

JUSTICE  **CENTER**
THE COUNCIL OF STATE GOVERNMENTS
Collaborative Approaches to Public Safety

To: Senator Cynthia Wolken
Senator Kris Hansen
Rachel Weiss

From: Madeline Neighly and Carl Reynolds

Re: Overview of Montana’s criminal record clearance policies

Date: July 6, 2016

Memo Overview

This memorandum summarizes Montana’s criminal record access, availability, and clearance policies and state laws regulating the occupational licensing of people with criminal records. Potential opportunities for improvement are provided.

Section One: Private employer access to criminal history information in Montana

Private employers in Montana who wish to perform background checks on employees or job applicants may access state criminal history information online,¹ go to a court to request records,² or purchase a commercially prepared background check from a consumer reporting agency. The federal Fair Credit Reporting Act³ and state law⁴ govern commercially prepared background checks while state law governs what information is made publicly available in the state’s repository.⁵

A. Commercially prepared background checks

Commercial reporting agencies (CRA) buy bulk data, repackage it, and sell it to private employers as individual criminal background checks. Frequently CRAs buy the bulk data from the state’s court system. We do not have information on whether CRAs obtain Montana criminal history information from the court system or the state repository.

¹ The Montana Department of Justice – Division of Criminal Information Criminal History Online Public Records Search is available at <https://app.mt.gov/choprs/>.

² State Supreme Court cases are available online. There is no central system to access district court records online but county courthouses may make their records available online.

³ 15 U.S.C. § 1618 et seq.

⁴ Mont. Code Ann. § 31-3-112

⁵ Mont. Code Ann. Title 44, Ch. 5.

The Fair Credit Reporting Act (FCRA) provides for authorization from and notification to job applicants,⁶ mandates that CRAs use “reasonable procedures to assure maximum possible accuracy” of the information included on the reports,⁷ and limits the information that may be included on commercially prepared reports.⁸ In particular, the FCRA prohibits CRAs from reporting non-conviction arrests that antedate the report by more than seven years.⁹ The federal law does not restrict the reporting of convictions. Under Montana state law, however, CRAs may not report arrests, indictments, or convictions which “from date of disposition, release, or parole, antedate the report by more than 7 years.”¹⁰

B. State criminal history repository information

Montana places no restrictions on the dissemination of public criminal justice information held in the state’s criminal history repository.¹¹ Public criminal justice information includes information on convictions, deferred sentences, and deferred prosecutions, initial arrest reports, bail records, and more.¹² Private employers may request these records online.

Section Two: Criminal record clearance policies

Montana’s criminal record clearance policies are quite limited when compared to the national context. Montana’s limited clearance policies are similar to most of the state’s closest neighbors with only Wyoming providing broader clearance options.¹³ The limitations of Montana’s clearance policies contrast with those of states such as Washington, Oregon, and Utah.¹⁴

A. Non-conviction information

Currently, Montana law does not permit clearance of non-conviction arrests from court records. The law does permit the photographs and fingerprints of arrests that do not lead to conviction to be cleared from the state repository. It is unclear if this removes all information regarding the

⁶ 15 U.S.C. § 1618b details the notification requires under FCRA, including obtaining written authorization from job applicants prior to procuring a commercially prepared background check. In addition, CRAs must provide a copy of the report and a description of the rights of the consumer should an adverse action be taken based in whole or in part on the report or maintain strict procedures to insure that the information it reports is complete and up to date. (15 U.S.C. § 1618b(b)(3); § 1681k).

⁷ 15 U.S.C. § 1618e(b).

⁸ 15 U.S.C. § 1618c details the information that may be included on a commercially prepared background checks. Per the code, records of arrest that antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period, may not be included while convictions may be reported indefinitely (15 U.S.C. § 1618c(a)(2); (a)(5)).

⁹ 15 U.S.C. § 1681c

¹⁰ Mont. Code Ann. § 31-3-112(5)

¹¹ Mass. Code Ann. § 44-5-301

¹² Mass. Code. Ann. § 44-5-103

¹³ Idaho and North Dakota mirror Montana in permitting clearance of only non-conviction information, convictions arising from one’s status as a victim of sex or human trafficking, and juvenile records. South Dakota does not permit clearance of convictions arising from one’s status as a victim of sex or human trafficking. Wyoming alone provides for clearance of some misdemeanor and felony convictions that are unrelated to sex or human trafficking.

¹⁴ Oregon, Utah, and Washington all permit clearance of some misdemeanor and felony convictions unrelated to sex or human trafficking.

non-conviction arrest from the repository, although there is some indication that the state Department of Justice considers this process to be an “expungement.”¹⁵

If a person is arrested but not charged, the charges do not result in a conviction, or the conviction is later invalidated, that state repository is required to return the original fingerprints and photographs to the originating agency. Upon request by the individual or a court order, the originating agency must return the copies to the individual.¹⁶

Photographs and fingerprints cards are considered “confidential criminal justice information”¹⁷ and are not publicly available. As such, it is unclear if the provision to return these records has much impact on what information employers may access. The state Department of Justice does, however, consider a request to remove this information an “expungement,” so all information regarding the non-conviction arrest may be removed from the repository.

Because there is not a similar statute permitting clearance of court records, non-conviction information that is cleared from the state repository may nonetheless be disclosed to a prospective employer. For example, a person found not guilty of all charges may submit the appropriate paperwork to “clear” the non-conviction information from the repository. There does not appear to be a similar procedure to clear the court records. If a prospective employer obtains a commercially prepared background check created by a CRA that obtained court records, or the employer goes to the courthouse herself to check records, the employer may learn of the non-conviction arrest. This discrepancy could negatively affect people who believe their non-conviction information to have been “expunged” and who thus fail to disclose the arrest on an employment application.

Potential improvements

- Clarify whether requesting removal of non-conviction information removes all record of the non-conviction arrest from the repository
- Standardize clearance of non-conviction information between repository and court records
- Clarify effect of removal of non-conviction information from repository on employment (can the applicant state no prior arrest?) and on commercially prepared background checks (are CRAs required to ensure “expunged” records are removed?)

B. Convictions

Montana law permits clearance of adult conviction information in three situations: (1) following a deferred imposition of sentence; (2) for victims of human trafficking or sex trafficking; and (3) for victims of identity theft.

¹⁵ See State of Montana Department of Justice Division of Criminal Investigation Criminal Records and Identification Services Section form to request removal of non-conviction arrest information, called “Expungement Form” on Division website. Form available at <https://media.dojmt.gov/wp-content/uploads/Expungement-Request-Form.pdf>. Division site with “Expungement Form” cite available at <https://dojmt.gov/enforcement/criminal-record-expungement-and-sealing/>.

¹⁶ Mont. Code Ann. § 44-5-202

¹⁷ Mont. Code Ann. § 44-5-103

1. Deferred imposition of sentence

State law permits judges to defer imposition of sentence after a verdict or plea of guilty or a plea of nolo contendere.¹⁸ Deferral is available for both misdemeanor and felony convictions, except that in most instances individuals with a prior felony conviction may not receive a deferred imposition of sentence for a felony offense.¹⁹ The deferral may not exceed one year for misdemeanors and three years for a felony, or two years for a misdemeanor and six years for a felony if a financial obligation is imposed as a condition of the sentence.²⁰

After the deferral period ends, individuals are eligible to have the verdict of guilty struck from the record and the charge or charges dismissed. Illogically, the process to strike the conviction and dismiss the charge is mandatory and automatic for felony convictions and discretionary and by petition for misdemeanor convictions:

- (a) for a felony conviction, the court ***shall*** strike the verdict of guilty from the record and order that the charge or charges against the defendant be dismissed provided that a petition for revocation under 46-18-203 has not been filed; or
- (b) for a misdemeanor conviction, ***upon motion*** of the court, the defendant, or the defendant's attorney, the court ***may allow*** the defendant to withdraw a plea of guilty or nolo contendere or ***may*** strike the verdict of guilty from the record and order that the charge or charges against the defendant be dismissed.²¹

Once the charge or charges are dismissed, the records and data relating to the offense become “confidential criminal justice information”²² and public access to the information is available only by district court order.²³ Because “confidential criminal justice information” is defined in the context of the state repository, it is unclear if the court records become confidential. Depending on whether the court records are provided to CRAs or otherwise available, this is an important clarification.

Potential improvements

- Standardize striking verdict of guilty and dismissing charges between felony and misdemeanor deferred imposition of sentence (use current felony standard of automatic, mandatory process)
- Clarify effect of strike and dismissal on court records and on commercially prepared background checks

2. Conviction as a result of human trafficking or sex trafficking

Montana permits people with prostitution, promoting prostitution, and other nonviolent offenses to petition the court to vacate their conviction. If the court finds the person’s involvement in the offense was “a direct result of having been a victim of human trafficking or

¹⁸ Mont. Code Ann. § 46-18-201

¹⁹ Mont. Code Ann. § 46-18-22

²⁰ Mont. Code Ann. § 46-18-201

²¹ Mont. Code Ann. § 46-18-204(1)

²² Mont. Code Ann. § 44-5-103(3)

²³ Mont. Code Ann. § 46-18-204(2)

sex trafficking,” the court may vacate the conviction.²⁴ The petition must be received within a “reasonable time” after the individual ceases to be involved in human trafficking or seeks services, and must include a statement as to why these facts were not presented during the prosecution that gave rise to the conviction.

If the court vacates the conviction, all records and data become “confidential criminal justice information” and public access is available only by court order.²⁵

3. Conviction as a result of identity theft

Individuals who have obtained an “identity theft passport” may apply to the court to expunge any record relating to a charge or conviction that was the result of identity theft.

Potential improvements

- Increase eligibility for record clearance
- Standardize effects between repository and court records

C. Juvenile adjudications

Montana is one of the very few states that does not hold juvenile adjudication records confidential.²⁶ State law does require any management information system developed after 2005 to maintain youth court records separate from adult offender management information systems, but does not specify that such records must be held confidential.²⁷

In contrast to its outlier position on the confidentiality of juvenile records, Montana does provide for automatic clearance of juvenile records at age eighteen or at termination of extended jurisdiction, unless the youth did not fulfill the requirements of the court’s judgment or disposition, or is required to register as a sex offender.²⁸ Unlike the clearance statutes detailed above, the juvenile clearance statutory language is clear that “formal youth court records, law enforcement records, and department records” are sealed.²⁹

²⁴ Mont. Code Ann. § 46-18-608

²⁵ Mont. Code Ann. § 46-18-608(4)

²⁶ As of 2014, only seven states permitted complete public access to juvenile records (Arizona, Idaho, Iowa, Michigan, Montana, Oregon, and Washington). Nine states fully protect juvenile records information from public disclosure (California, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, and Vermont). The vast majority of states hold some juvenile records confidential while allowing certain types of juvenile records information to be accessed by the public (Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin). See Riya Saha Shah et al., *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* (Philadelphia, PA: Juvenile Law Center and Community Legal Services of Philadelphia, 2014).

²⁷ Mont. Code Ann. § 41-5-220

²⁸ Mont. Code Ann. §§ 41-5-215, -216

²⁹ Mont. Code Ann. § 41-5-216(6)

Despite statutory language that finds juvenile adjudications are not criminal convictions and should not impose any civil disabilities, employers with access to juvenile adjudication information are likely to consider such information when making employment decisions.

Potential improvements

- Ensure juvenile records are confidential
- Clarify impact of sealed record (can youth answer “no” to criminal history inquiries on job applications, school applications, etc.)

Section Three: Consideration of criminal history information in licensing decisions

Montana’s general licensing statute expresses the state’s public policy of encouraging rehabilitation efforts of people with criminal records by supporting employment and licensure.³⁰ To that end, licensing authorities may not deny licensure solely on the basis of a criminal conviction. However, if the conviction relates to the public health, welfare, and safety as it applies to the occupational license, the licensing board may deny licensure if it finds that the applicant has not been sufficiently rehabilitated.³¹

Potential improvements

- Require convictions be “directly related” to the occupation to prevent licensure
- Exclude unrelated convictions from licensing decisions, as well as non-conviction information and records that have been cleared

³⁰ Mont. Code Ann. § 37-1-201

³¹ Mont. Code Ann. § 37-1-203