporting agencies are among the most regulated industries around. CRAs are supervised, regulated, and examined by</p>
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<sup>5</sup> In fact, all that is required for a person to be listed in the CalGang database is that the individual meet two of the eight qualifying criteria, which include, among others: (3) The person has been identified as a Gang Member or a Gang Associate by a reliable source. (4) The person has been seen associating with persons meeting the criteria for entry or who have previously been entered as a Gang Member into the CalGang database. (5) The person has been seen displaying one or more symbols and/or hand signs tied to a specific criminal street gang. The law enforcement officer shall document the specific symbols and/or hand signs that are tied to the criminal street gang. (6) The person has been seen at one or more gang-related addresses or locations. The law enforcement officer shall document the specific address and/or location(s) and to which criminal street gang such address and/or location(s) is related. (7) The person has been seen wearing a style of dress or accessory that is tied to a specific criminal street gang. The law enforcement officer shall document the specific items and to which criminal street gang the style of dress or accessory is related. (8) The person has one or more tattoos, marks, scars, or branding indicating criminal street gang membership. The law enforcement officer shall document a description of the tattoos, marks, scars, or branding and the location of each on the person's body.

<p>When it comes to consumer reporting agencies, there are several federal and state regulations in place that are designed to ensure reliability and accuracy of background checks. However, there is little oversight of such entities. This could potentially be why there is a growing number of lawsuits against such companies, like Checkr, that make accusations of erroneous background checks costing people chances at employment. (<i>Locked out of the gig economy: When background checks get it wrong</i>. Protocol. (2020) &lt;<a href="https://www.protocol.com/checkrgig-economy-lawsuits">https://www.protocol.com/checkrgig-economy-lawsuits</a>&gt; [as of Jun. 17, 2022].) The company is said to process approximately 1.5 million background checks every month, however:</p> <p>“Since 2015, Checkr has faced some 80 lawsuits under the Fair Credit Reporting Act, which regulates both credit reports and background checks...Roughly half of those suits have been filed in the last year alone. In court documents, the plaintiffs have accused Checkr of a wide range of wrongdoings, from mistaking them with other people to misreporting their offenses to including past criminal activity that is too old to report under the law ... These cases, some of which have been dismissed or ended in confidential settlements, represent only a fraction of the complaints</p>	<p>the CFPB. CRAs are regulated by the Federal FCRA, and the California CCRAA and the California ICRA. CRAs are subject to private rights of action under federal and state law and there is no cap on class action damages. CRAs are subject to enforcement by the FTC and state attorneys general.</p> <p>In addition to being regulated by federal and state agencies, the availability of private litigation with no limitation on class action damages and fee-shifting provisions provides for a robust consumer protection framework, which ensures CRAs maintain strict standards of accuracy. No such mechanism of accountability exists with state databases or public records.</p> <p>While the analysis cites an article regarding litigation against Checkr to suggest a lack of oversight, this citation misses the point – the statutory framework facilitates the filing of litigation against companies like Checkr and ensures accountability and responsiveness, even in instances outside of the CRA’s control. Importantly, the fact of litigation does not mean that information contained in the report was actually inaccurate. For example, Checkr receives complaints and is often sued for things outside of its control, including inaccuracies with the court record itself, as well as long-pending reports (which is at issue here). Checkr’s direct interactions with consumers regarding the negative impact of long-pending checks on them is why Checkr is actively supporting S.B. 1262.</p> <p>The FCRA and ICRAA ensure that CRAs remain responsive to consumer complaints in the background check process. To facilitate communication and transparency with the consumer, Checkr offers an online portal in addition to other channels of communication like email, mail, and telephone. Consumers can reach out to Checkr in any of the above-mentioned ways to dispute inaccuracies in their background check.</p>
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<p>about Checkr flooding Twitter and online review sites, like the Better Business Bureau.” (Ibid.)</p> <p>Individuals can dispute these errors by accessing Checkr’s online portal, but in order to access that portal, the individuals must check a box agreeing to Checkr’s terms of service, which includes an arbitration provision. (Ibid.) Although arbitration can be beneficial in some ways, it can be detrimental in other ways. “By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.” (Arbitration Everywhere, Stacking the Deck of Justice. The New York Times. (2015) &lt;<a href="https://www.nytimes.com/2015/11/01/business/dcalbook/arbitrationeverywhere-stacking-the-dcck-of-iustice.html">https://www.nytimes.com/2015/11/01/business/dcalbook/arbitrationeverywhere-stacking-the-dcck-of-iustice.html</a>&gt; [as of Jun. 17, 2022].)</p> <p>Although this bill only deals with search filters for court indexes, it poses the critical question of how California should approach the availability and accessibility of criminal history information. Should there be a move towards a centralized database available through the DO.I, or should there be decentralization of such information? In either situation there would still likely be a need for greater oversight and accountability.</p>	<p>The accountability for accurate reports with an ability to dispute those reports and to sue for violations are present for CRAs. No such protections exist do or likely will exist for a state repository.</p>
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### Arguments in Support

**5) Argument in Support:** According to Checkr, “As a Consumer Reporting Agency (‘CRA’) regulated under the federal Fair Credit Reporting Act (‘FCRA’) and California’s Investigative Consumer Reporting Agencies Act (‘ICRAA’), Checkr conducts background checks for statutorily authorized purposes, including employment, volunteering, and independent contracting. FCRA and ICRAA contain a number of protections for individual’s during this process, including limiting the types of information that can be included on a background check; for example, under ICRAA, non-convictions and expunged records cannot be reported, and convictions can only be reported for seven years.

“As part of the background check process for the purposes listed above, an individual provides their written consent to a background check and certain personally identifying information such as name and date of birth (‘DOB’). Based on this information, Checkr conducts a search of a court’s electronic index to determine whether there are records that should be included in the background report. Prior to May 2021, Checkr could search a court’s electronic index by using an individual’s name and DOB to determine whether there were any associated records. If no results returned, then the search was complete. If records were returned, then Checkr would conduct a clerk-assisted search to retrieve more information about the record to determine whether the record belonged to the individual at issue and whether the record should be included in the background check. A clerk-assisted search would usually take a few days to complete. Given the ability to conduct searches with unique identifiers such as DOB, searches requiring clerk assistance were limited (approximately 8%, prior to May 2021) ...

“The removal of DOB as a search field has resulted in substantial delays in the background check process for individuals with common

names and criminal records. Due to the inability to filter out results by a unique identifier like DOB, the number of searches requiring a clerk assisted search has nearly doubled from 8% to 14% of all searches; This means that the number of searches requiring clerk assistance has gone from tens of thousands to more than six figures. This has created a substantial backlog for these searches, resulting in these checks taking weeks to months as opposed to a few days prior to May 2021. Not only do these delays impact people with criminal records, but it also affects those with common names. Based on the data in Checkr's system, these delays disproportionately impact individuals with Spanish surnames (see Appendix A, top 50 impacted names of delayed background checks). Looking at searches conducted in Los Angeles County (one of the first courts to remove the ability to search by DOB), Checkr has been averaging more than 20,000 background checks that have been pending for more than 30 days. The most impacted individuals all have Spanish surnames.

“Similarly, searches requiring clerk assistance have effectively reached a standstill in Sacramento County, where DOB was removed as a search parameter a few months ago. There are currently six thousand background checks requiring clerk assistance, most of which are taking two months to complete. At the current rate - and with the growing backlog of searches requiring clerk assistance - processing of these checks has effectively come to a standstill, thereby preventing these individuals from getting to work ... “

**Arguments in Opposition**

**6) Argument in Opposition:** According to *Root & Rebound*, “Courts do not collect date of birth information in civil cases; however, they do in criminal cases. (Penal Code, § 11325.) Compiling criminal records with date of birth information helps criminal justice agencies create and share ‘accurate and reasonably complete criminal offender record information’ with one another ‘for the performance of their official duties.’ (Penal Code, § 13100.) Aside from criminal justice agencies, only those with a ‘compelling need’ can access criminal records compiled with the date of birth information. These include schools, nursing homes, licensing boards, and others who can show a ‘compelling need’ for the information. (Penal Code, §§ 11105, 13300.)

“The constitutional right to privacy restricts access to the criminal information compiled by criminal justice agencies. It prevents ‘government and business conduct in ... misusing information gathered for one purpose in order to serve other purposes’ and ‘to afford individuals some measure of protection against this most modern threat to personal privacy.’ (White v. Davis (1975) 13 Cal.3d 757, 774.) ...

“It is clear how commercial reports have come to cost less and become more instant than official DOJ rap sheets. Local courts are allowing commercial background check companies to access the criminal records compiled with the date of birth information for law enforcement purposes. The market for this cheap, instant information has grown exponentially in recent years. The Consumer Financial Protection Bureau (CFPB) cites a 2016 industry survey that approximately 59 percent of employers conduct criminal background checks. The number rose to nearly 90 percent by 2018. Due largely to the increasing demand, fueled by relentless marketing stoking our

Criminal Offender Record Information (“CORI”) is regulated by the penal code. This information is defined as “records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release.” [Cal. Penal Code Sec. 13102](#). This is the quintessential “rap sheet” maintained by law enforcement related to arrests.

- If a person went to a local law enforcement office and asked for all crimes committed by Jane Doe, they would be asking the police for a “rap sheet” on Jane Doe.
- The creation of the state database – maintained by the California Department of Justice – was designed as a single repository for such otherwise localized “rap sheets” across California. It fulfills requests to the California government for all records across the state about the individual.
- The location and review of an individual court case record is NOT the same as requesting a “rap sheet” about any individual.

The Penal Code limits who can access CORI information. Only those with “*expressly authorized by statute.*” While the CORI law allows certain people to access the information if they can show a “compelling need.”<sup>6</sup> [Penal Code §§ 13202, 13300\(b\)\(13\)](#), and 13300(c). “[California] state law provides that only those authorized by statute may obtain access to Department of Justice arrest records.” [Younger v. Berkeley City Council](#), 45 Ca. App. 3d 825, 830 (Court of Appeal, First Dist. 1975). It’s hard to imagine the state Department of Justice would grant access to its database for background checks.

<sup>6</sup> *Id.*, [13300\(c\)](#).

<p>collective bias against “the felons,” the background check industry collected a revenue of \$3.2 billion in 2019 alone. A small piece of the pie goes to courts. For example, the Los Angeles County Superior Court reports that it makes an annual revenue of about \$7 million through its website that filters its ‘criminal index’ by date of birth or driver’s license number.</p> <p>“SB 1262 claims that the delay in commercial background checks caused by the Hamrick ruling ‘disproportionately impacts individuals with common names and prevents these individuals from being able to secure work or housing on a timely basis.’ However, we have yet to see evidence to support this claim. Instead of being denied work or housing, some formerly incarcerated people report that they are allowed to work or rent on a probationary basis while the background check results are pending.</p> <p>“On the other hand, we know that the delay is in reducing the background check companies’ margins and increasing the cost of a commercial background check. In this era of mass incarceration and collateral consequences, the Court’s ruling asks us how much we are willing to pay for our biases against the formerly-incarcerated or convicted people. When a commercial background check costs more and takes longer, we would really have to believe in its utility to buy and use it. “The Court’s ruling disrupts the existing commercial market for criminal history information. The ruling certainly makes it more expensive, although not impossible, to compile a job applicant’s criminal history. In response to the aftermath of the ruling, an industry group explains that each report requires “hundreds of criminal case files to be reviewed” manually.</p>	<p>Keep in mind that DOJ information will not likely contain adjudications, so if someone is acquitted or has charges reduced and convicted of lesser charges, that will not be reflected.</p> <p>DOJ is a fingerprint search in many/most cases, so a person who wants a job or an apartment would have to go to a police station (who wants to do that) to get printed and then start a search. There are plenty of people who do not want to go to a police station. Also, there are many with access to transportation issues to getting to a police station if they wanted to. Also, think of the time that takes when an applicant may also have a job, or when an applicant has child care issues. Below and appended to this document are examples of hurdles that must be cleared for CORI information:</p> <ul style="list-style-type: none"> <li>• Step 1 “get the forms.”</li> <li>• Step 2 “get fingerprinted.”</li> <li>• Step 3. “Wait.”</li> <li>• And then there are “delays.”<sup>7</sup></li> </ul> <p>Senate Bill 1262 allows people to locate and search for case potentially relevant files at the courthouse. That is not the same as requesting a ‘rap sheet’ on an individual.</p> <p>Organizations who are unable to rely on the commercial background check process may resort to their own research methods – i.e., Internet searches, social media – which necessarily incorporates outdated and inaccurate information, without all the consumer protections afforded by the background check process regulated under the federal Fair Credit Reporting Act (<a href="#">FCRA</a>) and the California Investigative Consumer Reporting Agencies Act (<a href="#">CICRA</a>). In California, background check companies are also regulated by the California Consumer Credit Reporting Agencies Act (<a href="#">CCCRA</a>).</p>
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<sup>7</sup> <https://oag.ca.gov/fingerprints/applicants>.

<p>Employers with a compelling need can access DOJ rap sheets. Those without must be willing to bear the cost of a manual review process. “SB 1262 erases the distinction between these two groups. Anyone, with or without a compelling need, would have access to the information compiled for law enforcement purposes. The bill affirms the self-serving argument of commercial background check companies that one’s criminal history is always relevant and, therefore, should be made readily available to everyone.”</p>	
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**NOTE: The committee analysis is substantial, and this rebuttal is current as of June 21, at 5:00 p.m. PDT. More information for this rebuttal is likely**