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California Law Limits Housing Authority Access to Arrest Records*

As part of their screening process, public housing authorities (PHAs) consider whether a housing applicant has a criminal record. In doing so, PHAs often consider arrests that did not result in convictions. In addition to pushing PHAs to consider more equitable policies,¹ advocates must ensure that prospective tenants' arrest records are not made available to PHAs in violation of state law. For example, PHAs might seek arrest records from a number of different sources, including law enforcement agencies, private tenant screening agencies, applicants themselves, newspaper reports, or court records. But, most PHAs choose to use tenant screening agencies or local law enforcement agencies to conduct background checks.² In both of these instances, state law prohibits the disclosure of arrest records to PHAs when screening applicants.

Tenant Screening Agencies

Under the Investigative Consumer Reporting Agencies Act (ICRAA), tenant screening agencies cannot disclose information about arrests that are no longer pending and did not result in convictions.³ Nevertheless, consumer reporting agencies (CRAs) often include arrest records in reports to landlords. Advocates should contact offending CRAs and demand that the agencies remove information about arrests that did not result in convictions. Affirmative litigation could be possible against CRAs that do not maintain reasonable procedures to avoid the disclosure of information about arrests.⁴

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¹ Advocates often argue that PHAs should not consider arrest records, as arrests alone are not sufficient evidence of criminal conduct. Moreover, policies that exclude individuals on the basis of arrests have a disparate impact on people of color, in violation of the Fair Housing Act. *See, e.g.*, Brief of Amici in Support of Plaintiff-Appellee at 7-8, *Landers v. Chicago Housing Authority*, 2010 WL 3718028 (Ill. App. Ct. 2010) (No. 09-1717).

² If an applicant denied admission does not receive the criminal record that the PHA relied on with the notice of denial, he or she should request it. The PHA must provide the criminal record at no cost to the applicant. 24 C.F.R. § 960.204(c)-(d); 982.553(d).

³ Cal. Civ. Code § 1786.18(a)(7).

⁴ Cal. Civ. Code § 1786.20(a), 1786.50. The California anti-SLAPP statute could pose a barrier to enforcement of these restrictions. In *Mendoza v. ADP Screening and Selection Services, Inc.*, 107 Cal. Rptr. 3d 294 (Cal. Ct. App. 2010), the defendant CRA disclosed information from the state's sex offender website to a prospective employer. The plaintiff filed suit under a section of the penal code that prohibits the use of information from the website for purposes of employment, and the CRA filed a motion to strike under the anti-SLAPP statute, claiming a constitutional right to provide information from the website to its clients. The court granted the motion, calling the CRA's conduct protected speech under the First Amendment. The court noted that to fall outside of the anti-SLAPP statute, the defendant's conduct must be criminal in nature.

Law Enforcement

The California Department of Justice maintains a rap sheet on each person arrested and fingerprinted in the state. Due to the sensitive nature of criminal background information, California Penal Code § 11105 restricts the disclosure of this information to select state and local entities that perform particular functions.⁵ In 1990, the California Court of Appeal ruled that § 11105 does not allow the California DOJ to release present or prospective tenants' criminal records to PHAs.⁶ In response to the decision, the legislature added § 11105.03 to the Penal Code, which authorizes local law enforcement agencies to provide criminal background information from the DOJ California Law Enforcement Telecommunication System (CLETS) database to PHAs.⁷ The statute does, however, contain a number of restrictions, including a prohibition against local law enforcement disclosure of arrests not resulting in convictions.⁸

Agencies that use a local database (instead of the DOJ CLETS database) to conduct background checks on prospective tenants might claim that § 11105.03 is not applicable. Although the statute does not address the flow of information from a local database to PHAs, permitting PHAs to access an applicant's local arrest record would undercut the purpose of § 11105.03.

In addition, local law enforcement agencies might argue that 42 U.S.C. § 1437d(q) preempts § 11105.03. Section 1437d(q) mandates that the National Crime Information Center,⁹ police departments, and other law enforcement agencies release information about the "criminal convictions" of *adult* applicants to PHAs.¹⁰ The statute does not, however, mention arrest records. Based on the plain language of each statute, no conflict exists between § 1437d(q) and § 11105.03; federal law gives PHAs access to information about arrests that led to convictions, and the state law prevents PHAs from seeing information about arrests that did not result in convictions. Moreover, HUD guidance on PHAs' access to applicants' criminal records is silent on the issue of access to arrest records.¹¹

⁵ It is a misdemeanor for a DOJ employee to disclose criminal background information to someone who is not permitted to receive such information. Cal. Pen. Code § 11141.

⁶ *Housing Authority of the County of Sacramento v. Van de Kamp*, 272 Cal. Rptr. 584 (Cal. Ct. App. 1990).

⁷ It is important to remember that the CLETS database does contain errors. Also, because local law enforcement agencies use a name and a physical description to conduct a CLETS search, there is a chance of misidentification.

⁸ Cal. Pen. Code § 11105.03(b)(2).

⁹ The National Crime Information Center is an F.B.I. index of criminal records information collected from federal, state, local, and foreign law enforcement agencies, as well as from courts.

¹⁰ 42 U.S.C. § 1437d(q)(1)(A).

¹¹ See Screening and Eviction for Drug Abuse and Other Criminal Activity; Final Rule, 66 Fed. Reg. 28,776, (May 24, 2001); Instructions for Obtaining FBI Criminal History Record Information, PIH 98-20 (HA) (April 7, 1998) available at <http://www.hud.gov/offices/adm/hudclips/notices/pih/98pihnotices.cfm>.

Of course, some PHAs choose to access the NCIC for the purpose of screening prospective tenants,¹² and thus circumvent § 11105.03. Advocates should, however, challenge the release of arrest records from the NCIC on other grounds.¹³

¹² Instructions for Obtaining FBI Criminal History Record Information, PIH 98-20 (HA) (April 7, 1998), available at <http://www.hud.gov/offices/adm/hudclips/notices/pih/98pihnotices.cfm>.

¹³ In general, access to the NCIC is limited to criminal justice agencies. A federal statute must authorize the release of information from the NCIC to non-criminal justice agencies. 28 C.F.R. § 20.33(a). Advocates should argue that federal law does not give PHAs access to arrest records in the NCIC, as § 1437d(q)(1)(A) does not cover the disclosure of arrest records.