

CRIMINAL RECORD INFORMATION FOR BACKGROUND CHECKS: THE NEED FOR AN IDENTIFIER MATCHING PROCESS

Access to criminal records fulfills important social needs.

The availability of criminal records serves the public need for information, particularly for background checks. Employers, property managers, charities, and volunteer organizations rely on this critical information to make important decisions that allow them to provide a safe environment and to protect important assets. In today's society, we increasingly expect to work, live, and play in safe communities. Background checks enjoy overwhelming public support. Federal, state, and municipal legislators have responded by mandating background checks for many jobs. In addition, the federal government has recognized the benefits of background checks by requiring that criminal history reports be used in the tenant screening process for public housing.

Criminal records are most frequently used for employment and volunteer purposes. This vital information assists employers with identifying the right individuals for the right job, reducing risk, and safeguarding our communities. Background checks help remove discrimination from the workplace by providing facts to displace any potential subconscious biases connecting criminality to race by a hiring manager. The Equal Employment Opportunity Commission (EEOC) has bolstered this fact by providing employers with [Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act](#). This readily available and well-known guidance supports the use of the three identified Green factors (named after the 8th Circuit's 1975 decision in *Green v. Missouri Pacific Railroad*), which was subsequently updated by the EEOC in 2012, to assess whether an employment exclusion based on criminal record is justified as job related and consistent with business necessity:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

ACCURACY IS FUNDAMENTALLY ESSENTIAL.

Because criminal records are used for critically important decisions impacting both the requestor of information and the subject of the information searched, accuracy is essential. A review of public records without the ability to properly connect the record to the subject can have severe unintended consequences. If an individual cannot be properly identified in the public record, an employer may not learn of an individual's prior criminal history. Where information has been significantly restricted or made unavailable, limiting access to personal information may lead to a misidentification of an individual who shares the same personal information of another person. It is critical that there be sufficient personal information available to the public so that the information can be accurately matched to the subject of the search.

Personal information for purposes of searching the public record can be categorized as either a "Unique Identifier" or a "Shared Identifier."

A Unique Identifier is personal information that can only be properly attributed to one specific individual. A Social Security number or a driver's license number are examples of Unique Identifiers that court administrators may have in their court information.

A Shared Identifier is personal information that, standing alone, can be properly attributed to multiple individuals. A name, a date of birth, and an address are examples of Shared Identifiers that can be attributed to more than one individual. In other words, a Shared Identifier on its own lacks a unique quality that specifically identifies an individual:

- Individuals can have the same name.
- Individuals can have the same date of birth.
- Individuals can share the same address.



Without identifiers, criminal records that belong to an individual with a common name (e.g., John Smith) cannot be attributed to a particular individual without risk of misidentification. With the availability of additional Shared Identifiers, such as a date of birth, the confidence of positive identification increases significantly.

Since Shared Identifiers are commonly used and available publicly, they are not generally associated with identity theft. Identity theft typically involves a Unique Identifier. Shared Identifiers such as date of birth or address are readily available through a variety of public sources (e.g., search engines, phone books, and public profiles). Individuals readily provide others with their Shared Identifiers without concern over risk to their privacy. For example, an individual will readily provide a date of birth within their social media profile, for birthday clubs, for loyalty programs, or as the sole identifier when picking up a prescription. Public officials frequently include date of birth on their public profile webpages.

IDENTIFIER MATCHING PROCESS

An identifier matching process allows a researcher to identify record matches for an individual with a high level of confidence while significantly minimizing any risk of misidentification. Court Administrators can consider several options for identifier matching processes:

1. Providing Shared Identifiers as part of the public record and available for review via public access terminals. This allows for the most efficient research process and requires little support from court personnel.
2. Providing "Smart Matching Logic" (SML) for Shared Identifiers within remote access and public access terminals. This allows the requestor to input Shared Identifiers, such as a date of birth, and receive back only information for which there was a match. SML should indicate what identifiers were matched, without disclosing personal information. This provides for an efficient search process but may require some system programming and maintenance.
3. Providing court personnel to assist with the validation of Shared Identifier information. This requires a significant commitment from court personnel. Efficiency is dependent on availability of court personnel.

An effective identifier matching process can benefit both requestors and court administrators in terms of accuracy and efficiency, while minimizing the need for court resources. To be both accurate and efficient, an identifier matching process must allow access to Shared Identifiers.

REDACTION OF SHARED IDENTIFIERS IS BAD POLICY.

The need for positive identification to confirm whether a public record matches the individual being screened is critical for decision making. Access to Shared Identifiers increases accuracy by helping to identify records that relate to the individual and weeding out those that do not. If Shared Identifiers are not made available to requestors of criminal records, the unintended consequences of redaction can be significant. Unnecessary redaction can present an insurmountable obstacle to completing an accurate background check and result in "false negatives" in background reports (i.e., the absence of accurate criminal offense data that pertains to an applicant).

To understand the impact of redaction of Shared Identifiers, one should consider who may be impacted. To cite just a few examples, please consider the following:

- companies that need to employ an individual who works with a vulnerable population;
- property Managers that seek to provide safe housing;
- charities that entrust an individual with their charitable funds; and
- volunteer Organizations that manage youth recreational leagues.

For employment screening, redaction can cause an employer to fall out of compliance with the Occupational Safety and Health Act's "General Duty" clause, which requires employers to take reasonable steps to "prevent or abate a recognized violence hazard in the workplace." Accurate background checks are vital to preventing workplace violence.

Without a process to access Shared Identifiers, regulated employers who are required to have government mandated "clearances" for potential employees will not be able to meet their statutory obligations.



PRIVACY IS NOT IMPACTED BY BACKGROUND CHECKS.

A background check is NOT a search to develop or acquire identifier information that the requestor does not already possess.

Requestors of public record information for background checks are seeking to verify whether any Shared Identifiers that they already possess are associated with a specific individual's public record. These Shared Identifiers are provided by the subjects of the background check who have authorized the background screening company to use their personal information, both Shared and Unique Identifiers, to conduct the background check.

BACKGROUND CHECKS BY CONSUMER REPORTING AGENCIES (CRAS) ARE STRICTLY REGULATED.

A background check performed by a CRA is strictly regulated by the Fair Credit Reporting Act (FCRA). The FCRA requires that before a consumer report can be created, the requestor of the report must have an FCRA defined "permissible purpose" (such as employment), provide certain disclosures to the subject of the report, and obtain authorization from that individual. These processes are followed millions of times each year by requestors.

The FCRA permits CRAs who have followed the requisite compliance procedures to provide consumer reports to anyone authorized by the subject. Unauthorized dissemination of consumer report information by a CRA is strictly prohibited.

THERE ARE FEDERAL REQUIREMENTS REGARDING ACCURACY.

The FCRA requires that CRAs "follow reasonable procedures to assure maximum possible accuracy" when providing a consumer report. This creates a very high standard for CRAs to meet that necessitates access to Shared Identifiers. The implication is that any court that limits searches for records to just a name also makes background checks impossible for its local citizens.

AN IDENTIFIER MATCHING PROCESS SERVES THE PUBLIC RELIANCE ON ACCURATE INFORMATION.

Access to public record information serves the public need and the public good. Public records are used to make important decisions and can have far reaching impact on others. Therefore, it is imperative that any information obtained can be positively and confidently attributed to a specific individual.

If Shared Identifiers are unnecessarily redacted, incomplete, and inaccurate background checks are inevitable and will result in great harm. For any custodian of public record information, it is essential that an effective identifier matching process be made available to the public in order to serve the best interests of citizens and those that rely on public record information.

Founded as a non-profit trade association in 2003, the Professional Background Screening Association was established to represent the interest of companies offering employment and tenant background screening services. PBSA currently represents over 650 member companies engaged in employment and tenant screening around the world. PBSA's mission is to advance excellence in the screening profession. As a global association with members and geographic councils all over the world, PBSA makes an ongoing commitment to diversity and inclusiveness.

