

NEW YORK
CITY BAR

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**REPORT ON LEGISLATION BY THE
CORRECTIONS COMMITTEE AND THE
LABOR & EMPLOYMENT LAW COMMITTEE¹**

**A.9382
S.4406-B**

**M. of A. Kavanagh
Senator Hassell-Thompson**

AN ACT to amend the correction law, in relation to the posting of a person's information on the Department of Corrections' website

THIS BILL IS APPROVED

The New York City Bar Association (the "Association"), founded in 1870, is a private, non-profit organization of more than 23,000 attorneys, judges and law professors, and is one of the oldest bar associations in the United States. This report is submitted by the Association's Labor and Employment Law and Corrections Committees in support of A.9382/S.4406-B, which would require changes to the Department of Correctional Services' ("DOCS") web-based Inmate Population Information Search (the "Look-Up").²

People who have served a term in prison face enormous barriers to reentry, vocational and otherwise. Currently, the Look-Up increases those barriers because it is being used for purposes beyond those underlying its creation, to the detriment of job seekers reentering the community, their families, and the community at large.

The Bill

A.9382/S.4406-B provides:

Access to inmate information via the internet. Notwithstanding any provision of law to the contrary, any information relating to the conviction of a person, except for a person convicted of an offense that would make such person ineligible for merit time under section eight hundred three of this chapter or an offense for which registration as a sex offender is required as set forth in subdivision two or three of section one hundred sixty-eight-a of this chapter, that is posted on a website maintained by or for the department, under article six of the public officers law, may be posted on such website for a period not to exceed five years after the expiration of such person's sentence of

¹ This report has been revised and reissued to reflect a change in Assembly sponsorship and to omit suggested modifications that appeared in a May 2009 report.

² The web address for this service is <http://nysdocslookup.docs.state.ny.us>

imprisonment and any period of parole or post-release supervision; provided, however, that in the case of a person who has been committed to the department on more than one occasion, the department may post conviction information relating to any prior commitment on such website for a period not to exceed five years after the expiration of such person's sentence of imprisonment and any period of parole or post-release supervision arising from the most recent commitment to the department.

Background of the Look-Up and Current Improper Use

The Look-Up was, according to DOCS, “implemented to minimize the effort to request information and respond to those requests.”³ According to DOCS, certain information about current and former inmates—including sentencing and conviction information—is required to be made publicly available under Judiciary Law § 4 (which “provides that the sittings of every court in the state shall be public and every citizen may freely attend same”), and Judiciary Law §§ 255 and 255-b (which “generally provide that court records must be kept open to the public and made available upon request”) *Id.* In addition, DOCS notes that it must comply with FOIL and may not withhold information that is not exempted from disclosure under that statute. *Id.* According to the sponsoring memo, the Look-Up site is often used by victims and their families, as well as relatives of the inmate, in order to ascertain when the inmate will be released. However, it is difficult to imagine a scenario where this information would either be sought or necessary 5 or more years after a person’s release from prison.

The Look-Up is not and was never meant to be a comprehensive source of criminal records information. However, because DOCS does not remove information about inmates once they have left state custody — even decades after the fact—the Look-Up is now used by some employers and certain commercial background screening companies as a poor quality substitute for a criminal background check. Because it is free and freely available online, numerous commercial background screening companies —including ChoicePoint and Westlaw People Search — as well as individual employers use the Look-Up as their source for New York State criminal records information.

This causes the following problems, all of which have the potential to cost jobs, housing and other necessities to individuals seeking them:

1. Incorrect Matches

Information on inmates' and former inmates' New York State prison sentences and the crimes that led to them are available on the Look-Up by searching for a last name or portion of a name. This is not enough information to ensure a correct match because the website will return results for inmates and former inmates with names that are similar to the search name. Background screening companies (not all of whom are careful or conscientious) and individual employers who rely on information from the Look-Up as their sole source of New York State criminal record information may thus obtain by mistake information concerning a person other than the one sought.

³ See DOCS, “Inmate Lookup Instructions,” at <http://www.docs.state.ny.us/univinq/fpmsovrv.htm#who>.

2. Facilitates Employment Discrimination Against People with Conviction Histories

While DOCS surely does not intend employers to rely on Look-Up records, which are not comprehensive, are not vetted for accuracy, and may or may not actually belong to the individual in question, in fact both employers and commercial background check companies use the Look-Up as a source (and sometimes the *sole* source) of New York State criminal background information.⁴ This use may lead both directly and indirectly to illegal employment discrimination.

Even though the federal⁵ and New York State⁶ fair credit reporting acts and the City and State Human Rights Laws protect job-seekers with conviction histories, the statutes' requirements are often disregarded by background screeners and employers alike. While the Look-Up does state that employment discrimination on the basis of a person's criminal history is prohibited unless (1) a direct relationship exists between a prior offense and the employment sought, or (2) granting employment to the person "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public,"⁷ this information is not included in commercial background check companies' reports, so it is never seen by the entity using the information.

The federal and state fair credit reporting acts require background screening companies to prepare accurate and up-to-date reports, and they require employers, before taking an adverse action based upon a report, to provide a copy of it so that the individual can dispute the information. Unfortunately, the more than 400 background screening companies are difficult to police and have wildly varying records of compliance. Moreover, employers very rarely allow individuals to contest background checks before taking an adverse action.

Conclusion

The Bill goes a long way towards balancing society's interest in both maintaining public access to certain information and not creating unfair roadblocks to reentry will be satisfied. The City Bar supports its passage as an important first step. It is our hope and belief, however, that time will demonstrate the reasonableness and efficacy both of (i) reducing the 5-year period to an even shorter period (particularly in light of the fact that the Bill requires that this period commence on completion of any term of parole or post-release supervision), and (ii) reconsidering the Bill's blanket exclusion of individuals whose convictions rendered them ineligible for merit time. While non-merit eligible convictions can indeed be serious, the rationale supporting passage of this bill applies with equal force to this large subset of people.

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⁴ Examples of consumer reporting agencies whose criminal background checks rely on the Look-Up include ChoicePoint and Westlaw PeopleSearch®.

⁵ 15 U.S.C. § 1681 *et seq.*

⁶ N.Y. Gen. Bus. L. Art. 25.

⁷ See DOCS, "Inmate Lookup Instructions," at <http://www.docs.state.ny.us/univinq/fpmsovrv.htm#who>. The website cites to N.Y. Correct. Law § 752 and N.Y. Exec. Law § 296(15).