



**Testimony of the
Professional Background Screening Association
(PBSA)**

Before the

House Judiciary Subcommittee
on Courts and Intellectual Property

September 26, 2019

The Federal Judiciary in the 21st Century:
Ensuring the Public's Right of Access to the Courts

Introduction

Chairman Nadler, Ranking Member Collins and Members of the Committee:

The Professional Background Screening Association (PBSA), formerly known as the National Association of Professional Background Screeners, is pleased to submit testimony before the Subcommittee on Court and Intellectual Property on its hearing on The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts. As you will see below, the federal judicial branch's system for managing public records, known as the Public Access to Court Electronic Records or "PACER", is an outlier from all state court records systems with respect to its failure to incorporate certain identifiers such as dates of birth. The failure to adhere to best practices in this regard has a detrimental impact on the quality of searches conducted on PACER. PBSA believes Congress should direct the Administrative Office of the Courts to adopt best practices with respect to incorporating dates of birth and/or other identifiers to improve the quality of searches conducted on PACER.

Background of the Professional Background Screening Association (PBSA)

PBSA is the trusted global authority for the screening profession. In pursuit of our mission to advance excellence in the screening profession, PBSA promotes and advocates for ethical business practices and fosters awareness of privacy rights and consumer protection issues. PBSA is an international trade association of over 900 member companies. Its members provide employment, tenant, and volunteer background screening and related services to virtually every industry, including motor carriers, education, banks, healthcare, government, and community organizations. The reports prepared by PBSA's background screening members are used by employers, property managers, and volunteer organizations every day to ensure that workplaces, schools, roadways and residential communities are safe for all who work, reside or use them.

PBSA members range from large background screening companies to individually-owned businesses, each of which must comply with applicable law, including when they obtain, handle, or use public record and private data. PBSA members also include suppliers of background screening information such as court-record retrieval services and companies that provide access to public record data to background screeners. We believe the membership of PBSA represents the largest set of users of PACER outside of the judicial branch and lawyers appearing in federal court.

PBSA appreciates the opportunity to offer our views on the state of the Public Access Court Electronics Records (PACER) system. PBSA members have greatly appreciated the bipartisan interest and support of Congress over the past few years. While there are a number of legislative proposals in Congress that would promote greater transparency and modernization of PACER, including bills offered by members of this Committee including Representative Collins and Representative Cicilline, the Association will limit this statement directly to the need for legislation to reform the use of identifiers in PACER in the employment context. PBSA shares the same goals as the public, industry partners, and Congress: ensure employers across the country can continue to hire the best candidates and maintain a safe working environment. We look forward to working closely with the Committee to achieve these goals.

Importance of Accuracy in Court Record Searches for Employment

Business in the U.S. is booming. Unemployment continues to decrease and employers are looking to fill more jobs. In this environment, hiring the best candidate in a timely manner is imperative to employers. The cost and time associated with onboarding a new hire is valuable – both to the employer and potential employee. If the hiring process takes too long, employers may lose the best talent to the competition and the employees may lose the opportunities for which they were best suited. It is critical to get it right with all due haste.

Millions of background screening reports are requested by employers in the United States, allowing them the necessary information to make informed hiring decisions. Over 1,500 companies and small businesses provide these critical background screening services to these employers, landlords, and volunteer organizations. Screening companies are hired by these entities to verify the education, employment, financial, and criminal histories of prospective employees, tenants, and volunteers. The motivations for conducting such searches include: providing all applicants of any race or gender a fair chance at a job without preconceived notions of criminality; avoiding legal exposure for negligent hiring; ensuring a safe working environment by reducing the likelihood of workplace violence, theft, and hiring of individuals based on fraudulent credentials; improving productivity and profits by making better hiring decisions; and compliance with state-law requirements designed to protect the elderly, disabled, and children. The demand for background screening services has increased significantly in the last ten years and will continue to do so as more businesses, landlords, and volunteer organizations recognize that the cost of conducting background checks are far outweighed by the benefits of doing so. The number one challenge employers reported they face when it comes to screening is the length of time to get results. It is clear that employers use background checks to help them find the ideal candidate, and speed and accuracy are paramount.

PACER is an Outlier of Court Record Repositories

Often as employers run background checks on prospective employees, the process includes a check for federal criminal records, all of which are held in PACER. The criminal history check component of employment screening is dependent on open public record access and transparency in the courts. Screeners use information provided by applicants on applications and other documents, including their Social Security number (SSN) and date of birth (DOB), to verify criminal history information through public documents searches. Proper verification of an applicant's criminal history is difficult when federal court records fail to include full dates of birth and SSNs. Because name alone is not usually enough to identify a person, record searches on PACER can result in numerous "false negatives" when they are screened. For example, one source estimates there are more than 45,000 individuals in the United States with the name "Robert Smith." Without additional identification data, a screener may have to omit reporting a federal criminal record on Robert Smith since the record is more likely relate to a different Robert Smith than the one being screened. Some of them may have committed federal crimes like drug trafficking or identity theft, while most others are law-abiding citizens. By virtue of the lack of identifiers in PACER, the criminal Robert Smith would have the good fortune to be hired without the employer being able to consider and evaluate the significance of serious federal criminal convictions. These "false negatives" leave employers to speculate about the quality of

the criminal history check results of applicants, potentially compromising the safety and security of fellow employees, vulnerable customers, and the general public.

In addition, the absence of identifiers may result in a “false positive,” where the screener – in good faith – incorrectly attributes a criminal conviction to a person with a common name, requiring individuals to engage the statutory dispute process to have the criminal record removed from the background check report, potentially delaying the start of their employment and resulting in additional work for the court employees needed to assist them. This can happen where the lack of identifiers in the public record itself requires a screener to go to secondary sources of information, such as calling parole officers. That is a less certain process than using a DOB on the record itself, so can result in errors. The resulting delay can cost honest prospective employees the jobs they have applied for or allow dishonest applicants with criminal histories to obtain sensitive jobs. The absence of identifiers in PACER leaves the screener vulnerable to reporting false positives and impeding an applicant’s ability to get a job, as well as risking an employer’s ability to maintain a safe workplace.

The absence of identifiers harms job applicants too. Professors Holzer, Raphael and Stoll – three noted economists – published an article in the *Journal of Law and Economics* discussing their empirical analysis of the impact of background checks on hiring minorities. The professors discovered that employers who are deprived of the information contained in criminal background checks actually engage in statistical discrimination. For example, since an African American male is more likely to have had a criminal conviction than a Caucasian female, an employer will tend to choose the female candidate over the male one in the absence of background screening. And – perversely – employers deprived of the information contained in criminal background checks are more likely to hire white applicants who have been convicted of crimes. The economists concluded, “[T]he empirical estimates indicate that employers who perform criminal background checks are more likely to hire black applicants than employers that do not. . . .”¹

The accuracy and timeliness of any background check is dependent on access to personal identifiers like complete DOB. One may assume that this information would be available to background screening companies, especially since the subject of the check already provided them with this information. However, that is not always the case. DOBs are systemically unavailable in PACER.

PACER was not created for the benefit of the Judiciary. In 1988, contemplating the reasons for creating a program of electronic access for the public to court information, the Judicial Conference acknowledged, “The judiciary generates a large volume of data which is of considerable interest and value to the bar and litigants, to the media, to scholars and government officials, to commercial enterprises, and to the general public.” PACER was created for the public. (The Electronic Case Filing system, which was integrated with PACER, was created for members of the judiciary, the bar and litigants.) But PACER is only useful to the public insofar as it actually identifies the parties. Lacking information about the parties to a case, the public cannot tell whether a particular matter relates to a particular individual. It doesn’t do the public

¹ Holzer, Raphael & Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 *J. Law & Economics* 451 (Oct. 2006).

much good to know that some person was convicted of making terrorist threats if you can't tell which exact person made those threats.

PACER's failure to utilize key identifiers, even minimally, is unlike state and county court repositories around the country. It is important to remember that employers and background screeners already have the DOB and SSN obtained from the applicant with their consent and may enter this data into their search criteria to ensure accurate identification of the parties in the search results without publicly displaying this information. That is often the model employed by state courts.

PACER is a vital source for screeners conducting criminal record checks and including identifiers is immensely important. Federal crimes include weapons offenses, terrorist threats, kidnapping, embezzlement, wire fraud, bomb threats, and financial and internet crimes, and the inability to properly identify criminal records puts the safety of Americans at risk. Not only that, it can cause unnecessary delays in the hiring process, which harms employers and jobseekers alike.

Congressional Action Necessary

The Judicial Conference of the United States, a policy-setting organization for the federal court system, has adopted a policy that requires all personal identifiers to be redacted from criminal case documents, e.g., motions, exhibits, etc., that are filed electronically or in paper format. This was done to facilitate electronic filing of court records while protecting the sensitive, personally identifiable information of individuals from identity theft. PBSA is supportive of the Judicial Conference's efforts to make federal court records available through the PACER system and understands the Conference's desire to protect individuals named in court records from identity theft. Unfortunately, this policy has hindered the ability of background screeners to confirm the criminal histories of prospective job applicants.

In addition, because many state courts look to the federal courts as a model, the failure to include full identifiers in federal court records could influence the state court administrators who are now debating whether to redact or remove personal identifiers from state court records. This could make conducting criminal background checks using state and local criminal histories more difficult as well.

In 2018, PBSA (then NAPBS) filed a formal request with the Judicial Conference to consider steps to promote greater accuracy through improved use identifiers in PACER. Unfortunately, the Judicial Conference declined to take up the proposal on the basis that such action exceeded its authority under the Rules Enabling Act. Therefore, Congress must act to appropriately address this issue.

PBSA Urges Congress to Promote Accuracy of PACER Searches Through Better Utilization of Identifiers in Public Records

PBSA members provide a valuable service to employers, landlords, volunteer organizations, and others by obtaining the critical information needed to make safe, intelligent hiring and leasing decisions. PBSA therefore:

- Urges Congress and the Judicial Conference to allow the use of personal identifiers, such as dates of birth, for legitimate purposes such as background screens that are critical to keeping America's workplaces and communities safe.
- Believes federal courts and Congress can develop policies that protect individuals from identity theft while giving those with permissible purposes the access they need to verify the identity and background of prospective employees, tenants, and volunteers.
- Urges Congress to take note that the balance between privacy and the public's right to know who is a party to a case has already been struck in the federal bankruptcy context – a member of the public can run a search of bankruptcy filings using a person's Social Security number and thereby accurately identify which individuals have filed for bankruptcy. This feature only works if you already have the SSN. If don't, you can't obtain it simply by perusing bankruptcy files.
- Supports including full dates of birth in private and public records since they are rarely used as a sole source in identity theft.
- Supports securing SSNs in case files, provided that these key identifiers are not displayed to the public, and appropriate authorized personnel² are permitted to verify a SSN match in civil or criminal court records when the SSN is provided by the individual applicant for the purpose of facilitating a background check.
- Calls upon Congress to enact legislation requiring that federal courts include full dates of birth in publicly available paper and electronic court records for adults charged in criminal cases.

Conclusion

The Professional Background Screening Association wants to ensure employers across the country can continue hiring the best candidates and jobseekers can continue to be placed in the right jobs. Fortunately, we can remedy this dilemma with a simple fix. Congress and the Judicial Conference should take steps to fix the problem and ensure access to dates of birth in PACER.

On behalf of the Professional Background Screening Association and our members, I thank you for this opportunity to testify before the Judiciary Committee. PBSA stands ready to work with this Committee and other interested parties in devising effective solutions regarding PACER reform, as well as any other important issues affecting the background screening industry.

² Fair Credit Report Act (FRCA) establishes definitions and responsibilities for companies performing background checks. There are also similar federal models for the protection and accesses of personally identifiable information, such as the Gramm-Leach-Bliley and the Driver's Privacy Protection Act. For more information on the privacy protections in these acts, please contact Collins & Company, Inc. on behalf of PBSA at the number listed below.