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## Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used Employment-Related Background Checks for Employment-Related Background Checks

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*Government Accountability Office*

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# Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used Employment-Related Background Checks for Employment-Related Background Checks

## Abstract

Authorized employers use information from FBI criminal history record checks to assess a person's suitability for employment or to obtain a license. States create criminal records and the FBI facilitates access to these records by other states for nationwide checks. GAO was asked to assess efforts to address concerns about incomplete records, among other things.

This report addresses to what extent (1) states conduct FBI record checks for selected employment sectors and face any challenges; (2) states have improved the completeness of records, and remaining challenges that federal agencies can help mitigate; and (3) private companies conduct criminal record checks, the benefits those checks provide to employers, and any related challenges.

GAO analyzed laws and regulations used to conduct criminal record checks and assessed the completeness of records; conducted a nationwide survey, which generated responses from 47 states and the District of Columbia; and interviewed officials that manage checks from the FBI and 4 states (California, Florida, Idaho, and Washington). GAO selected states based on geographic location and other factors.

## Keywords

background checks, criminal records, employment

## Comments

### Suggested Citation

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February 2015

# CRIMINAL HISTORY RECORDS

## Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks

## Why GAO Did This Study

Authorized employers use information from FBI criminal history record checks to assess a person's suitability for employment or to obtain a license. States create criminal records and the FBI facilitates access to these records by other states for nationwide checks. GAO was asked to assess efforts to address concerns about incomplete records, among other things.

This report addresses to what extent (1) states conduct FBI record checks for selected employment sectors and face any challenges; (2) states have improved the completeness of records, and remaining challenges that federal agencies can help mitigate; and (3) private companies conduct criminal record checks, the benefits those checks provide to employers, and any related challenges.

GAO analyzed laws and regulations used to conduct criminal record checks and assessed the completeness of records; conducted a nationwide survey, which generated responses from 47 states and the District of Columbia; and interviewed officials that manage checks from the FBI and 4 states (California, Florida, Idaho, and Washington). GAO selected states based on geographic location and other factors.

## What GAO Recommends

GAO recommends, among other things, that the FBI establish plans with time frames for completing the Disposition Task Force's remaining goals. The Department of Justice concurred with all of GAO's recommendations.

View [GAO-15-162](#). For more information, contact David C. Maurer at (202) 512-9627 or [maurerd@gao.gov](mailto:maurerd@gao.gov)

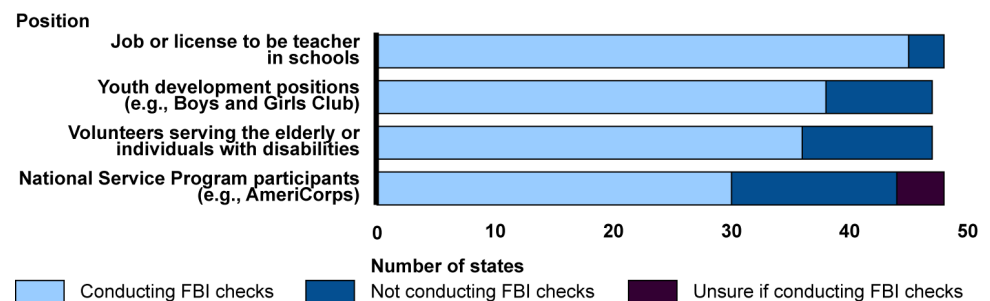
# CRIMINAL HISTORY RECORDS

## Additional Actions Could Enhance the Completeness of Records Used For Employment-Related Background Checks

### What GAO Found

Most states that responded to GAO's nationwide survey reported conducting Federal Bureau of Investigation (FBI) criminal history record checks for individuals working with vulnerable populations—such as children and the elderly—and other employment sectors that GAO reviewed (see fig. below). States that did not conduct FBI record checks said this was because the state lacked a designated agency to review check results, among other challenges. In 2006, the Attorney General proposed that nongovernmental entities also serve in this role but noted that this would require considerations about securing data and protecting personal information.

States Conducting FBI Criminal Record Checks for Selected Employment Sectors



Source: GAO analysis of national survey of state and District of Columbia record repositories. | GAO-15-162

States have improved the completeness of criminal history records used for FBI checks—more records now contain both the arrest and final disposition (e.g., a conviction)—but there are still gaps. Twenty states reported that more than 75 percent of their arrest records had dispositions in 2012, up from 16 states in 2006. Incomplete records can delay checks and affect applicants seeking employment. The Department of Justice has helped states improve the completeness of records through grant funding and other resources, but challenges remain. For example, the FBI's Advisory Policy Board—which includes representatives from federal, state, and local criminal justice agencies—created a Disposition Task Force in 2009 to address issues regarding disposition reporting, among other things. The task force has taken actions to better measure the completeness of state records and identify state requirements for reporting disposition information. However, the task force does not have plans with time frames for completing remaining goals, such as examining and recommending improvements in national standards for collecting and reporting disposition information.

According to stakeholders GAO contacted, the use of private companies to conduct criminal history record checks appears to be increasing because of employer demand and can provide benefits, such as faster response times. Federal agencies regulate these companies and have settled complaints, such as in cases where the wrong records were sent to employers. Private companies can face challenges in obtaining complete and accurate records, in part because not all states make their criminal record information accessible for private companies to search.

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## Abbreviations

BJS	Bureau of Justice Statistics
CFPB	Consumer Financial Protection Bureau
CNCS	Corporation for National and Community Service
DOJ	Department of Justice
EEOC	Equal Employment Opportunity Commission
FBI	Federal Bureau of Investigation
FCRA	Fair Credit Reporting Act
FTC	Federal Trade Commission
NCHIP	National Criminal History Improvement Program
NCPA	National Child Protection Act
NGI	Next Generation Identification
OPM	Office of Personnel Management
PSOEAA	Private Security Officer Employment Authorization Act

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February 12, 2015

Congressional Requesters

From fiscal years 2009 through 2013, about 120 million criminal history record checks were conducted through the Federal Bureau of Investigation (FBI) for non-criminal-justice purposes. Employers can use information from these types of checks to screen job applicants, including those seeking positions working with children, the elderly, or other vulnerable populations. States primarily create and maintain criminal history records—which can include arrest and disposition information—and make these records available to the FBI to facilitate the interstate sharing of records for criminal and non-criminal-justice purposes. In general, disposition refers to the result or conclusion of criminal proceedings, such as charge dismissed, acquittal, adjudication withheld, probation, or conviction.<sup>1</sup> Authorized state agencies have direct access to FBI-maintained criminal history records to conduct non-criminal-justice record checks, and the results are automatically sent back to the requesting agency.

The primary vehicle for states to conduct FBI criminal history record checks for non-criminal-justice purposes is through provisions contained in the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1973 (hereinafter referred to as Public Law 92-544).<sup>2</sup> Pursuant to Public Law 92-544, the FBI is authorized to use funds for the exchange of identification records, including criminal history record information, with officials of state and local governments for purposes of employment and licensing if this is authorized by state statute and approved by the Attorney General. In general, government agencies that receive the results of FBI criminal record checks apply their own suitability criteria for employment or licensing or criteria established under state law. In addition, to expand access to FBI record checks for certain populations—such as individuals who provide services to children—federal laws have been enacted that authorize state governmental agencies to conduct FBI checks without

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<sup>1</sup>28 C.F.R. § 20.3(i).

<sup>2</sup>Pub. L. No. 92-544, 86 Stat. 1109.

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requiring a separate state statute and approval from the Attorney General.

In June 2006, the Attorney General reported that the criminal history background check system was a patchwork of state and federal laws that had resulted in inconsistencies in access to FBI criminal record checks across states and industries.<sup>3</sup> Since then, Congress has raised questions about the extent to which FBI record checks are carried out across states, as well as the impact that incomplete records may have on employment or licensing decisions.<sup>4</sup>

Employers can also obtain background information on an applicant—including criminal record information—from private sector companies that compile and sell information that they may obtain directly from states or other sources. You asked that we assess the states' use of FBI record checks, the completeness of records, and the role of the private sector in conducting checks.<sup>5</sup> This report addresses the following questions:

- To what extent do states conduct FBI criminal history record checks for selected employment sectors and what challenges, if any, do they face in conducting these checks?
- To what extent have states made progress in improving the completeness of criminal history records and what challenges remain that federal agencies can help mitigate?
- To what extent do private companies conduct record checks, what benefits do they provide, how are they regulated, and what challenges do they face?

Regarding access to FBI record checks and state challenges, we assessed whether states had established laws or were using authorities under federal laws to conduct FBI checks for three employment sectors—

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<sup>3</sup>U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks* (Washington, D.C.: June 2006).

<sup>4</sup>In general, a criminal history record is complete when it contains both the arrest charge and the disposition of the arrest (e.g., conviction or acquittal).

<sup>5</sup>In general, private sector companies that compile and sell background information do not have access to FBI record checks. Rather, these companies obtain criminal history information directly from states or other sources.



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those related to the National Child Protection Act of 1993,<sup>6</sup> which covers, among other things, individuals with responsibility for vulnerable populations;<sup>7</sup> the Edward M. Kennedy Serve America Act (Serve America Act),<sup>8</sup> which covers organizations that can serve vulnerable populations and receive funding under national service laws (e.g., AmeriCorps);<sup>9</sup> and the Private Security Officer Employment Authorization Act of 2004, which covers organizations that employ private security officers.<sup>10</sup> We selected these laws to represent a range of factors, including variation in whether the law requires or authorizes (permits) an FBI record check. In addition, we conducted a web-based survey of officials at agencies within all 50 states and the District of Columbia that maintain criminal history records (state repositories) to determine the extent to which states are conducting FBI checks for the employment sectors covered under the three federal laws and what challenges, if any, states face in doing so. We received a response rate of 94 percent—47 states and the District of Columbia—which we collectively refer to as states throughout this report. We also interviewed management officials from state repositories and courts that maintain criminal history information in 4 states—California, Florida, Idaho, and Washington—to determine the extent to which they conduct FBI checks, any challenges, and actions taken to address those challenges. We selected the 4 states based on geographic location and other factors. In addition, we analyzed federal regulations and procedures for conducting criminal record checks and interviewed FBI officials who manage the checks to determine any challenges in providing access. We also interviewed senior officials from the Compact Council—the primary state and federal body for setting policy around the interstate sharing of criminal history records for non-criminal-justice purposes.<sup>11</sup> Further, we

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<sup>6</sup>Pub. L. No. 103-209, 107 Stat. 2490.

<sup>7</sup>Pub. L. No. 103-209, § 3, 107 Stat. 2490, 2491 (codified, as amended by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320928, 108 Stat. 1796, 2131-2132 and the Volunteers for Children Act, Pub. L. No. 105-251, § 222, 112 Stat. 1885, at 42 U.S.C. § 5119a).

<sup>8</sup>Pub. L. No. 111-13, 123 Stat. 1460.

<sup>9</sup>Pub. L. No. 111-13, §§ 1612, 1614, 123 Stat. 1460, 1538-1541, 1541-1544 (codified at 42 U.S.C. § 12645g).

<sup>10</sup>Pub. L. No. 108-458, § 6402, 118 Stat. 3755, 3755-3758 (codified at 28 U.S.C. § 534 Note).

<sup>11</sup>The Compact Council was established by the National Crime Prevention and Privacy Compact Act of 1998, Pub. L. No. 105-251, 112 Stat. 1874.

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interviewed management officials from the Corporation for National and Community Service—a federal agency that oversees service programs such as AmeriCorps and the Senior Corps and requires background checks for its participants and program employees—to determine whether challenges existed in obtaining information from FBI record checks. We also interviewed management officials from the National Center for Missing and Exploited Children—an organization that uses criminal history records provided by the FBI to determine suitability of its volunteers—to determine what challenges existed in its use of FBI criminal history records.

Regarding the progress states have made in improving the completeness of criminal history records and related challenges, we analyzed data that states provided to the Department of Justice (DOJ) via a survey from 2006 through 2012 on the percentage of their arrest records that contained information on the disposition of those arrests.<sup>12</sup> We selected this time frame because 2006 was the year the Attorney General issued the criminal history background check report and 2012 was the year with the most current available survey data. To assess the reliability of the data, we analyzed the survey methodology, interviewed DOJ officials who conducted the surveys, and examined data for obvious errors. We determined that the data were sufficiently reliable for the purposes of this report. We also analyzed the results of the FBI's most recent round of triennial state audits, which include assessing the completeness of state records and use of the records for non-criminal-justice purposes.<sup>13</sup> As of January 2014, the FBI had finalized 44 state audits that the bureau conducted from 2011 through 2013. Further, we interviewed management officials who maintain criminal history records in the 4 states we contacted to determine challenges they face in maintaining complete records and related initiatives to improve record completeness. We also interviewed officials from the FBI and DOJ's Bureau of Justice Statistics (BJS) who have key roles in providing access to FBI record checks and providing assistance to states in maintaining complete records. Further, we interviewed officials from the Office of Personnel Management (OPM)

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<sup>12</sup>See, for example, U.S. Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal Justice Information Systems, 2012* (Washington, D.C.: 2012).

<sup>13</sup>The FBI audits each state's use of FBI-maintained criminal history records every 3 years.

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who collect disposition information as part of OPM background investigations.

Regarding the role of the private sector in conducting employment-related criminal record checks, we reviewed relevant sections of the Fair Credit Reporting Act<sup>14</sup> and Title VII of the Civil Rights Act of 1964<sup>15</sup> that related to private background screening companies' use of criminal history records. We also analyzed a 2005 national task force report on the commercial sale of criminal justice record information<sup>16</sup> and a 2006 Attorney General's report on criminal history background checks.<sup>17</sup> We also interviewed senior officials from associations that represent background companies, such as the National Association of Professional Background Screeners and the Consumer Data Industry Association, to determine the role of private sector agencies in providing criminal history information to employers. Further, we interviewed senior officials from federal agencies that regulate these private sector entities—including the Federal Trade Commission, the Equal Employment Opportunity Commission, and the Consumer Financial Protection Bureau—to determine how the industry is regulated as well as the size and scope of the industry.

We conducted this performance audit from October 2013 to February 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Appendix I contains additional information on our scope and methodology.

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<sup>14</sup>Pub. L. No. 91-508, 84 Stat. 1114.

<sup>15</sup>Pub. L. No. 88-352, 78 Stat. 241, 253-266.

<sup>16</sup>SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Information* (Sacramento, CA: 2005). The task force included representatives from the law enforcement community, among others. The report resulted from a project funded by DOJ. SEARCH—the National Consortium for Justice Information and Statistics—is a non-profit organization governed by governor appointees from the 50 states and is a resource for information, best practices, services, and solutions for criminal justice information sharing.

<sup>17</sup>U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks* (Washington, D.C.: June 2006).

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## Background

Private, public, and nonprofit employers can use information from criminal history records for non-criminal-justice purposes, such as screening an individual's suitability for working with children, the elderly, or other vulnerable populations. States primarily create and maintain criminal history records, but the FBI facilitates the interstate sharing of these records for criminal and non-criminal-justice purposes. Specifically, state central record repositories collect criminal history information from law enforcement agencies, courts, and other agencies throughout the state and submit records to the FBI. For example, state repositories collect arrest records from local police departments and disposition records from prosecutors or courts.

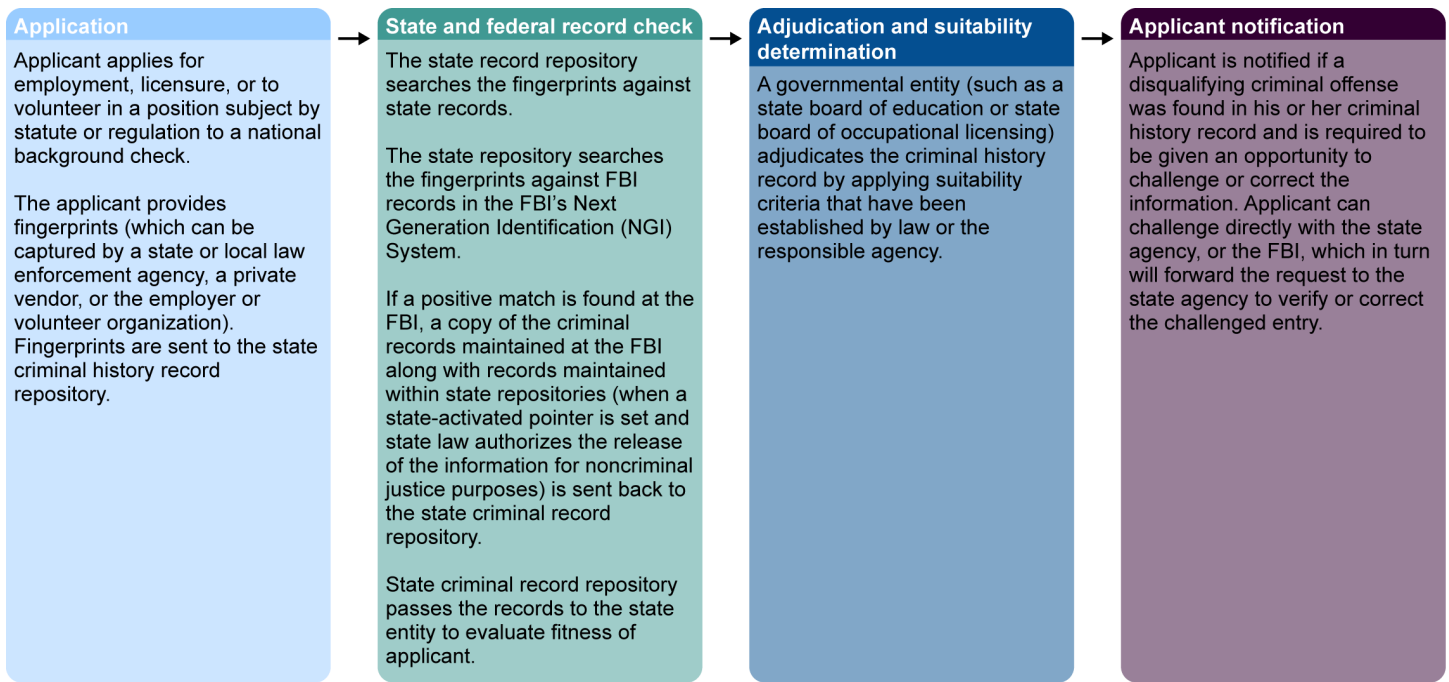
The FBI maintains a fingerprint-based criminal history record repository called the Next Generation Identification (NGI) System (previously the Integrated Automated Fingerprint Identification System). The NGI System contains records from all states and territories, as well as from federal and some international criminal justice agencies. The FBI's Interstate Identification Index provides for the decentralized interstate exchange of criminal history record information for authorized criminal and non-criminal-justice purposes and functions as a part of the NGI System.<sup>18</sup> In general, states conduct FBI criminal history record checks by searching an applicant's fingerprints against records in the NGI System (see fig. 1).<sup>19</sup>

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<sup>18</sup>The Interstate Identification Index was developed in 1978 to coordinate the decentralized exchange of interstate criminal history record information among states and federal criminal justice agencies. All 50 states and the District of Columbia participate in the index.

<sup>19</sup>States generally charge a fee to cover the expenses related to conducting these checks, in addition to a fingerprint fee charged by the FBI.

**Figure 1: Example of a Process for Conducting a FBI Criminal History Record Check**



Source: GAO analysis of Department of Justice information. | GAO-15-162

In general, the FBI provides the results of a FBI criminal history record check to a designated agency—such as a state department of health and human services or board of occupational licensing—through a criminal history summary. This summary—often referred to as a criminal history record, or rap sheet—includes the name of the agency that submitted the criminal record to the FBI; the date of the arrest; the arrest charge; and the disposition of the arrest, if known, to the FBI.

Federal laws that require or authorize states to conduct FBI criminal history record checks for non-criminal-justice purposes—including employment and licensing—cover a wide range of industries, such as those that serve vulnerable populations. These federal laws may authorize states to conduct FBI checks using just the authority of the

federal law without requiring a related state statute.<sup>20</sup> This report primarily addresses the states' use of three federal laws, as shown in table 1.

**Table 1: Description of Selected National Background Check Laws**

Federal law	Population affected by law	Is criminal record check required or authorized?
The National Child Protection Act of 1993/Volunteers for Children Act <sup>a</sup>	Providers with responsibility for the safety and well-being of children, the elderly, or individuals with disabilities (also defined as "vulnerable populations").  Examples include applicants to work as teachers in schools, providers in health and day care centers serving vulnerable populations, counselors for youth development, and volunteers for the elderly.	Authorized
The Edward M. Kennedy Serve America Act <sup>b</sup>	Individuals who receive a living allowance, stipend, national service education award, or salary through a program receiving federal assistance under national service laws.  Examples of programs include AmeriCorps and Senior Corps programs.	Required
The Private Security Officer Employment Authorization Act of 2004 <sup>c</sup>	Employees or applicants for employment as private security officers.  Examples include licensed security guards and unlicensed security employees.	Authorized

Source: GAO analysis of selected federal laws. | GAO-15-162

<sup>a</sup>Pub. L. No. 103-209, 107 Stat. 2490/Pub. L. No. 105-251, 112 Stat. 1885.

<sup>b</sup>Pub. L. No. 111-13, 123 Stat. 1460.

<sup>c</sup>Pub. L. No. 108-458, § 6402, 118 Stat. 3755.

In addition to federal laws, states may pass statutes that the Attorney General approves pursuant to Public Law 92-544 that require or authorize employers or organizations to request FBI criminal record checks for applicants seeking employment or licensing in their state. For example, states can require FBI checks for non-criminal-justice purposes in areas regulated by the state, such as civil servants and nursing home workers. States can also pass laws to implement federal laws, which can include, for example, additional provisions on the types of criminal activities that would disqualify an applicant from employment or licensing. All state laws related to Public Law 92-544 have to be approved by the Attorney General. According to FBI officials, as of 2014, states had passed a total

<sup>20</sup>App. II contains examples of federal laws that authorize states to conduct FBI criminal history record checks for non-criminal-justice purposes.

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of about 2,800 laws that require or authorize FBI criminal history record checks, which include checks for employment or licensing purposes.

DOJ, states, and others have emphasized the importance of having complete records when conducting FBI checks—records that contain the arrest charge and the disposition of the arrest (e.g., conviction or acquittal)—since incomplete records can lead to delays in completing checks and have adverse impacts on applicants. In 1995, DOJ established the National Criminal History Improvement Program (NCHIP) to enhance the quality, completeness, and accessibility of criminal history record information maintained by the states. All 50 states, the District of Columbia, and U.S. territories have received grant awards. The FBI also helps to ensure the integrity of state-level criminal record systems through periodic audits.

Employers can also obtain background information—including criminal record information—from private sector companies that compile and sell information that they may obtain from state courts or other public sources. These companies are classified as consumer reporting agencies under the Fair Credit Reporting Act (FCRA).<sup>21</sup> This act contains provisions that are intended to require these agencies to adopt reasonable procedures for using consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.<sup>22</sup> At the federal level, the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) regulate private background companies and employers that conduct background checks that may contain criminal record information. In addition, the Equal Employment Opportunity Commission (EEOC) regulates and oversees employers' use of criminal record information provided by private background companies under Title VII of the Civil Rights Act of 1964.<sup>23</sup>

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<sup>21</sup>Under 15 U.S.C. § 1681a(f), “the term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”

<sup>22</sup>15 U.S.C. § 1681(b).

<sup>23</sup>Pub. L. No. 88-352, 78 Stat. 241, 253-266.

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## Most States Conduct FBI Record Checks for Selected Employment Sectors, but Lack of State Agencies to Review Check Results Remains a Challenge

Most states that responded to our nationwide survey reported that they conduct FBI record checks for individuals working with vulnerable populations and other employment sectors we reviewed.<sup>24</sup> States not conducting such checks reported lacking designated state agencies to review the check results, among other challenges.<sup>25</sup> The Attorney General has proposed expanding FBI record checks to employers and other third parties, but also noted that any expansion should consider concerns about securing data and protecting personal information.

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## Most States Conduct FBI Checks for Individuals Working with Vulnerable Populations and Other Selected Employment Sectors, but Gaps Remain in Conducting Checks

### Employment and Volunteer Positions with Vulnerable Populations

The National Child Protection Act (NCPA), as amended, authorizes states to have procedures that require qualified entities designated by the state to contact an authorized state agency to request an FBI criminal background check. This check is for the purpose of determining whether a person has been convicted of a crime that bears upon the person's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.<sup>26</sup> Our survey results show that 45

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<sup>24</sup>We surveyed officials at agencies within all 50 states and the District of Columbia that maintain criminal history records (state repositories), and received responses from 47 states and the District of Columbia. We collectively refer to survey respondents as states throughout this report.

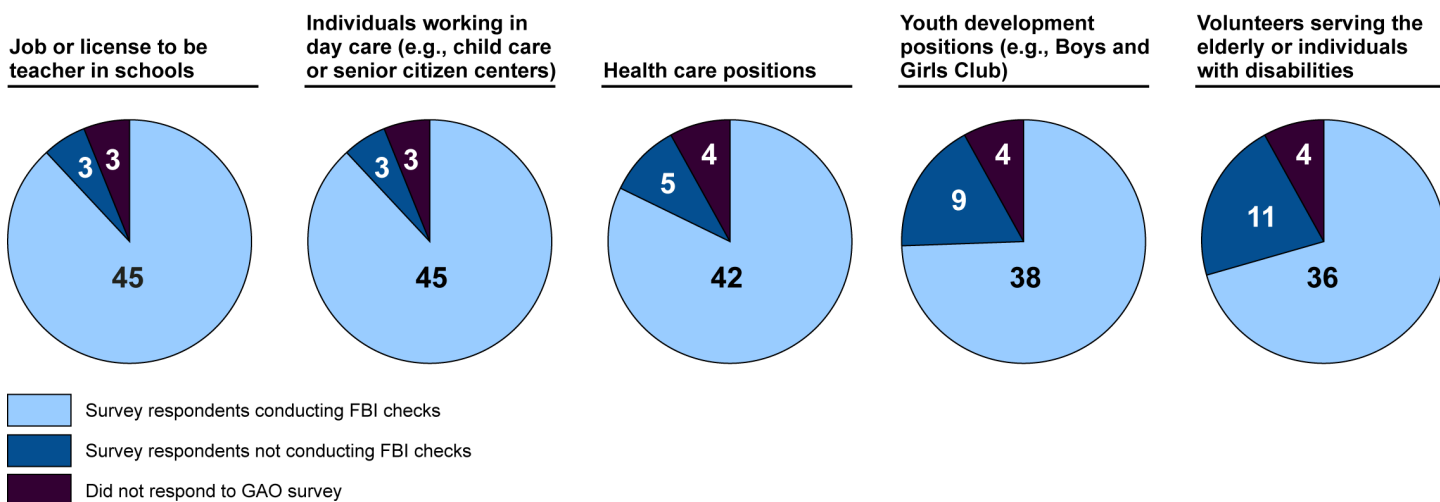
<sup>25</sup>In general, states conduct FBI record checks using the authority of federal law or a state law that has been approved by the Attorney General under Public Law 92-544. States can establish suitability criteria for employment or licensing that are in addition to criteria that are established in federal law. This report focuses on the extent to which states conduct checks for selected employment sectors and generally does not distinguish between the use of federal or state authorities to conduct checks.

<sup>26</sup>42 U.S.C. §§ 5119a, 5119c.



of 48 respondents conduct FBI record checks for individuals seeking jobs or licenses to be teachers in schools—positions that are typically regulated by states.<sup>27</sup> The largest gap in FBI record checks was for volunteers serving the elderly or individuals with disabilities, where 36 of 47 respondents reported conducting such checks, but 11 of 47 respondents did not, as shown in figure 2.<sup>28</sup>

**Figure 2: Number of Survey Respondents Conducting Federal Bureau of Investigation (FBI) Checks for Selected Employment and Volunteer Positions Covered under the National Child Protection Act**



Source: GAO nationwide survey of criminal history repositories in 50 states and the District of Columbia. | GAO-15-162

The primary reasons states reported not conducting FBI criminal history record checks for employment or volunteer positions covered by the NCPA were the lack of a designated state agency to review the FBI record check results or the states did not have licensing or regulatory requirements to check volunteers. One survey respondent noted that, in some cases, state legislatures do not support expanding the availability of background checks to certain classes of employees, despite the existence of federal laws that seek to encourage such checks.

<sup>27</sup>Three states did not respond to our survey.

<sup>28</sup>In addition to the 3 states that did not respond to our survey, 1 state did not respond to our survey question about volunteers serving the elderly or individuals with disabilities.

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Recognizing concerns about the background check process available to volunteer organizations, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 established the Child Safety Pilot Program. The act required the Attorney General to establish an 18-month program that would provide for the FBI to conduct 100,000 criminal history record check requests from certain youth-serving organizations, such as the Boys and Girls Clubs of America.<sup>29</sup> Under the pilot, the FBI provided the results of a check to the National Center for Missing and Exploited Children—rather than through a state agency—which made suitability determinations and conveyed the decision to the organization that made the request.<sup>30</sup> According to officials from the national center, of the approximately 105,000 FBI checks that the organization conducted over the 8-year pilot, about 6,500 (6.2 percent) of all applicants had a criminal record that disqualified them from working with children.<sup>31</sup> Officials who represent volunteer organizations said that they plan to continue to pursue legislation in upcoming congressional sessions that would provide for certain youth-serving organizations to use information from FBI record checks to screen applicants.

Some states have also developed programs that allow volunteer organizations to obtain information from FBI criminal record checks. For example, according to officials from the Florida Department of Law Enforcement, Florida has established a program—which the FBI approved—that authorizes certain volunteer organizations to receive the results of FBI record checks from the department and determine an applicant's suitability for employment, rather than relying on a Florida agency to adjudicate the results on the organization's behalf. Senior officials from the Florida Department of Law Enforcement noted that the state requires volunteer organizations to sign a user agreement before gaining access to FBI-maintained criminal records, a requirement that is intended to help ensure that the organizations properly use and safeguard the records. The Florida officials also said that the department can audit these entities to ensure compliance with the agreement.

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<sup>29</sup>Pub. L. No. 108-21, § 108(a)(3), 117 Stat. 650, 656-658.

<sup>30</sup>The National Center for Missing and Exploited Children made determinations based on criteria that the center and other volunteer organizations jointly established.

<sup>31</sup>Subsequent legislation extended the Child Safety Pilot Program to a 104-month program and 200,000 criminal history record checks.

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## Individuals Serving in National Service Programs

In general, the Edward M. Kennedy Serve America Act requires, with limited exceptions, that entities conduct FBI criminal history checks for certain individuals working with vulnerable populations.<sup>32</sup> These individuals serve in positions that provide the individuals with a living allowance, stipend, national service educational award, or salary through a program receiving assistance under national service laws.<sup>33</sup> Among other things, these individuals can tutor children in reading, run after-school programs, provide health information to a vulnerable population, and conduct neighborhood watch programs. Our survey results show that 30 of 44 respondents conduct FBI record checks for national service program grant recipients and 14 of 44 respondents did not conduct such checks.<sup>34</sup>

Of the 14 respondents that did not conduct FBI checks, 12 reported not having procedures or agencies in place to review the results of checks for national service program grant recipients, 6 reported lacking sufficient resources to review check results, and 5 reported lacking a state licensing or regulatory need to conduct such checks.<sup>35</sup> According to a senior official from the Corporation for National and Community Service (CNCS)—the federal entity that administers programs established under national service laws—CNCS has received hundreds of requests from national service program grantees for an exemption from the FBI record check requirement and for approval to use an alternative screening procedure, such as the ability to use a substantially equivalent process. The officials noted that a subset of these requests are from organizations that seek an exemption to the FBI record check requirement because of the difficulties they have encountered in obtaining such checks.

According to CNCS officials, CNCS is authorized to receive FBI criminal history records and adjudicate applicants' criminal records on behalf of its national service program grantees. The officials noted, however, that CNCS opted not to develop a national, centralized mechanism for

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<sup>32</sup>42 U.S.C. § 12645g(d)(3).

<sup>33</sup>Pub. L. No. 111-13, §§ 1612, 1614, 123 Stat. 1460, 1538-1541, 1541-1544 (codified at 42 U.S.C. § 12645g).

<sup>34</sup>Three states did not respond to our survey and officials from 4 of the 48 states that responded were unsure if their states conducted checks for grant recipients.

<sup>35</sup>Survey respondents could provide more than one reason for not conducting checks.

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conducting state and national fingerprint-based criminal history record checks for national service program participants, in part to allow states to make their own suitability determinations. In October 2014, CNCS officials stated that in light of the challenges national service programs have faced in obtaining FBI record checks, CNCS is assessing the costs and benefits of acting as a national clearinghouse for such checks if no option is available in the organization's own state. CNCS expects to make a decision in 2015 regarding whether acting as a clearinghouse is feasible.

## Private Security Officers

In general, the Private Security Officer Employment Authorization Act (PSOEAA) of 2004 and its associated regulations permit authorized employers to submit the fingerprints of an employee or applicant for employment as a private security officer to a state repository of a participating state for purposes of conducting an FBI criminal history record check.<sup>36</sup> Congress found that employment of private security officers in the United States was growing rapidly; private security officers function as an adjunct to, but not replacement for, public law enforcement by helping to reduce and prevent crime; and such officers protect individuals, property, and proprietary information. Private security officers provide protection to banks, hospitals, manufacturing facilities, nuclear power plants, airports, and schools, among other operations.<sup>37</sup>

Our survey results show that

- 37 of 43 respondents conduct FBI record checks for private licensed security officers, and
- 7 of 43 respondents conduct FBI record checks for private unlicensed security officers.<sup>38</sup>

The primary reasons why states reported not conducting FBI record checks for private security officers were because the states did not license or regulate security officers or because the states did not have a

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<sup>36</sup>Pub. L. No. 108-458, § 6402, 118 Stat. 3755. See 28 U.S.C. 534 Note.

<sup>37</sup>Pub. L. No. 108-458, § 6402(b)(1)-(3), 118 Stat. 3755, 3755.

<sup>38</sup>Three states did not respond to our survey and officials from 5 of the 48 states were unsure if their state conducted FBI checks for private security officers. It was beyond the scope of our review to assess the extent to which employers of private security officers used private companies to conduct criminal record checks.

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designated state agency to adjudicate the results of the checks. Under certain circumstances, PSOEEA regulations also generally permit authorized employers to submit the fingerprints to a state other than the state in which the employee or applicant would be working for purposes of an FBI criminal history record check.<sup>39</sup> The chair of the Compact Council informed us about 1 state (Minnesota) that was conducting FBI checks for employers located in other states. According to a senior official from Minnesota's Bureau of Criminal Apprehension, the bureau did not face any challenges in conducting such checks. The official noted, however, that only one employer had requested Minnesota's help and the employer asked Minnesota to conduct FBI checks for employees in 11 other states where the employer operated.

According to an executive-level official from the National Association of Security Companies—the nation's largest contract security trade association—requiring that a state agency be involved in conducting FBI checks is a barrier for employers. The official explained that for a state agency to set up an FBI background check program, the state may need legislative authority, appropriations, and employees with expertise in interpreting criminal records, among other things. The official added that PSOEEA and federal requirements only allow states to provide employers with a determination as to whether or not an applicant failed to meet the state's or PSOEEA's criteria that would disqualify an applicant from employment, and that the private security industry would like to see revisions to PSOEEA that would allow employers greater access to the actual information returned in a FBI record check. The official said that the association plans to propose legislative changes in future congressional sessions to address these and other barriers.

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<sup>39</sup>Under 28 C.F.R. § 105.27, an employer may take this step if the employer is prevented from submitting the fingerprints because the employment is in (1) a state that does not have an applicable Public Law 92-544 statute authorizing state and national fingerprint-based criminal history checks for private security officers and has elected to opt out of the PSOEEA, or (2) a participating state that has not yet established a process for receiving fingerprints and processing the checks in accordance with the established regulations.

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## DOJ and Others Have Recommended Expanding Access to FBI Checks, but Concerns Remain about Securing Data and Protecting Personal Information

### Recommendations for Expanding Access to FBI Record Checks

In 2005 and 2006, the Attorney General and others recommended expanding employer and third-party access to FBI criminal history record checks as a way to overcome barriers presented by the need for a state agency to adjudicate record check results. For example, according to a 2005 national task force report on criminal background checks, states faced challenges in conducting FBI record checks for employment purposes, which resulted in inconsistent use of records across the states.<sup>40</sup> The task force made recommendations to state and federal policymakers regarding access to records for non-criminal-justice purposes, which included removing the federal requirement that a public agency must receive record check results. Senior officials from SEARCH and the FBI, as well as a state official we met with who participated on the task force, said that they were not aware of any specific actions that either Congress or DOJ took related to expanding record access as a result of the recommendations. Our discussions with officials from organizations representing employers for the various employment sectors we reviewed indicate that the access issues identified in the 2005 report are still of concern to employers today.

Also, according to a 2006 Attorney General report, inconsistent national access to background checks was a challenge for employers and volunteer organizations.<sup>41</sup> The report proposed recommendations that would broaden and standardize the private sector's authority to access state-held and FBI-held criminal history record information. The report noted that criminal history information that the FBI and state record repositories maintain should be a source of information—as system

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<sup>40</sup>SEARCH, *Report of the National Task Force on the Criminal Backgrounding of America* (Sacramento, CA: 2005).

<sup>41</sup>U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks*.

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Concerns Remain over  
Expanding Access

capacity allows—that private employers are authorized to use to inquire if an applicant or employee has a criminal history. Senior DOJ officials, a former official from the Attorney General’s office with direct knowledge of the report’s history, and SEARCH officials who work with states on related policy issues were not aware of any specific actions on these recommendations.

Senior officials from the FBI’s Criminal Justice Information Services Division and officials from all 4 case study states raised some concerns that any attempt to expand access to FBI criminal records checks must consider. Specifically, FBI officials said that a primary concern is the extent to which nongovernmental entities would be able to adequately protect and store criminal history record information and the potential impacts on individual privacy rights if records were to be shared extensively beyond state agencies. The officials added that another concern is the potential resulting increase in the FBI’s workload in auditing these entities’ compliance with security policies regarding the storage, use, and dissemination of criminal record information. Senior officials from SEARCH and all 4 of our case study states noted that expanding access too broadly to nongovernmental entities could mean that state agencies could lose the fees collected for facilitating checks, thereby undermining the revenue streams that states use in turn to maintain and operate criminal history repositories.

The SEARCH and Attorney General reports discussed above noted similar concerns with expanding access, and proposed some potential solutions that could balance expanded access with data security and applicant privacy concerns. For example, SEARCH recommended steps to improve the completeness and accuracy of criminal history records and protection of applicant privacy rights, through allowing individuals to access and correct their records, among other things.<sup>42</sup> The task force also recommended expanding access only to organizations that appoint individuals to positions or responsibilities involving access to vulnerable populations, sensitive information, or as otherwise deemed necessary by the Attorney General for public safety or national security. In addition, to address concerns regarding information security, the Attorney General recommended that (1) criminal and civil penalties be established for those

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<sup>42</sup>We discuss the completeness of criminal history records and individuals’ rights to correct inaccurate or incomplete information later in this report.

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provided access under any new authority for the unauthorized use of criminal history information and (2) users of such information should enter into agreements that specify the requirements for access, including security of the information and notice to individuals concerning record access and correction and fair use of the information. Further, to address concerns about state fee revenues, the task force noted that any expansions in access should require authorized entities to go through state criminal history repositories for access—not directly to the FBI—unless states have specifically opted out of providing such access.

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## States Have Improved the Completeness of Criminal History Records with DOJ's Assistance, but Continue to Face Challenges

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### States Reported Progress in Providing Complete Records to the FBI, but Incomplete Records That Can Delay Criminal Record Checks and Affect Applicants Still Exist

According to BJS surveys of state criminal history information systems, from 2006 through 2012, states reported making progress in providing complete criminal history records to the FBI—records that include the arrest and the final disposition of the arrest.<sup>43</sup> For example, BJS surveys show that the number of states that reported providing more than 75 percent of their arrest records with final dispositions increased from 16 states in 2006 to 20 states in 2012, as shown in figure 3.<sup>44</sup>

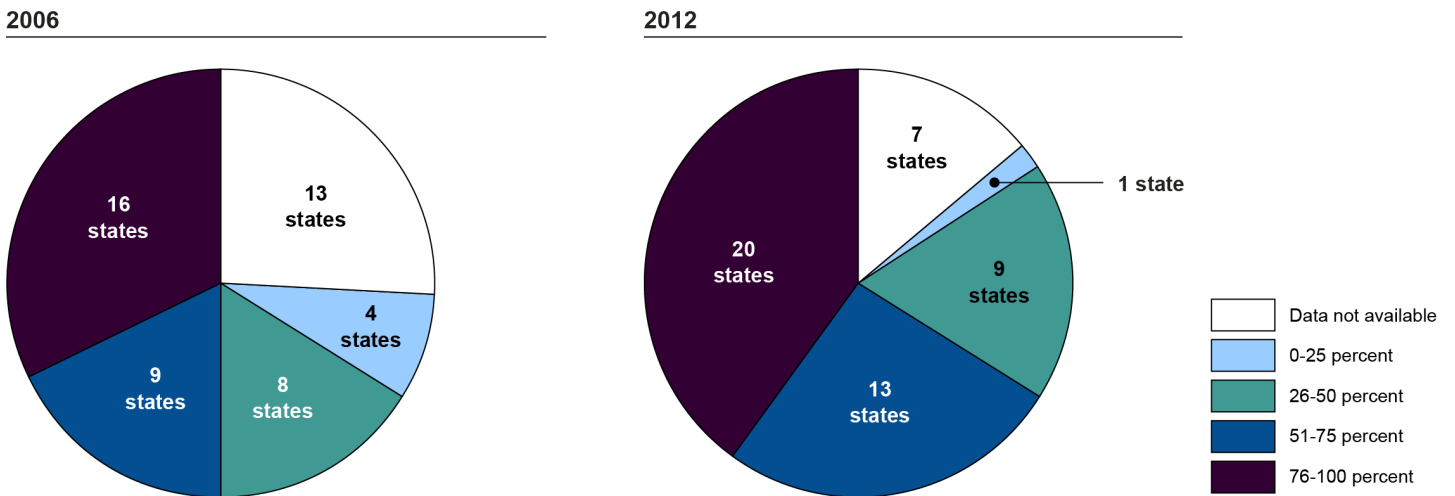
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<sup>43</sup>In general, disposition refers to the result or conclusion of criminal proceedings, such as charge dismissed, acquittal, adjudication withheld, probation, or conviction.

<sup>44</sup>U.S. Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems* (Washington, D.C.: 2006). U.S. Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2012*, (Washington, D.C.: January 2014).



**Figure 3: Percentages of Arrest Records with Final Dispositions per State, 2006 and 2012.**



Source: Bureau of Justice Statistics survey data. | GAO-15-162

According to officials from BJS’s Statistical Planning, Policy, and Operations Division and senior officials from our 4 case study states, factors that help states compile complete criminal records include the automation of criminal record information—such as devices that digitally record and electronically transmit fingerprint images from police departments to state agencies that maintain criminal history records—and improved coordination among local criminal justice entities. For example, according to a director in the Florida Department of Law Enforcement, the high level of coordination among officials on the Florida Criminal and Juvenile Justice Information Systems Council has helped increase the completeness of state records because the members collectively decided on the best use of federal grant funding to improve state record completeness.<sup>45</sup>

Nevertheless, in 2012, 10 states reported that 50 percent or less of their arrest records had final dispositions. FBI officials noted that it is not

<sup>45</sup>Florida’s Criminal and Juvenile Justice Information Systems Council’s mission is to develop standards and policies that will promote and enhance the sharing of criminal and juvenile justice information throughout the state. The council is composed of representatives from many different state agencies, including Florida’s Attorney General’s office, local law enforcement officials, court administrators, a public defender, and criminal justice information users.

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possible for states to have 100 percent complete records because it can take more than 1 year for criminal felony cases to conclude and disposition information to be entered into criminal record systems.

FBI officials also noted that the statement in the 2006 Attorney General's report on criminal history background checks that only 50 percent of arrest records in the FBI's Interstate Identification Index have final dispositions reflects a misunderstanding of how criminal history records are maintained. Rather, during an FBI criminal history record check, the FBI accesses certain records that states maintain that are not forwarded to the FBI. For example, some states forward arrest records to the FBI but not disposition information. For these states, during an FBI record check, the FBI reaches out to the state to obtain the arrest and disposition information from the state's records.

The impact of incomplete criminal history records on individuals seeking employment or licensing depends in part on whether a state's laws permit employers or licensing agencies to hire applicants contingent upon the completion of a criminal record check. According to senior repository officials from our 4 case study states, 2 states permit contingent hiring for certain positions and 2 do not. For example, a manager within the Idaho State Police's Bureau of Criminal Identification said that it could take months to obtain disposition information from other states, but that applicants are placed in certain jobs if they are supervised pending the results of the FBI record check. In contrast, a bureau chief within the California Department of Justice said that applicants cannot be hired or licensed until all aspects of the background check are completed, which includes following up on incomplete criminal records. A senior official from Washington's Department of Social and Health Services Background Check Central Unit said that incomplete records can lead to negative impacts on the applicant, since the applicant is responsible for obtaining missing information from courts. The official added that when employers have urgent hiring needs, they may choose another qualified applicant rather than wait for an individual to gather court records that are needed to complete the FBI record check.

According to a 2005 BJS report, complete records enable hiring entities to avoid delays due to the time needed to track down missing criminal

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record information.<sup>46</sup> Senior officials from central record repositories at all 4 of the states we visited noted that incomplete criminal records returned from an FBI record check can result in a variety of challenges when screening an individual's suitability for employment or licensing. For example, an official from 1 state said that because of limited staff and resources, criminal justice agencies in other states may not be responsive to requests for information on incomplete criminal records. The official noted that these agencies may also give a higher priority to addressing inquiries from law enforcement, further delaying responses to record inquiries for employment and licensing purposes. Repository officials from another state noted that it generally takes 1 or 2 days to finish an FBI criminal record check when no records are returned or the records are complete, but otherwise it can take up to several months, for example, to conduct the research needed to complete a record.

Further, officials from the four record repositories said that state privacy laws—which can restrict the information that agencies are allowed to disseminate for non-criminal-justice purposes—can affect a state's ability to obtain information. For example, officials in Washington State said that according to state law, they can disseminate a criminal record for non-criminal-justice purposes only if the record contains conviction information or arrest information that is less than 1 year old. Also, the officials said that it can be difficult to interpret whether records returned from another state would prohibit employment or licensing in the state where an individual is seeking employment, since state laws can define felonies and misdemeanors differently. The officials noted that these differences require following up with the state that generated the record, thus adding more time to the background check.

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<sup>46</sup>U.S. Department of Justice, Bureau of Justice Statistics, *Improving Access to and Integrity of Criminal History Records* (Washington, D.C.: 2005).

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## DOJ Helps States Improve Record Completeness, but States Continue to Face Challenges in Submitting Complete Records to the FBI

DOJ has several programs designed to help states improve the overall quality of criminal history records—including the completeness of records—and officials from our 4 case study states said that they generally found DOJ’s assistance to be helpful. Our analysis of published reports and interviews with officials from our case study states, BJS, SEARCH, and the National Center for State Courts<sup>47</sup> indicate that state challenges in submitting complete records to the FBI are generally inherent to local jurisdictions, and states have used DOJ’s assistance programs to help address these challenges.<sup>48</sup>

### DOJ Efforts to Help States

DOJ provides a number of different resources to help states improve criminal record completeness, including grant funding, sharing best practices, task forces, and audits.

**National Criminal History Improvement Program:** DOJ assists states in improving the completeness, accuracy, and timeliness of criminal history records through the National Criminal History Improvement Program.<sup>49</sup> For fiscal years 2008 through 2012, DOJ targeted approximately \$23 million in NCHIP grants to state record disposition improvement projects, such as updating records that only contain arrests to include disposition information and upgrading and automating criminal history record systems to capture data on dispositions from courts and prosecutors. Senior officials from all 4 of our case study states reported that NCHIP grants have helped improve the quality and completeness of their criminal history records. For fiscal years 2008 through 2012, NCHIP grant funds ranged from \$6 million to \$11 million and averaged approximately \$9.5 million per year. Appropriations for NCHIP for fiscal year 2014 were at \$46.5 million. This was primarily intended to support state efforts to increase the number of felony records and criminal-related

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<sup>47</sup>The mission of the National Center for State Courts is to promote the rule of law and to improve the administration of justice in the state courts and courts around the world.

<sup>48</sup>See, for example, U.S. Department of Justice, Bureau of Justice Statistics, *Improving Access to and Integrity of Criminal Records*, (Washington, D.C.: 2005), and SEARCH–National Consortium for Justice Information and Statistics, *Report of the National Taskforce on the Criminal Backgrounding of America* (Sacramento, CA: 2005).

<sup>49</sup>We have previously reported on DOJ efforts to assist states. See, GAO, *Bureau of Justice Statistics Funding to States to Improve Criminal Records*, [GAO-08-898R](#) (Washington, D.C.: July 8, 2008), and *National Criminal History Improvement Program: Federal Grants Have Contributed to Progress*, [GAO-04-364](#) (Washington, D.C.: Feb. 27, 2004).

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mental health records available for firearm background checks through the National Instant Criminal Background Check System.<sup>50</sup> BJS officials who administer the NCHIP grants said that an increase in felony records available for firearm checks will also benefit non-criminal-justice checks because the FBI searches the Interstate Identification Index, which stores felony records for both types of checks.<sup>51</sup>

**Best practices:** DOJ has also worked to help states improve record completeness by sharing best practices through informational websites and reports, among other avenues. For example, under a DOJ grant, the National Center for State Courts is creating a web-based tool kit that brings together information from state pilot projects, focus groups, and other research reports to identify, among other things, best practices on how to overcome disposition reporting and coordination challenges among state and local criminal justice agencies.<sup>52</sup> Also, under DOJ's funding and direction, SEARCH is implementing the State Repository Records and Reporting Quality Assurance Program, which includes a voluntary self-assessment checklist for states as a way to disseminate best practices. According to a director at SEARCH, after a state completes the checklist, a SEARCH official provides on-site technical assistance to review the responses and recommend additional state follow-up actions. The official noted that, as of September 2014, SEARCH officials had provided on-site technical assistance in 20 states. The official said that the program will continue under BJS grant funding in order to provide on-site technical assistance to additional states, continue improving the checklist, and incorporate new standards that states need to meet in order to utilize the FBI's technology advancements related to criminal record information.

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<sup>50</sup>For additional information on state challenges making records available for the National Instant Criminal Background Check System, see GAO, *Gun Control: Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks*, [GAO-12-684](#) (Washington, D.C.: July 16, 2012).

<sup>51</sup>It was beyond the scope of our review to assess DOJ's grant-monitoring efforts.

<sup>52</sup>According to National Center for State Courts officials from the Technology and Research divisions, the web-based tool kit is scheduled for completion in 2015, but the National Center for State Courts has been posting information to the website as activities are completed.

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**Disposition Task Force:** The FBI's Advisory Policy Board formed the Disposition Task Force in 2009 to address issues related to the completeness, accuracy, and availability of criminal record dispositions from courts and prosecutors and develop a national strategy for improving the quality of disposition reporting.<sup>53</sup> The task force is composed of representatives from different components of state and local criminal justice systems—including state repositories, state courts, prosecutors, and Compact Council members—as well as federal criminal justice officials, such as from DOJ and OPM. According to an FBI official who helps facilitate task force meetings, the task force established an initial set of goals in 2009, but under new leadership in 2012 determined that these goals would not address the greatest disposition-reporting challenge—the lack of national disposition-reporting standards.<sup>54</sup> As a result, the FBI official noted that the task force decided to take a broader look at disposition-reporting issues, and evolved its initial goals into five broader goals and the foundation of a national strategy.<sup>55</sup>

According to FBI officials, as of September 2014, the task force had achieved one of its 2012 goals by refining the calculation that the task force would use to estimate the rate in which state and federal arrest records contained dispositions and reaching consensus on the definition of the term “disposition” to calculate the disposition rate. The officials noted that the task force had also taken steps to achieve two other goals by (1) reviewing the results of a National Center for State Courts national survey to identify existing federal and state requirements for collecting and reporting disposition information, and (2) identifying steps to develop and produce a guide on disposition best practices.

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<sup>53</sup>The FBI's Advisory Policy Board is responsible for reviewing appropriate policy, technical, and operational issues related to the FBI's Criminal Justice Information Services Division programs.

<sup>54</sup>The task force's initial goals were to (1) develop strategies to improve the flow of disposition information with little or no funding, (2) increase the electronic transfer of information from the courts to the state repositories, and (3) educate decision makers on the importance of allocating resources for disposition improvement.

<sup>55</sup>The task force's revised goals are to (1) refine disposition rate calculations, (2) identify existing federal and state requirements for collecting and reporting disposition information, (3) identify and recommend best practices for collecting and reporting disposition information, (4) examine and recommend improvements to the national standards for collecting and reporting disposition information, and (5) promote the adoption of national standards for sharing dispositions by state judicial systems.

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The task force, however, did not have a plan with time frames or milestones for either completing the best practices guide or achieving the remaining goals, which could also lead to a national strategy—an original 2009 objective for the task force. Our work indicates that the task force has not formulated such plans or set time frames and milestones in part because of the changes in leadership and goals in 2012. Nevertheless, after more than 5 years, the task force has not issued best practices or national standards for collecting and reporting disposition information or developed a national strategy, even though disposition reporting has been a long-standing challenge. Establishing plans with time frames and milestones could help hold the task force accountable for more progress in achieving the goals and the overall results of improved disposition reporting. Taking these steps would also be consistent with program management standards that call for specific goals and objectives to be conceptualized, defined, and documented in the planning process, along with the appropriate steps, time frames, and milestones needed to achieve those results.<sup>56</sup>

**FBI audits of states:** The FBI conducts a triennial audit of state criminal justice information systems to determine, among other things, whether (1) the records the state maintains contain all known arrest and disposition information and (2) the submission of criminal record information to the FBI has been “unduly” delayed. Federal regulations provide that states should submit dispositions to the Interstate Identification Index within 120 days after the disposition occurred.<sup>57</sup> To determine whether states are meeting these two requirements, FBI auditors review state-level processes and procedures and assess, among other things, if the state repository has a backlog of dispositions that it has not submitted to the FBI. The FBI found that from 2011 through 2013, 12 of the 44 states that it had audited were noncompliant with one or both of the requirements.<sup>58</sup>

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<sup>56</sup>Project Management Institute, *A Guide to the Project Management Body of Knowledge (PMBOK® Guide)*, Fifth Edition, (Newton Square, PA: 2013). We have used this guide to provide criteria in previous reports, including GAO, *Nonproliferation and Disarmament Fund: State Should Better Assure the Effective Use of Program Authorities*, GAO-13-83 (Washington, D.C.: Nov. 30, 2012).

<sup>57</sup>28 C.F.R. § 20.37.

<sup>58</sup>The FBI is to conduct an audit of each state once every 3 years to ensure that the state complies with Interstate Identification Index participation requirements, including disposition reporting requirements. As of January 2014, the FBI had finalized 44 state audits that the FBI conducted from 2011 through 2013.

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## Challenges Faced by State Criminal Justice Agencies

For example, a 2012 FBI audit of 1 state found that the state was submitting dispositions to the FBI only twice a year. In response to noncompliant audit findings, states are required to submit a corrective action plan to the FBI describing how the state plans to come into compliance with audit requirements.

In addition to the lack of national standards that govern the submission of dispositions from state criminal justice agencies and repositories to the FBI, our discussions with officials from our 4 case study states, BJS, SEARCH, and the National Center for State Courts—and our review of reports that these entities published—identified three challenges as most frequently cited as negatively affecting the completeness of state criminal records: (1) prosecutors not reporting final decisions in a case, (2) lack of official arrest records when law enforcement cites and then releases an individual, and (3) case numbers not transferring accurately among local agencies. DOJ's grant funding and other assistance programs have helped states address these challenges.

**Prosecutors not reporting final case decisions:** According to officials from DOJ and our case study states, one of the major contributors to arrest records not having final dispositions occurs when prosecutors decline to prosecute an individual but do not report this information to the state's central records repository.<sup>59</sup> Prosecutors may decline to prosecute an individual for a variety of reasons, such as insufficient evidence or the low severity of the offense. Prosecutors also have the authority to offer plea bargains, which reduce the seriousness of a charge in return for a guilty plea or other forms of cooperation with the prosecution. Prosecutors cited excessive workload and the lack of technology and human resources as reasons why they did not report declinations to prosecute, according to a 2005 BJS survey.<sup>60</sup> When not reported, other prosecutorial decisions that can lead to an arrest record without a disposition include decisions to consolidate a case into another case and to close a case that has become dormant because of insufficient evidence or witnesses, among other things.

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<sup>59</sup>The prosecutor is the principal representative of the state in all matters related to the adjudication of criminal offenses.

<sup>60</sup>U.S. Department of Justice, Bureau of Justice Statistics, *Reporting by Prosecutors' Offices to Repositories of Criminal History Records*, (Washington, D.C.: 2005). The results of this survey are not representative of state prosecutors nationwide.



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**Fingerprints not collected under cite-and-release practices:**

Incomplete criminal history records can also result from law enforcement officials citing and releasing individuals without formally arresting and fingerprinting them. This can result in state and local courts submitting dispositions to a state’s central records repository without a corresponding arrest record because the individual was never fingerprinted. Typically, states allow citation and release for misdemeanor offenses, but according to the National Conference of State Legislatures, at least 2 states permit citation and release for some felonies.<sup>61</sup> Cite-and-release policies can result in a significant number of incomplete criminal history records. For example, a senior official from 1 of our case study states said that cite-and-release arrests were one of the practices that contributed to approximately 1.6 million dispositions that are not linked to an arrest, which the state keeps in an independent data system and is working to match up with the corresponding arrest records.

According to the National Conference of State Legislatures, cite-and-release arrests are a common practice for law enforcement agencies and are useful to these agencies. These arrests can lower jail populations and reduce costs by releasing arrestees who pose little risk to public safety. According to officials from our 4 case study states and a national focus group convened by the National Center for State Courts, mobile “live scan” devices that digitally record and electronically transmit fingerprint images or live scan devices in courtrooms could help improve the completeness of criminal history records. Courts can use such devices to immediately fingerprint individuals upon arrival in court for the citation hearing. However, a senior official from one of our case study states and a senior official from the National Center for State Courts said that local criminal justice agencies face significant barriers—such as the lack of resources and difficulty of integrating live scan devices into existing courtroom procedures.

**Case numbers not transferring among local agencies:** Senior officials in 3 of our 4 case study states said that they faced challenges in transferring unique case control numbers among local criminal justice agencies—such as law enforcement agencies, courts, prosecutors, and the state record repository. Law enforcement typically generates the case

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<sup>61</sup>National Conference of State Legislatures, “Citation in Lieu of Arrest” (Denver, CO: National Conference of State Legislatures, 2013).

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control number when an individual is arrested and fingerprinted, and some states use the number to associate all subsequent criminal history information from criminal justice entities with the original arrest event. According to the state officials, the process to transfer the case control number among local criminal justice entities may be manual and therefore prone to errors or occur inconsistently. For example, officials from 1 state said that certain local agencies that make arrests write case control numbers on a white board, and the numbers do not always get transferred to prosecutors and courts. A disposition-reporting focus group convened by the National Center for State Courts proposed that local and state governments develop policies that identify the case control number and specify that this number should be maintained in all criminal justice systems.<sup>62</sup>

DOJ's assistance programs—such as best practice dissemination programs and NCHIP grant funding—have helped states address challenges in providing complete criminal records. For example, sections of the Quality Assurance Program's checklist address state practices regarding prosecutors failing to report declinations to prosecute, cite-and-release arrests, and the transfer of case numbers among local agencies. Further, the National Center for State Courts' web-based tool kit contains information on the impact that each of these challenges has on the completeness of criminal records as well as potential solutions to overcome these challenges. Additionally, states have used NCHIP grants to help overcome these challenges. For example, in fiscal year 2013, 1 state received NCHIP grant funds to implement the electronic transfer of prosecutorial case management information to the state's court system, and another state used NCHIP grant funds to automate transferring the case control number from some prosecutors to the courts.

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<sup>62</sup>The disposition-reporting focus group was conducted as part of the Warrant and Disposition Toolkit project under a DOJ grant to the National Center for State Courts.

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## The FBI and OPM Have Not Yet Determined How the FBI Could Use Information Obtained during OPM Security Clearance Investigations to Help States Update Criminal Records

In June 2010, the Compact Council and the FBI's Advisory Policy Board approved the practice of having the FBI supply states with source documents that OPM personnel obtain during their investigations of applicants for federal employment and security clearances.<sup>63</sup> The information contained in these source documents, such as arrest dispositions, could help to enhance the completeness of state criminal history records. The agencies did not enter into a formal written agreement for this information-sharing arrangement, but it was discussed and recommended in Advisory Policy Board meeting minutes.

According to FBI and OPM officials, each week, OPM is to provide criminal justice-related information to the FBI, such as disposition information related to an applicant's arrest records. The FBI would then review the information and send any relevant information to state record repositories so that the states could decide whether to update their records. OPM began sending this information to the FBI in January 2011. According to OPM officials, OPM sends approximately 3,500 to 4,500 investigative records to the FBI each week, with each record representing state or local criminal record information obtained by an OPM investigator.<sup>64</sup>

According to officials from the FBI's Criminal Justice Information Services Division, the FBI has not been able to utilize any of the information that OPM has provided since 2011 because OPM has not provided the source documents uncovered during OPM's investigations, such as a copy of a court record. Instead, OPM provided the FBI with information derived from its final investigative reports, which can include the results of OPM investigators' phone or in-person conversations with court officials or other state criminal justice officials, among other things. According to OPM officials, OPM informed the FBI during briefings prior to when it started sending information to the FBI that OPM investigators generally do not collect source documents as part of their investigations and would not be able to do this on a routine basis. OPM officials noted that there may have been a misunderstanding with the FBI regarding the term "source" as to whether the FBI required an original court record.

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<sup>63</sup>OPM conducts approximately 2.5 million investigations each year, and each investigation is to include a fingerprint-based check of FBI criminal history records.

<sup>64</sup>One individual's FBI record check could result in multiple records if the individual had criminal records from multiple locations and law enforcement agencies.

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In October 2014, senior FBI officials said that they had had recent discussions with OPM officials to determine what, if any, criminal record information that OPM collects could be provided to the FBI to meet the FBI's requirement for source documents. A senior OPM official noted that these discussions included an FBI request for OPM to change how it provided the disposition information to the FBI to better support sorting of the information. The official added that OPM's initial assessment of the FBI's request was that it is most likely feasible. Further, the official noted that OPM had been engaged in a dialog with the FBI regarding its request and was researching the possibilities as the FBI further defined what it needed from OPM. Prior GAO work has found that collaborative activities—such as the one between the FBI and OPM—benefit from agreeing upon decisions to achieve desired outcomes.<sup>65</sup> By clarifying what disposition information OPM will provide to the FBI and formally agreeing on how OPM will provide it, the FBI would be able to forward the information to states. This would allow each state to determine if the information can be used to update their criminal history records.

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### Many States Did Not Fully Comply with Federal Requirements to Inform Individuals of Rights to Correct or Complete Their Criminal History Records

FBI audits of the states' use of criminal history records conducted from 2011 through 2013 show that 44 states went through an audit within these 3 years, and 31 of the 44 states (about 70 percent) had at least one state agency that was out of compliance with federal regulations related to applicant notifications. Specifically, the agency did not provide all of the required notifications to a job or license applicant on the individual's rights to challenge and correct that person's criminal history records.<sup>66</sup> According to FBI audit management officials, state agencies did not provide the required notifications primarily because the agencies were not aware that they had to do so. According to federal regulations:

- Officials at governmental institutions and other entities that are authorized to submit fingerprints and receive FBI identification

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<sup>65</sup>GAO, *Managing for Results: Key Considerations for Implementing Interagency Collaborative Mechanisms*, [GAO-12-1022](#) (Washington, D.C.: Sept. 27, 2012). Agencies can enhance and sustain their collaborative efforts by engaging in several practices, including defining and articulating a common outcome through having clear goals.

<sup>66</sup>The FBI is to audit each state once every 3 years to ensure that the state complies with requirements on the use of criminal history records, including applicant notification requirements. As of January 2014, the FBI had finalized 44 state audits that the FBI conducted from 2011 through 2013.

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records, including criminal history records, must notify the individuals that their fingerprints will be used to check FBI criminal history records.

- Officials making the determination of suitability for employment or licensing must provide applicants the opportunity to complete or challenge the accuracy of information contained in the FBI records.
- Officials making suitability determinations must also advise applicants that procedures for obtaining a change, correction, or update to FBI identification records are set forth in 28 C.F.R. § 16.34.
- Officials making employment and licensing determinations should not deny employment or licenses based on information in the record until the applicant has been afforded a reasonable time to correct or complete the record, or has declined to do so.<sup>67</sup>

On the basis of our analysis of FBI audit results, the two notifications that state agencies most frequently did not provide to applicants were (1) that the applicant's fingerprints would be used to check FBI criminal history records, and (2) the process for changing or updating FBI records. For each audit finding related to applicant notifications, the FBI is to make a recommendation to the state that addresses the finding. The state in turn is to respond in writing with a description of the state's plans to address the FBI's recommendation, including how the state will correct its practices to ensure compliance with the audit requirements. The Compact Council or FBI may also require the state to provide additional information or updates on the state's progress in addressing the FBI's recommendations.<sup>68</sup>

According to Compact Council and FBI officials, the Compact Council and the FBI have educated states on the applicant notification requirements through different methods, including biannual Compact Council meetings, a communication notice from the FBI to states in 2010, and during the FBI's triennial audit of states. Additionally, from May through August 2012, the Compact Council disseminated documents to states that are affiliated with the Compact Council via e-mail and at FBI Advisory Policy Board meetings that, among other things, describe (1) applicant rights to challenge and correct their criminal records during a FBI record check,

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<sup>67</sup>28 C.F.R. § 50.12(b).

<sup>68</sup>It was beyond the scope of our review to assess the states' corrective actions.

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and (2) the states requirement to notify applicants of these rights.<sup>69</sup> The FBI also published the information from these documents on the FBI's website. FBI officials noted that these documents have been widely distributed to the states and are now provided as training tools during audits. Therefore, the FBI expects that audit findings regarding the provision of applicant notice may improve in the future.

Despite the FBI's audit process and the FBI's and Compact Council's efforts to educate states on the applicant notification requirements, FBI audit findings show that states generally do not provide all of the required applicant notifications. Specifically, the FBI finalized audits for 14 states after August 2012—when the Compact Council disseminated the documents to states—and 13 of the 14 states had at least one agency out of compliance with the federal notification requirements. Internal control standards note that an agency's management should ensure that audit findings are resolved, and that separate evaluations of control activities that are designed to ensure compliance with regulations can be useful to determine their effectiveness.<sup>70</sup> Taking additional action to identify the reasons why states continue to fail to comply with applicant notification requirements could help the FBI and Compact Council revise the methods they use to educate states and achieve compliance, thereby helping the FBI and states ensure that applicants are aware of their rights to challenge and correct their criminal history records.

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<sup>69</sup>According to FBI officials, both of these documents largely track the language of the relevant regulations.

<sup>70</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-AIMD-00-21.3.1](#) (Washington, D.C.: Nov. 1, 1999).

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## Private Company Criminal Record Checks Increasing; Companies Face Challenges in Obtaining Complete and Accurate Records

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### Number of Private Companies Conducting Criminal Record Background Checks Appears to Be Increasing because of Employer Demand

The exact number of private companies that conduct criminal record checks, the number of checks conducted each year, and the number of employers and industries requesting checks are generally unknown, but appear to be increasing. According to a 2005 SEARCH report on criminal background checks—the most recent report DOJ has funded on this issue—in addition to a few large industry players, there are hundreds, perhaps even thousands, of regional and local background check companies that conduct criminal record checks.<sup>71</sup> Management officials from the FTC, EEOC, and two industry associations we contacted said that they believed the industry is growing because of employer demand for such checks. For example, according to a senior official from the Consumer Data Industry Association—a trade association that represents private background screening companies and other companies that compile data on consumers—new companies that perform criminal records checks are regularly forming due in part to employers' increasing demand for background checks, as well as the availability of online criminal history records and publicly available databases of court records.

The 2005 SEARCH report also noted that private background check companies can offer benefits that government agencies are not always able to provide, including collecting and consolidating criminal justice information from multiple sources, achieving faster response times than

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<sup>71</sup>SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Information*. The task force included representatives from the law enforcement community and the private background check industry, among others. The report was produced as a product of a project funded by DOJ.

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state agencies, and creating reports that include non-criminal-justice information. For example, in addition to an applicant's criminal history record, private companies can search other sources of information to help employers assess an applicant's suitability for employment, including public records (e.g., real estate records, liens, and motor vehicle registrations) and nonpublic information related to an individual's credit history (mortgages, auto loans, and student loans). Information provided to us by a senior official from the Consumer Data Industry Association in September 2014 cited similar benefits that private background check companies can provide.<sup>72</sup>

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### Private Background Check Companies That Compile and Use Criminal Record Information Are Subject to Federal Regulation

At the federal level, the Federal Trade Commission and the Consumer Financial Protection Bureau are responsible for, among other things, enforcing provisions of the Fair Credit Reporting Act. FCRA provisions require consumer reporting agencies to maintain reasonable procedures designed to avoid violations of requirements relating to information that may not be contained in consumer reports, to limit furnishing consumer reports to the permissible statutory purposes, and to assure maximum possible accuracy of the information concerning the individual referenced in the report.<sup>73</sup> In addition, generally under FCRA, if an employer intends to take an adverse action on an employee or applicant based in whole or in part on a consumer report, the employer must first provide that person with a copy of the report and a description in writing of that person's rights under FCRA.<sup>74</sup>

According to senior FTC and CFPB officials, the agencies can take law enforcement action in connection with alleged FCRA violations through filing civil lawsuits in federal courts or through settlements with companies. In addition, the FCRA contains provisions that generally allow for a civil action to address certain FCRA violations to be brought in an appropriate United States district court or another court of appropriate

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<sup>72</sup>U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks*.

<sup>73</sup>15 U.S.C. § 1681e.

<sup>74</sup>15 U.S.C. § 1681b(b)(3)(A).



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jurisdiction within specified time frames.<sup>75</sup> FTC officials stated that the FCRA does not require private criminal background check companies to submit to federal audits or provide disclosure statements on their activities.

According to FTC officials, from fiscal years 2009 to 2014, the FTC settled 16 complaints against private background screening companies and employers for alleged FCRA violations involving information that private background check companies reported. Of the 16 complaints, 4 included allegations that related to the use of criminal record information in employment matters, such as not following reasonable procedures when providing information to employers or not providing proper notice to employees under FCRA provisions on how the information will be used. For example, in 1 complaint, the FTC alleged that a private background company failed to follow reasonable procedures to prevent the company from including the same criminal offense information in a consumer report multiple times, failed to follow reasonable procedures to prevent the company from providing obviously inaccurate consumer report information to employers, and in numerous cases provided the records of the wrong person to employers. The FTC alleged that these failures led to consumers being denied employment or other employment-related benefits. The private background company agreed to settle with the FTC by paying a civil penalty and is barred from continuing the practices that the FTC identified as violating the FCRA.<sup>76</sup>

CFPB also accepts complaints regarding consumer financial products and services within its jurisdiction. According to senior CFPB officials, the bureau forwards those complaints directly to the relevant companies for a response. The CFPB officials noted that they have not received many consumer complaints regarding the use of criminal history records in employment background checks. The officials said that consumers may not think to contact CFPB with such complaints because consumers may think that criminal background checks are outside of CFPB's jurisdiction since the complaints are not "financial" in nature, even though CFPB has had jurisdiction to enforce most FCRA provisions since 2011. As of

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<sup>75</sup>15 U.S.C. § 1681p. We did not assess the extent to which consumers file complaints with state regulators or through private litigation because this was outside the scope of this review.

<sup>76</sup>App. III contains a summary of the 4 FTC complaints.

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October 2014, CFPB had not brought any FCRA enforcement actions against private companies related to the use of criminal history information in employment background checks.

In addition, the Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Act of 1964, which makes it illegal to discriminate in employment against a job applicant or employee on the basis of race, color, religion, national origin, or sex. In general, there are two ways in which an employer's use of criminal history records may violate Title VII—disparate treatment and disparate impact. Under disparate treatment, an employer may face liability for discrimination if an employer treats criminal history information differently for different applicants or employees based on a Title VII-protected characteristic, such as race or national origin. Under disparate impact, if an employer's neutral employment practice (e.g., excluding any applicant from employment based on certain criminal conduct) disproportionately harms individuals based on race or national origin, the policy will violate the law if it is not job related and consistent with business necessity for the position in question. For example, in fiscal year 2012, a large employer agreed to pay a monetary penalty and make major policy changes to resolve an EEOC administrative charge. Specifically, under the company's former background check policy, the company did not hire job applicants for permanent jobs if the applicants had been (1) arrested and were pending prosecution but were never convicted of an offense, or (2) arrested or convicted of certain minor offenses. The EEOC investigation revealed that this policy operated to disproportionately deny permanent employment to African-Americans, and found reasonable cause to believe that the policy was discriminatory under Title VII of the Civil Rights Act of 1964.

In addition to enforcing the FCRA and Title VII of the Civil Rights Act of 1964, federal agencies have taken actions to help ensure industry compliance with, and consumer awareness of, employers' and private background companies' use of criminal history records. For example, according to senior EEOC officials, because of the increased ease of employers' access to criminal history record information, in 2012, EEOC updated its guidance on the use of criminal records in employment

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decisions.<sup>77</sup> The guidance provides information on how an employer may use criminal history information—such as conviction records—to make nondiscriminatory employment decisions and to ensure that the employer uses the information for legitimate job-related purposes. For example, the guidance states that the fact of an arrest does not establish that criminal conduct has occurred, and excluding an applicant based on an arrest, in itself, is not job related and consistent with business necessity. The guidance notes, however, that an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the applicant unfit for the position in question.

The guidance also suggests examples of best practices that employers may adopt on the use of criminal history information to make employment decisions. One example from the guidance suggests that employers develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct that (1) identifies essential job requirements and the actual circumstances under which an applicant would perform the jobs, and (2) determines the specific offenses that may demonstrate an individual is not fit for performing such jobs. In addition, EEOC and the FTC jointly published employer guidance on how to comply with federal requirements when an employer receives background check information from private background screening companies.<sup>78</sup> For example, the guidance states that if an employer is going to get criminal history and other background information from a company that is in the business of compiling such information, the employer must first get an applicant's or employee's written permission to do the check.

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## Private Companies Face Challenges in Obtaining Complete and Accurate Criminal Records

Officials from private background check companies, states we contacted, and DOJ identified challenges that private companies face in obtaining complete and accurate criminal history records. For example, the officials said that private companies do not always have access to complete commercial databases, which can result in companies providing employers with incomplete information. The 2006 Attorney General's report also noted that not all states make their criminal record information

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<sup>77</sup>EEOC Enforcement Guidance, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, 2012.

<sup>78</sup>EEOC and FTC. *Background Checks: What Employers Need to Know*, 2012.

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accessible for private companies to search. The report added that states and state agencies that do make their criminal history records accessible to the public may only periodically update these records, which may affect the information the private background companies access. Senior officials from the Washington State Patrol who maintain the state's criminal record repository said that the state provides a subscription service to private vendors for access to public records, but that the state updates the records only every few months.

Also, private companies generally conduct name-based checks (versus fingerprint-based checks), which can decrease the accuracy of the information that the check produces. According to the Attorney General's 2006 report, name-based checks can result in false positives—which can occur when a person with a common name is associated with another person's records—and false negatives, which can occur when a search misses a record because of errors in the record or in the information used to initiate the search. According to CFPB officials, private background check companies can use additional identifiers—such as date of birth—when conducting checks in order to help mitigate inaccurate search results. We have also reported that using personal identifying information in addition to an individual's name when conducting a check, such as the person's date of birth, can minimize false positives and false negatives.<sup>79</sup> The stakeholders we contacted did not have information on the extent to which private companies use additional identifiers when conducting checks.

Related to the accuracy of private company checks, senior officials from two private sector screening companies we interviewed raised concerns about FCRA's "contemporaneous notice" provision and its potentially negative effects on employees and applicants. In general, under FCRA, a consumer reporting agency that provides a consumer report for employment purposes that contains public record information and is likely to have an adverse effect on an individual's ability to obtain employment is required to either (1) notify the individual that is the subject of the report that the public record information is being reported and of the name and address of the person receiving the information or (2) maintain strict procedures designed to insure that the public record information reported

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<sup>79</sup>GAO, *Terrorist Watchlist Screening: Efforts to Help Reduce Adverse Effects on the Public*, [GAO-06-1031](#) (Washington, D.C.: Sept. 29, 2006).

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is complete and up to date.<sup>80</sup> The officials explained that notification to an employee that a company is reporting public record information to the employer relieves the consumer reporting agency from ensuring that criminal record information provided to an employer is accurate. The officials did not have data or other information on how this provision has affected employees and applicants.

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## Conclusions

Employers' increasing use of criminal history record checks to determine applicants' suitability for employment, licensing, or volunteering underscores the need for accurate and complete criminal records—including the final disposition of any criminal charges—and assurances that applicants have an opportunity to challenge or correct potentially inaccurate records. DOJ components have taken a range of actions to help state and local agencies improve the accuracy and completeness of their criminal history records and address related challenges. However, the FBI Advisory Policy Board's Disposition Task Force has been in existence since 2009, but it has not issued best practices or national standards for collecting and reporting disposition information or developed a national strategy for improving the quality of disposition reporting, as intended. Establishing a plan with time frames and milestones could help the task force achieve its remaining goals and help improve disposition reporting.

In addition, for more than 3 years, the FBI has received but not used disposition information from OPM to potentially help states enhance the completeness of their criminal history records. It is important that the FBI and OPM clarify what disposition information that OPM collects will be provided to the FBI and formally agree on how OPM will provide it. This would enable the FBI to forward the information to states and allow each state to determine if the information can be used to update their criminal history records. Finally, although the FBI and the Compact Council have taken steps to educate states on the regulatory requirement that they notify applicants of their right to challenge and correct the information in their criminal history records, FBI audits of state and local agencies' use of criminal history records consistently show that states do not notify all applicants as required. Taking additional action to determine why states

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<sup>80</sup> 15 U.S.C. § 1681k(a). Items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments are considered up to date if the current public record status of the item at the time of the report is reported.

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do not comply with this requirement could help the FBI and the Compact Council revise their educational programs and achieve compliance, thereby helping to ensure that applicants are aware of their rights to challenge and correct their criminal history records.

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## Recommendations for Executive Action

We are making the following three recommendations:

- To improve disposition reporting that would help states update and complete criminal history records, we recommend that the Director of the FBI task the FBI Advisory Policy Board to establish a plan with time frames and milestones for achieving its Disposition Task Force's stated goals.
- To potentially help states enhance the completeness of their criminal history records, we recommend that the Director of the FBI and the Director of the Office of Personnel Management clarify what disposition information OPM will provide to the FBI and formally agree on how OPM will provide it. This would enable the FBI to forward the information to states and allow each state to determine if the information can be used to update their criminal history records.
- To better equip states to meet the regulatory requirement to notify individuals of their rights to challenge and update information in their criminal history records, and to ensure that audit findings are resolved, we recommend that the Director of the FBI—in coordination with the Compact Council—determine why states do not comply with the requirement to notify applicants and use this information to revise its state educational programs accordingly.

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## Agency Comments and Our Evaluation

We provided a draft of this report to DOJ and OPM for their review and comment. OPM provided written comments, which are reprinted in appendix IV.

DOJ concurred with all three recommendations in this report in an e-mail provided on January 13, 2015. In its written comments, OPM concurred with the one recommendation that was directed to the office. Specifically, the recommendation calls for the FBI and OPM to clarify what disposition information that OPM collects as part of its background investigations will be provided to the FBI and formally agree on how OPM will provide it. OPM noted that preliminary discussions between the FBI and OPM indicate that the disposition data in OPM's reports of investigations may be useful to the FBI in identifying records in its system that are lacking

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dispositions but that contain a disposition at the local level. OPM added that it has been researching internal technical strategies that will provide specific data fields to the FBI that can be formatted and sorted in a manner best suited to the FBI's needs. OPM noted, however, that the format in which OPM collects and maintains data is necessarily oriented toward fulfilling the agency's assigned mission. OPM added that it is not tasked with the authority to perform criminal justice record management functions for the FBI or criminal justice assistance functions for the states and localities.

DOJ and OPM also provided technical comments, which we incorporated in this report as appropriate.

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As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the Attorney General, the Director of the Office of Personnel Management, and appropriate congressional committees. The report is also available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-9627 or [maurerd@gao.gov](mailto:maurerd@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix V.



David C. Maurer  
Director  
Homeland Security and Justice

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*List of Requesters*

The Honorable Bob Goodlatte  
Chairman

The Honorable John Conyers, Jr.  
Ranking Member  
Committee on the Judiciary  
House of Representatives

The Honorable F. James Sensenbrenner, Jr.  
Chairman  
Subcommittee on Crime, Terrorism, Homeland Security  
and Investigations  
Committee on the Judiciary  
House of Representatives

The Honorable Robert C. Scott  
House of Representatives



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# Appendix I: Objectives, Scope, and Methodology

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This report addresses the following questions:

- To what extent do states conduct Federal Bureau of Investigation (FBI) criminal history record checks for selected employment sectors and what challenges, if any, do they face in conducting these checks?
- To what extent have states made progress in improving the completeness of criminal history records and what challenges remain that federal agencies can help mitigate?
- To what extent do private companies conduct record checks, what benefits do they provide, how are they regulated, and what challenges do they face?

Regarding the extent to which states conduct FBI record checks and related challenges, we assessed the extent to which states were conducting checks—either under state statutes or regulations, or under federal authorities—for employment and volunteer positions covered by three federal laws. Specifically, the National Child Protection Act of 1993,<sup>1</sup> the Edward M. Kennedy Serve America Act,<sup>2</sup> and the Private Security Officer Employment Authorization Act of 2004.<sup>3</sup> We selected these laws to represent a range of factors, including variation in whether the law requires or authorizes (permits) an FBI record check, different employment sectors covered (i.e., nonprofit, private, or public employment), and variation in paid versus volunteer positions.

In addition, we conducted a web-based survey of officials at agencies within all 50 states and the District of Columbia that maintain criminal history records (state repositories) to determine the extent to which states are conducting FBI checks for the employment sectors covered under the three federal laws. We conducted the survey from July 29, 2014, to September 30, 2014. We received a response rate of 94 percent—47 states and the District of Columbia—which we collectively refer to as states throughout this report. Because this was not a sample survey, it has no sampling errors. However, the practical difficulties of conducting any survey may introduce errors, commonly referred to as nonsampling

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<sup>1</sup>Pub. L. No. 103-209, 107 Stat. 2490.

<sup>2</sup>Pub. L. No. 111-13, 123 Stat. 1460.

<sup>3</sup>Pub. L. No. 108-458, § 6402, 118 Stat. 3755, 3755-3758 (codified at 28 U.S.C. § 534 Note).

errors. We took steps in developing the questionnaire, collecting the data, and analyzing them to minimize such nonsampling error. To ensure our survey questions were accurate, understandable, and unbiased, we pretested our survey instrument with officials in 3 states—California, Idaho, and Washington. An independent reviewer within GAO also reviewed a draft of the questionnaire prior to its administration. We made appropriate revisions to the content and format of the questionnaire after the pretests and independent review. To ensure the validity of the responses, we reviewed survey responses to ensure logic and consistency in the responses.

We also analyzed federal regulations and procedures for conducting criminal record checks and evaluated previously published reports from SEARCH, the Department of Justice (DOJ), and other organizations regarding the national availability of FBI background checks, solutions proposed to address access challenges, and what challenges remain.<sup>4</sup> To supplement information obtained through our national survey and our analysis of previously published reports, we conducted semistructured interviews with management officials from repositories and courts that maintain criminal history information in 4 case study states—California, Florida, Idaho, and Washington—to determine the extent to which they conduct FBI checks, any challenges faced with conducting checks, and actions taken to address those challenges. We selected the 4 states based on geographic location and other factors, including participation in the Compact Council—the primary state and federal body for setting policy regarding the interstate sharing of criminal history records for non-criminal-justice purposes.

We interviewed FBI officials with responsibility for managing the Interstate Identification Index—the national system for the interstate sharing of criminal history records—to determine any challenges employers face in obtaining access to checks, and any challenges states face in adjudicating records on behalf of employers. Further, we interviewed management officials from the National Mentoring Organization, the National Center for Missing and Exploited Children, the Corporation for National and Community Service—the federal agency that oversees service programs such as AmeriCorps and Senior Corps—and the

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<sup>4</sup>SEARCH, the National Consortium for Justice Information and Statistics, is a nonprofit organization governed by appointees from the 50 states that shares best practices and solutions for criminal justice information sharing.

National Association of Security Companies—to obtain their views on the availability of FBI criminal record checks and any challenges in obtaining access. To better understand state legal and policy challenges regarding access to background checks, we interviewed officials with SEARCH and attended a November 2013 meeting of the Interstate Compact Council, where a wide range of issues related to the non-criminal-justice use of criminal history records were discussed.

Regarding the progress states have made in improving the completeness of criminal history records and related challenges, we analyzed data that states provided to DOJ via a survey from fiscal years 2006 through 2012 on the percentage of their arrest records that contained information on the disposition of those arrests.<sup>5</sup> We selected this time frame because 2006 was the year the Attorney General issued the criminal record background check report and 2012 was the year with the most current available survey data. To assess the reliability of the data, we analyzed the survey methodology, interviewed DOJ officials who conducted the surveys, and examined data for obvious errors. We determined that the data were sufficiently reliable for the purposes of this report.

We also analyzed the results of the FBI's most recent round of triennial state audits, which include assessing the completeness of state records and use of the records for non-criminal-justice purposes.<sup>6</sup> As of January 2014, the FBI had finalized 44 state audits that the FBI conducted from 2011 through 2013. Further, we interviewed officials who maintain criminal history records in our 4 case study states to determine challenges they face in maintaining complete records and related initiatives to improve record completeness. We also interviewed officials from the FBI and DOJ's Bureau of Justice Statistics (BJS) who have key roles in providing access to national criminal history records and providing assistance to states in maintaining complete records. In addition, we interviewed officials from the National Employment Law Project to discuss the potential impacts that incomplete criminal records have on job applicants. Further, we interviewed officials from the Office of Personnel Management (OPM) who collect disposition information as part of OPM background investigations.

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<sup>5</sup>See, for example, U.S. Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal Justice Information Systems, 2012* (Washington, D.C.: January 2014).

<sup>6</sup>The FBI audits each state's use of FBI-maintained criminal history records every 3 years.

Regarding what is known about the role of the private sector in conducting employment-related background checks, we reviewed relevant sections of the Fair Credit Reporting Act (FCRA)<sup>7</sup> and Title VII of the Civil Rights Act of 1964,<sup>8</sup> laws that govern the use of criminal history records and that regulate background checks conducted by private background screening companies.<sup>9</sup> We analyzed SEARCH's 2005 report on the commercial sale of criminal justice record information and a 2006 Attorney General's report on criminal history background checks.<sup>10</sup> We analyzed guidance prepared by the Equal Employment Opportunity Commission on the use of criminal history record information in employment decisions in order to better understand what challenges employers, applicants, and consumer reporting agencies face in using criminal history record information. We also interviewed senior officials from associations that represent background screening companies, including the National Association of Professional Background Check Screeners and the Consumer Data Information Association, to determine the role of private sector agencies in providing criminal history information to employers. Further, we interviewed senior officials from federal agencies that regulate these private sector entities—including the Federal Trade Commission, the Equal Employment Opportunity Commission, and the Consumer Financial Protection Bureau—to determine how the industry is regulated as well as the size and scope of the industry.

We conducted this performance audit from October 2013 to February 2015 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe

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<sup>7</sup>Pub. L. No. 91-508, 84 Stat. 1114.

<sup>8</sup>Pub. L. No. 88-352, 78 Stat. 241, 253-266.

<sup>9</sup>Private sector agencies that conduct background checks do not have access to FBI record checks. Rather, these agencies obtain criminal history information directly from states or other sources.

<sup>10</sup>SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Information* (Washington, D.C.: 2005). The task force included representatives from the law enforcement community and the private background check industry, among others. The report was produced as a product of a project funded by DOJ; U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks* (Washington, D.C.: June 2006).

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that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

# Appendix II: Examples of Federal Laws Authorizing State Access to FBI-Maintained Criminal History Records for Non-Criminal-Justice Employment and Licensing Purposes

Federal law	Description
Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1973, Pub. L. No. 92-544	Allowing expenditure of funds for the Federal Bureau of Investigation (FBI) to be used for the exchange of identification records, including criminal history record information, with officials of state and local governments for purposes of employment or licensing if authorized by state statute and approved by the Attorney General.
Private Security Officer Employment Authorization Act of 2004, Pub. L. No. 108-458, § 6402, 28 U.S.C. § 534 Note	Allowing authorized employers to submit to the state identification bureau of a participating state, fingerprints or other means of positive identification, as determined by the Attorney General, of an employee or applicant for employment as a private security officer.
Edward M. Kennedy Serve America Act, Pub. L. No. 111-13, 42 U.S.C. § 12645g	For conducting criminal history checks of individuals selected to serve in a position in which the individuals receive a living allowance, stipend, national service educational award, or salary through a program receiving assistance under the national service laws.
National Child Protection Act of 1993, Pub. L. No. 103-209, amended by Volunteers for Children Act, Pub. L. No. 105-251, 42 U.S.C. § 5119a	Permitting states to have in effect procedures requiring qualified entities designated by the state to contact an authorized agency of the state to request a nationwide background check for the purpose of determining whether an individual has been convicted of a crime that bears upon that individual's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.
Interstate Transportation of Dangerous Criminals Act of 2000, Pub. L. No. 106-560, 42 U.S.C. § 13726b	Relating to promulgation of regulations by the Attorney General to address the minimum standards for background checks, including criminal background checks, and pre-employment drug testing for potential employees involved in the transportation of violent prisoners in or affecting interstate commerce in the private prisoner transport industry.
Crime Control Act of 1990, Pub. L. No. 101-647, 42 U.S.C. § 13041	Relating to the fingerprinting and criminal background check of individuals involved with the provision to children under the age of 18 of child care services for each federal agency or facility operated by the federal government that hires such individuals.
Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 153, 42 U.S.C. § 16962	Provides for the Attorney General, upon request of the chief executive officer of a state, to conduct fingerprint-based checks of the national crime information databases pursuant to a request submitted by a private or public elementary or secondary school, a local educational agency, or state educational agency, on individuals employed by or under consideration for employment by, or otherwise in a position in which the individual would work with or around children in the school or agency.
Indian Gaming Regulatory Act, Pub. L. No. 100-497, 25 U.S.C. § 2701, et. seq.	For use of officials of the National Indian Gaming Commission in conducting background checks on key employees and primary management officials.
USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 1012, 49 U.S.C. § 5103a	Upon the request of a state regarding the issuance of a license to operate a motor vehicle transporting in commerce a hazardous material to an individual, the Attorney General shall carry out a background records check, including a check of the relevant criminal history databases, regarding the individual and notify the Secretary of Homeland Secretary regarding the results.
Futures Trading Act of 1982, Pub. L. No. 97-444, 7 U.S.C. § 12a	The Commodity Futures Trading Commission is authorized to register futures commission merchants, associated persons of futures commission merchants, introducing brokers, associated persons of introducing brokers, commodity trading advisors, associated persons of commodity trading advisors, commodity pool operators, associated persons of commodity pool operators, floor brokers, and floor traders upon application in accordance with rules and regulations and in the form and manner to be prescribed by the commission, which may require the applicant, and such persons associated with the applicant as the commission may specify, to be fingerprinted and to submit, or cause to be submitted, such fingerprints to the Attorney General for identification and appropriate processing.

**Appendix II: Examples of Federal Laws  
Authorizing State Access to FBI-Maintained  
Criminal History Records for Non-Criminal-  
Justice Employment and Licensing Purposes**

Federal law	Description
Omnibus Appropriations Act of 1999, Pub. L. No. 105-277, § 124, 28 U.S.C. § 534 Note	A nursing facility or home health care agency may submit a request to the Attorney General (through the appropriate state agency or agency designated by the Attorney General) to conduct a search of the records of the Criminal Justice Information Services Division of the Federal Bureau of Investigation for any criminal history records corresponding to the fingerprints or other identification information submitted regarding an applicant for employment if the employment position is involved in direct patient care.
Aviation and Transportation Security Act, Pub. L. No. 107-71, 49 U.S.C. §§ 44935, 44936, and 44939	The Under Secretary of Transportation for Security shall require that an individual to be hired as a security screener undergo an employment investigation (including a criminal history record check) under 49 U.S.C. § 44936(a)(1).
Parimutuel Licensing Simplification Act of 1988, Pub. L. No. 100-413, 28 U.S.C. 534 Note	An association of state officials regulating pari-mutuel wagering, designated by the Attorney General, may submit fingerprints to the Attorney General on behalf of any applicant for a state license to participate in pari-mutuel wagering. In response to such a submission, the Attorney General may, to the extent provided by law, exchange, for licensing and employment purposes, identification and criminal history records with state governmental bodies to which such applicant has applied.
Securities Acts Amendments of 1975, Pub. L. No. 94-29, 15 U.S.C. § 78q(f)(2)	Every member of a national securities exchange, broker, dealer, registered transfer agent, registered clearing agency, registered securities information processor, national securities exchange, and national securities association, shall require that each of its partners, directors, officers, and employees be fingerprinted and shall submit such fingerprints, or cause the same to be submitted, to the Attorney General for identification and appropriate processing. In providing identification and processing functions, the Attorney General shall provide the Securities and Exchange Commission and self-regulatory organizations designated by the commission with access to all criminal history record information.

Source: GAO analysis of federal laws authorizing state access to FBI-maintained criminal history records. | GAO-15-162

# Appendix III: Summary of Selected Federal Trade Commission (FTC) Complaints and Outcomes Involving Criminal History Record Information, Fiscal Years 2009 through 2014

Summary of federal complaint	Outcome
<p>According to the FTC's complaint, a private background company failed to follow reasonable procedures to prevent the company from including the same criminal offense information in a consumer report multiple times, failed to follow reasonable procedures to prevent the company from providing obviously inaccurate consumer report information to employers, and in numerous cases even included the records of the wrong person to employers. The FTC alleged that these failures led to consumers being denied employment or other employment-related benefits.</p>	<p>The private background company agreed to settle with the FTC by paying a civil penalty and is barred from continuing the practices that the FTC identified as violating the Fair Credit Reporting Act (FCRA).</p>
<p>According to the FTC's complaint, a private background company obtained, and provided employers with, information about job applicants, including possible criminal records of applicants on the National Sex Offender Registry. The FTC claimed the company violated the FCRA by failing to use reasonable procedures to assure maximum possible accuracy of the information and failing to provide written notices to applicants that the company reported public record information to prospective employers that may adversely affect the applicant's ability to obtain employment.</p>	<p>The private background company agreed to settle with the FTC by maintaining reasonable procedures to (1) assure the maximum possible accuracy of information provided in background checks, and (2) notify consumers when the company has provided public information about them that is likely to have an adverse affect upon their ability to obtain employment.</p>
<p>According to the FTC complaint, a private background company offered an online service allowing employers to purchase background reports that contain, among other information, arrest and conviction records. The FTC claimed that the background company violated several provisions of the FCRA, including failure to maintain reasonable procedures that the information provided was used for a permissible purpose and failure to use reasonable procedures to assure maximum possible accuracy of information provided to employers.</p>	<p>The private background company agreed to settle with the FTC and pay a civil penalty. In addition, the settlement barred the private background company from continuing the practices that the FTC identified as violating the FCRA.</p>
<p>According to the FTC's complaints, two employers contracted with a private background company to conduct background checks that included, among other information, criminal history records. The employers used the results of the background checks as a basis for hiring applicants or retaining employees, and throughout the course of a year, took adverse action against numerous job applicants by denying employment to them. The FTC claimed that the employers violated the FCRA by, among other things, failing to provide the employees and applicants with notices before taking adverse actions. Providing such notices would have allowed the applicants and employees to dispute the accuracy of the background checks.</p>	<p>The two employers agreed to settle with the FTC and both paid civil penalties. In addition, the settlements required the employers to provide FCRA-required notices to applicants and employees in the future. The settlements also contain record-keeping and reporting provisions to allow the FTC to monitor compliance.</p>

Source: GAO analysis of FTC complaints from the agency's Legal Resources Database. | GAO-15-162



# Appendix IV: Comments from the Office of Personnel Management



Federal Investigative  
Services

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

December 19, 2014

Ms. Eileen Larence  
Director, Homeland Security and Justice  
U. S. Government Accountability Office  
441 G. Street, NW  
Washington, DC 20548

Dear Ms. Larence:

Thank you for giving the U.S. Office of Personnel Management (OPM) the opportunity to comment on the Government Accountability Office (GAO) draft report, "Criminal History Records: Additional Actions Could Help Enhance the Completeness of Records Used for Employment-Related Background Checks."

**GAO Recommendation #1**

*To improve disposition reporting that would help states update and complete criminal history records, we recommend that the Attorney General direct the FBI Advisory Policy Board's Disposition Task Force to establish a plan with time frames and milestones for achieving the task force's goals.*

**OPM Response:** We appreciate your efforts to highlight potential enhancements to the completeness of criminal history records as well as inconsistencies in access to criminal history records. OPM was an active participant in the recent Task Force on Records Access for Security Clearance Background Investigations that was established through the National Defense Authorization Act for Fiscal Year 2014 (NDAA). As such, OPM recognizes the importance of implementing government-wide solutions to problems inherent in accessing complete criminal history records. OPM, as the primary background investigations service provider for the U.S. Government, is also interested in the investigative resource efficiencies and cost savings that can be realized from complete criminal history records maintained by the Federal Bureau of Investigation (FBI).

**GAO Recommendation #2**

*To potentially help states enhance the completeness of their criminal history records, we recommend that the Attorney General and the Director of the Office of Personnel Management direct the FBI and OPM to clarify the extent to which the disposition information that OPM collects in its background investigations can be used to help states update their records and formally agree on how OPM will provide it to the FBI.*

**OPM Response:** OPM concurs with this recommendation. As the GAO points out in the draft report, OPM has been providing disposition information from its reports of investigation to the FBI

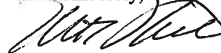
since January 2011.<sup>1</sup> However, the FBI contends it could not use the information because it did not include source documents, such as court records. As OPM does not routinely include source documents in its reports of investigation, OPM and the FBI have recently begun to collaborate on alternatives for providing and using the disposition information contained in OPM's reports.<sup>2</sup>

Preliminary discussions between the FBI and OPM indicate that the disposition data in OPM's reports of investigations may be useful to the FBI in identifying records in its system that are lacking dispositions but that contain a disposition at the local level. OPM has been researching internal technical strategies that will provide specific data fields to the FBI that can be formatted and sorted in a manner best suited to its needs. OPM understands and accepts the notion that both the OPM and the FBI should clarify the anticipated outcome of their collaborative efforts prior to implementing a formal agreement for exchanging information.

The collaboration between OPM and the FBI may help to mitigate the challenges faced by the States in reporting disposition information. However, OPM is authorized to obtain criminal history record information only for limited purposes when conducting personnel background investigations of persons working or seeking to work for or on behalf of the United States. The format in which OPM collects and maintains data is necessarily oriented toward fulfilling the agency's assigned mission. OPM is not tasked with the authority to perform criminal justice record management functions for the FBI or criminal justice assistance functions for the States and localities.

Again, thank you for the opportunity to comment on the report. If you have any questions, please feel free to contact Ms. Janet Barnes, Director, Internal Oversight and Compliance at (202) 606-3700.

Sincerely,



Merton W. Miller  
Associate Director  
Federal Investigative Services

<sup>1</sup> Contrary to a suggestion in the draft report, OPM provides the FBI with data derived directly from standardized final investigative reports, not with individual investigators' preliminary "notes" of source testimony.

<sup>2</sup> As OPM recently noted in GAO engagement # 351882, *Quality of Personnel Security Clearance Background Investigations and Adjudications*, OPM does not routinely include original source documents in its investigative reports. OPM investigators are trained to prepare reports with the accuracy and completeness necessary to ensure fairness to individuals undergoing background investigations, in uniform, consistent format that facilitates review of character, conduct, access, and national security issues. Under Federal investigative standards, copies of source records are required only in very specific instances.

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# Appendix V: GAO Contact and Staff Acknowledgments

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## GAO Contact

David C. Maurer, (202) 512-9627 or [maurerd@gao.gov](mailto:maurerd@gao.gov).

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## Staff Acknowledgments

In addition to the contact named above, Eric Erdman (Assistant Director), Joanna Chan, Willie Commons III, Charlotte Gamble, Eric Hauswirth, Brandon Jones, Jill Lacey, Eileen Larence, Winchee Lin, Linda Miller, Jessica Orr, Martene Rhed, Tovah Rom, and Cynthia Saunders made key contributions to this report.

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