

## **White Paper #7**

# **Benchmarking the Background Check Industry**

## **Criminal and Civil Records**

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## Criminal and Civil Records

Since September 11, there have been thousands of references to federal background checks, criminal record checks, security checks, and heightened due diligence. Talk to one of the federal agencies tasked with implementing these 'new, tough standards' and you'll encounter inconsistencies.

Those working in the background check industry often hear misrepresentation about information sources, availability, and legal issues. The internet has, in many ways, hurt the industry. Prices for a background check vary wildly from \$19 to \$10,000. Global Standards are nonexistent. Even specific terms, such as 'criminal records check', can mean many things to many people.

To exacerbate the problem, nearly anyone can title themselves background check professionals with little, if any, licensing required at the state level. Data re-sellers have some requirements but are unable to control those who re-sell again to unqualified individuals.

The biggest misperception, and one already mentioned, is the term 'court records check'. This is the most requested service from our clients. Many are fulfilling hiring requirements that have no specific guidelines or standards.

Remember: Nearly all Criminal records available in a typical due diligence or hiring process exist at the county and federal district level.

### The 'FBI' Federal Background Check

A Federal Background Check, sometimes referred to as an FBI Check, Fingerprint Check, or NCIC Check, is required for employment in financial institutions, law enforcement, and many federal agencies. The NCIC database records cannot be accessed by anyone in the private sector, the results cannot be shared outside of the requesting organization, and it can only be requested in specific industries. If any non-law enforcement or non-federal agent tells you they can do a federal background check, they are (with extraordinarily few exceptions) either lying or advertising a highly illegal service.

Begun in 1967, NCIC (National Crime Information Center) initially began with online access to stolen autos, license plates, guns and wanted persons in a limited number of jurisdictions. All NCIC records were entered into the system by the agency with the investigative jurisdiction--that way, everyone knew the records were valid. Over the years, existing NCIC files have been expanded, and new ones have been added. Today, there are some 17 files containing more than 10 million records, plus 24 million criminal history records contained in the Interstate Identification Index.

One of the fundamental differences in the FBI's files is arrest versus conviction. An arrest record should not be used in the hiring decision if the person was found not guilty. Arrests that were not followed up with county-level District Attorney charges will, in most cases, never make it to a person's courthouse criminal file, but may very well show up in NCIC. The arrest report, in most cases, cannot be released to anyone but the arresting agency and the person who was arrested. You, the potential employer, or victim, or spouse, will not have access to it.

Although a financial institution might rely solely on the NCIC record check, there is a HUGE potential for missing litigation that is not contained in the FBI's files. Many misdemeanor charges, such as petty theft, drug use, assault, or drunk driving, may not make it into the NCIC database. Civil filings, such as judgments or bankruptcies, are not included at all.

*Bottom line: An enormous amount of criminal arrest, warrants, and conviction information is NOT contained in the NCIC database. Nearly ALL of the NCIC's records are ultimately filed at the county or federal district court where the arrest took place as basic criminal records, and are freely available to the public as 'public record data.'*

## **Federal District Courts**

Not to be confused with NCIC, the federal district courts handle civil, criminal, appellate, and bankruptcy cases involving individuals and companies. High-profile, interstate crimes, and many drug, fraud or intellectual property theft cases are filed at the federal level.

Each state has one or many federal court districts, and each district may have their own separate index of cases. A majority of these districts allow attorneys and qualified individuals to submit and view case information and dockets online via the Pacer system. A state-wide federal court search should include an individual search of each district. Federal-level records are usually searchable by name or case number only. The actual case documents may include a secondary identifier such as date of birth, address used by process of service or arrest, or social security number (in bankruptcy dockets). These must be examined at the courthouse itself or acquired from Pacer.

## **County-level Courts**

These courts handle convictions for the cities, municipalities, sheriff agencies and other non-federal law enforcement as well as local civil filings of individuals and companies. Each county handles public information requests differently and many impose a surcharge for each name submitted for research.

Criminal records can nearly always be searched by name and date of birth at the courthouse. Civil records, on the other hand, rarely include a secondary identifier other than the plaintiff and defendant name. A competent researcher should include, at the very least, an index of all the cases found and forward to the customer for perusal.

## **County-level Record Checks - The Seven Year Rule**

Most consumers of criminal and civil record checks do not realize that nearly all walk-in court researchers only include cases filed within the past seven years. These companies are abiding by the Fair Credit Report Act limitation of reporting no cases over 7 years old for hiring situations.

Ironically, if a recently released prison inmate has been incarcerated for over 7 years as a result of, for example, a murder charge or for bank robbery, he or she will (according to the researcher) be guaranteed to have a clean criminal record. It's true. They have not committed a felony or misdemeanor for the past seven years (but only because they've been locked up).

## **Statewide Court Searches**

Some states are now promoting state-wide or multi-county court consolidation sources. New York, for example, has recently begun offering state-wide criminal record searches at a cost of about \$50. State-wide searches are limited, and you should be very sure you are getting what you are promised.

## **Nationwide Court Searches**

Unless you are spending \$25,000, you are not receiving a nationwide court search. California alone has nearly 60 counties, and none of these county records are officially consolidated. The term 'national' or 'nationwide' usually infers that the research company will examine the court within the vicinity of the subject's residence, county by county, regardless of where this person lives in the US.

Remember: NO ONE, not even the President of the United States, can search a database containing all U.S. criminal or civil convictions.

## **'Instant' Nationwide Background Checks**

Many companies now offer very inexpensive one-click criminal record research services. These products are dangerously inadequate and are 100%-guaranteed INCOMPLETE.

These companies are affiliated with information brokers that purchase multi-county, multi-state 'indexes' (see *Criminal and Civil Record Standards* section below). Although these indexes contain hundreds of thousands of records, they leave out ENTIRE STATES in many instances. Only a fraction of the total contains a date of birth or address.

For example, the seller may claim to contain records for all 50 states, but may fail to disclose that Utah's records are limited to Utah prison records and contain absolutely no felony and misdemeanor records that didn't result in a prison incarceration.

In another classic example, your record requests may include a name AND date of birth, but huge amounts of criminal index records contain no DOBs. It is likely you will always get a 'no record found' result when, in fact, several records exist.

Although these reseller sites are great for a "let's see what else is out there" situation, it is an extraordinarily dangerous single source if you are mandated to complete a criminal record check as an employer, financial services provider, or other reputation-critical sector.

## **Non-Court 'Regulatory' Cases (NASD, SEC)**

Some individuals and business entities are charged with quasi-criminal offenses in regulated industries. These professions include stockbrokers, securities dealers, investment consultants, mortgage professionals, real estate agents, and health care professionals. Although the person or company might be accused and found guilty for fraud, theft, or gross negligence, the case can be filed outside of county and federal courts, usually by the internal governing body of their group.

For example, a stockbroker might be proven to have misused a client's money via a complaint filed by the victim and the National Association of Securities Dealers (NASD) and the offending broker subsequently fined in the tens of thousands of dollars or barred temporarily or permanently from their field. No county or federal Court action exists, but the offender was still found guilty.

The NASD will not release offenses to the public that is more than a couple years old and, in most cases, will not release substantive detail of the offense. In many cases, it deems this information confidential. Also, a NASD judgment is almost NEVER filed at the county or federal level.

## **Whose Name Are You Checking?**

The subject's name on an employment or credit application might be different than the name on their driver's license, or the actual legal name may be different altogether. A strong ethnic name, such as 'Mohammad' may be Americanized to 'Manny' in public records, depending on the identification used during an arrest. Women may interchange a maiden name and married name based on either a business setting or social gathering.

Always, always, ALWAYS perform a credit header search of name variations, dates of birth, social security numbers, and addresses used (see section below for 'Geographic Scope'). A criminal record check ordered under the wrong name will result in erroneous information.

## Geographic Scope

So where should you request court record research? It depends on where your subject has resided for the past seven years, or where they work. For example, if your subject lives in Arlington, Virginia and works in Bethesda, Maryland, a distance of under 20 miles, he or she will regularly have had the opportunity to be sued or arrested in two states, one district, and a number of different counties. In most cases, criminal records will only be found in the county of conviction. It is strongly suggested that you initially order an address history from a credit header file, then adjust your scope of court research accordingly.

If your subject of inquiry was convicted of aggravated rape in, for example, Los Angeles County, but now resides in the adjacent county, and court records are ordered in that adjacent county only, he will have a 'No Criminal Records Found' background report.

Does the subject regularly travel to Las Vegas? Maybe a gambling vacation turned into a jail visit for prostitution and drugs. Starting to wonder how wide of a net to cast? It all depends on what your exposure is for the subject you're investigating.

## County-level Criminal and Civil Record Standards

How should you choose a record researcher? Although the liability will arguably end with this party, an incomplete search benefits no one.

The author started in this business as a criminal and civil records researcher at the local county-level court. Like most of his counterparts, he had several customers providing nationwide court record retrieval services who would fax him their list of names to be checked in the local county. He would access a public computer terminal at the courthouse and search each request by name and date of birth, then submit the 'hits' to the court employees, who would pull each case for conviction or dismissal details. This is commonly known as a '*walk-in*' or '*hand search*' record check.' This standard complies with the Fair Credit Reporting Act.

An *index search*, on the other hand, entails searching an information broker's database, usually purchased weeks or months ago. They do not usually include dates of birth. These files are not as accurate as a walk-in search because of the age of the records. Index searches do not comply with the Fair Credit Reporting Act since the FCRA specifies employers use the most current and up-to-date information available (whereas index searches are out of date as soon as they are purchased by the re-seller). However, index searches are very useful and should not be viewed as a waste of money. When used in conjunction with a hand search, they can turn up valuable arrest, conviction, and incarceration records in distant states that would never have been found during a local walk-in hand search.

Remember: County-level court record checks should always include a hand search at the courthouse or direct access to a court's real-time updated computer. You should be paying at least \$8 to \$20 per search unless you have a huge volume discount. Turnaround time should be two to 10 days. When choosing a vendor, always ask about the exact search methodology used, the standards applied to their court researchers, and known problems with your most frequent court searched.

## Testing your Sources

One method of verifying the quality of your researcher is to check against known records. Send the same request to five different vendors and compare results. If one vendor returns a 'no record found' and another researcher finds several hits, the decision on who to use in the future will be painfully obvious.

## **Overview**

In our opinion, a minimal background check for financial institutions, health care industries, or any industry regulated by the federal government, should consist of the following:

1. Identity verification by social security number for address history and name variations
2. County-level criminal record hand search in the past locales of a person's residence or employment
3. Federal criminal records in the District of a person's residence or employment.

-and -

4. A review of any list of industry-excluded persons (such as the financial sanctions list or federal health care sanctions list).