

THE BACKGROUND OF OUR BEING: INTERNET BACKGROUND CHECKS IN THE HIRING PROCESS

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ABSTRACT

Many employers are searching job applicants on Google, Facebook, and any number of other search engines and social networks. For some, this search is a cause of great concern, leading the FTC and Senators Al Franken and Richard Blumenthal, among others, to investigate the issue. So-called “internet background checks” can vary greatly in their degree of thoroughness; on the one hand, a third-party agency might produce a formal “internet background report” documenting all websites consulted and evaluating every source, while on the other hand, a member of the employer’s hiring committee might simply search the candidate off the record. Both of these practices can inform the decision-makers in the hiring process, and both, ultimately, afford the employer access to information about the candidate they might not otherwise find in the rest of the candidate’s application. This Note analyzes the legal and normative issues surrounding internet background checks. After reviewing studies showing that, at minimum, a fifth to a quarter of employers use internet search engines or social networks to screen candidates at some point during the hiring process, this Note suggests a taxonomy of three different approaches to internet information gathering. It then considers how fair credit reporting and equal employment laws might apply to these three approaches. The Note then concludes with recommended best practices for employers in light of this legal analysis.

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I. INTRODUCTION

The Internet has changed the way we meet and evaluate people, and in particular, has altered the way employers evaluate prospective employees during the hiring process. Although the studies assessing the percentage of employers that use social networks and search engines to screen candidates vary widely in their conclusions, by the most conservative estimate about a fifth to a quarter of employers are searching job applicants on Google,

Facebook, or any number of other search engines and social networks.¹ Some estimate that this number is much higher—claiming that as many as 91% of employers are using social networks at some point during the hiring process.² In light of these findings, this Note is concerned with the legal and normative issues surrounding various methods of performing preemployment internet background checks.

Some consider internet background checks inherently unfair because these checks can be inaccurate—mixing information about job applicants with the same name—or because they expose the hiring individual to information relating to the applicant’s status as a member of a protected class under equal employment laws.³ In 2006, the Finnish Data Protection Ombudsman outlawed internet searches of potential employees entirely.⁴ More recently, Senators Al Franken and Richard Blumenthal wrote to the CEO of Social Intelligence Corp., one of the more prominent internet background screening services, expressing their concern that “their business practices relating to personal privacy were unfairly detrimental to prospective employees.”⁵ The Federal Trade Commission also investigated Social Intelligence for compliance with the Fair Credit Reporting Act, ultimately deciding to take no further action.⁶

State and federal laws, including fair credit reporting and equal employment statutes, regulate the traditional forms of preemployment

1. See SHRM Survey Findings: The Use of Social Networking Websites and Online Search Engines in Screening Job Candidates, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Aug. 25, 2011), <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/TheUseofSocialNetworkingWebsitesandOnlineSearchEnginesinScreeningJobCandidates.aspx>.

2. *Managing Your Online Image Across Social Networks*, REPPLER (Sept. 27, 2011, 5:00AM), <http://blog.reppler.com/2011/09/27/managing-your-online-image-across-social-networks/>.

3. See *infra* Section IV.C (discussing the challenges of gathering accurate information for an internet background check); *infra* Part V (discussing the application of equal employment laws to internet background checks).

4. William McGeeveran, *Finnish Employers Cannot Google Applicants*, INFORMATION, LAW, AND THE LAW OF INFORMATION BLOG (Nov. 15, 2006), <http://blogs.law.harvard.edu/infolaw/2006/11/15/finnish-employers-cannot-google-applicants/>.

5. Press Release, Senator Richard Blumenthal, Blumenthal, Franken Call on Social Intelligence Corp to Clarify Privacy Practices (Sept. 19, 2011), *available at* <http://blumenthal.senate.gov/newsroom/press/release/blumenthal-franken-call-on-social-intelligence-corp-to-clarify-privacy-practice>.

6. Letter from Maneesha Mithal, Associate Director, Federal Trade Commission Division of Privacy and Identity Protection, to Renee Jackson, Att’y for Social Intelligence (May 9, 2011), <http://www.ftc.gov/os/closings/110509socialintelligenceletter.pdf>.

screening, including credit, criminal, and character background checks.⁷ This Note will address how these laws apply to internet background reporting, and specifically will seek to answer two fundamental questions. First, how does this mosaic of statutes apply to internet information gathering? Second, once the information about a prospective employee is gathered, how do these laws control how that information is used in the hiring process?

The discussion proceeds in five parts. Part II considers several studies assessing the prevalence of internet background checks in the hiring process. Part III explains the taxonomy of different approaches to information gathering in the context of internet background checks. Part IV then analyzes how the Fair Credit Reporting Act and one state fair credit reporting statute might apply to the information gathering process. Part V considers the application of equal employment laws to the internet background process. Finally, based upon this legal analysis, Part VI recommends several best practices for employers to follow.

II. INTERNET BACKGROUND CHECKS ON PROSPECTIVE EMPLOYEES: THE CURRENT LANDSCAPE

The term “internet background checks”⁸ refers to the general phenomenon in which employers gather information from the internet about a person—in this case, a job candidate. As discussed, *infra*, the hiring committee (or other hiring decision-making body) can acquire this information in a variety of ways—by searching the candidates themselves, by delegating the task to a special department with no decision-making authority within the organization, or by contracting with a third-party service outside of the organization. The internet background check, therefore, can vary greatly in its thoroughness; on the one hand, a third-party agency might produce a formal “internet background report” documenting all websites consulted and evaluating every source, while, on the other hand, a hiring committee member might simply “google” the candidate off the record.⁹ Both of these practices can inform the decision makers in the hiring process, and both ultimately afford the employer access to information about the candidate they might not otherwise find in the candidate’s application.

7. See *infra* Part IV (discussing state and federal fair credit reporting laws); *infra* Part V (discussing state and federal equal employment laws).

8. I suggest the use of this term instead of “internet and social media background checks,” as many have called them, since the latter phrase is tautological (social media networks, after all, are part of the Internet).

9. See *infra* Part III (proposing a taxonomy of internet background information gathering).

Moreover, both approaches to internet background checking search the same source: the Internet. It is the wide accessibility of the Internet that makes internet background checks readily accessible, in contrast to, for example, credit checks or criminal background checks, which are generally only available for specific purposes through consumer reporting agencies or the government.¹⁰

Unfortunately, the majority of studies assessing the number of employers that use internet background checks in the hiring process appear to fail, at least according to their reported survey methods, to account for the multitude of ways in which internet background information is gathered. The studies by the Society for Human Resource Management, CareerBuilder (2009 and 2012 studies), and Cross-Tab—four of the five surveys summarized in Figure 1 and Figure 2—only surveyed the internet background checking habits of individuals who worked as human resource professionals, hiring managers, or recruiters.¹¹ In other words, these studies failed to account for the more casual forms of internet background checking, such as internet searches performed by a member of a hiring committee. Only Repler, shown in Figure 1, surveyed the broader group of “individuals involved in the hiring process at their company.”¹²

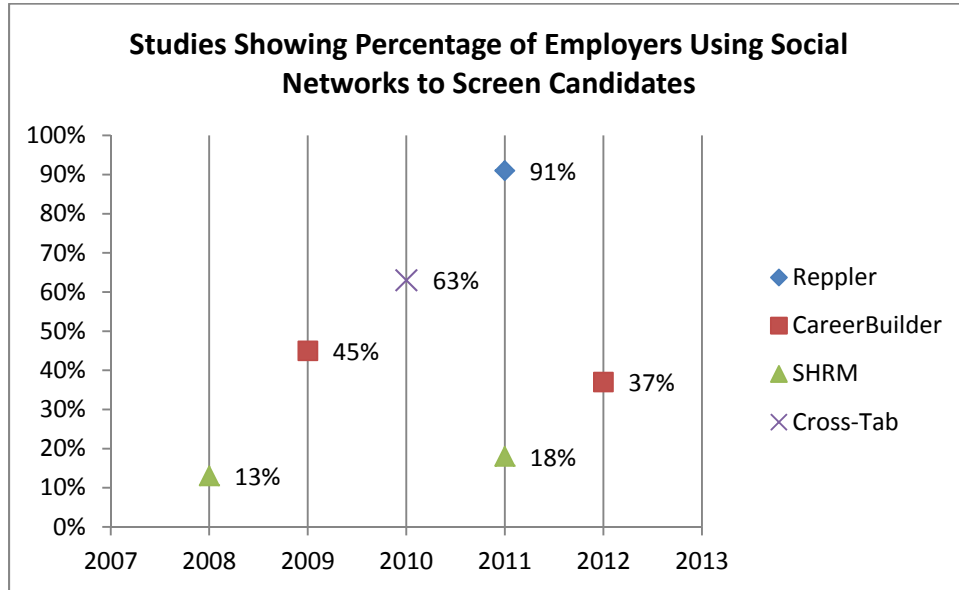
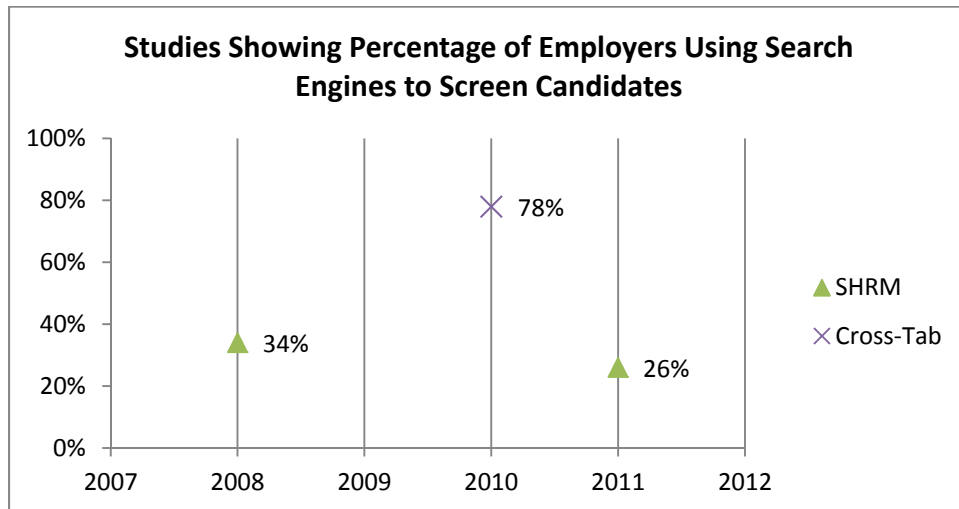
It would be premature to jump to the conclusion that Repler’s statistic—that 91% of employers use social networks to screen candidates¹³—is significantly greater than the four other studies simply because Repler used the right methods to determine the number of employers performing internet background checks. But it is safe to assume that employees, outside of traditional HR functions, are engaging in some internet background checks. When considered together, these five studies suggest that—at a minimum—a fifth to a quarter of employers are using some form of internet background checks in the hiring process.

10. *See, e.g.*, 15 U.S.C. § 1681b (2011) (limiting the permissible uses of consumer reports).

11. *Forty-Five Percent of Employers Use Social Networking Sites to Research Job Candidates, CareerBuilder Survey Finds*, CAREERBUILDER (Aug. 19, 2009), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009> [hereinafter CAREERBUILDER 2009]; SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *supra* note 1; *Online Reputation in a Connected World*, CROSS-TAB (Jan. 2010), http://download.microsoft.com/download/C/D/2/CD233E13-A600-482F-9C97545BB4AE93B1/DPD_Online%20Reputation%20Research_overview.pdf; *Thirty-seven Percent of Companies Use Social Networks to Research Potential Job Candidates, According to New CareerBuilder Survey*, CAREERBUILDER (Apr. 18, 2012), <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr691&sd=4%2F18%2F2012&ed=4%2F18%2F2009> [hereinafter CAREERBUILDER 2012].

12. REPLER, *supra* note 2.

13. *Id.*

Figure 1¹⁴Figure 2¹⁵

14. *Id.*; CAREERBUILDER 2009, *supra* note 11; SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *supra* note 1, at 2, 6; CROSS-TAB, *supra* note 11, at 8; CAREERBUILDER 2012, *supra* note 11.

15. SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *supra* note 1, at 2; CROSS-TAB, *supra* note 11, at 8.

III. A TAXONOMY OF INTERNET BACKGROUND INFORMATION GATHERING

As a theoretical matter, there are three general paradigms of information gathering in the context of internet background checks, ranging in the degree of separation between the person gathering the information and the person using it in the hiring process.¹⁶ In the first approach—which I will call the Hiring Committee Approach—people involved in making the hiring decision research the candidate themselves using search engines, social networks, and other internet databases. In other words, the information gathering and information using stages are collapsed as an employee on the hiring committee simultaneously researches and evaluates whatever information he can find about the candidate. In the second approach—which I will call the Special Department Approach—an employee with no hiring decision-making power is delegated the task of preparing the internet background report on the prospective employee. Compared to the Hiring Committee Approach, this approach involves actual separation between the information gatherer and the information user. In the third approach—which I will call the Third-Party Approach—a separate consumer reporting agency prepares the internet background check and delivers a formal report to the employer.

Social Intelligence, based in Santa Barbara, CA, is one of the more prominent third-party internet background screening services.¹⁷ Founded by Max Drucker and Geoff Andrews, the company uses “a combination of automated research and manual, multi-tier analyst review” processes to gather information about prospective and current employees.¹⁸ Social Intelligence scours public internet sources, including, according to Andrews, “social networking websites (i.e., Facebook and others), professional networking websites (i.e., LinkedIn and others), blogs, wikis, video and

16. See Lester S. Rosen & Thomas Ahearn, *Managing the Risks of Using the Internet for Employment Screening Background Checks*, EMPLOYMENT SCREENING RESOURCES, <http://www.esrcheck.com/Download/> (last visited Oct. 19, 2011) (identifying independent in-house and third-party background screening as alternatives to screening by the hiring decision-maker).

17. SOCIAL INTELLIGENCE, <http://www.socialintel.com/about/> (last visited Oct. 17, 2011). While, at the time of this Note, Social Intelligence is the best known third-party internet background screening service, other background screening services have announced plans to offer social network and internet background reports. See, e.g., Molly Armbrister Share, *Tandem Select Now Part of Global Firm*, NORTHERN COLORADO BUSINESS REPORT (Sept. 23, 2011), <http://www.ncbr.com/article.asp?id=59980> (announcing that Colorado-based background screening company, Tandem Select, will begin offering “social media background checks”).

18. SOCIAL INTELLIGENCE, <http://www.socialintel.com/social-media-policy-enforcement/> (last visited Oct. 21, 2011).

picture sharing websites, etc.”¹⁹ From these sources, the company then delivers a background report to the requesting employer that highlights objectionable material, such as “racists remarks or behavior, explicit photos and video, and illegal activity,” but filters out any information that would relate to an employee’s status as a member of a protected class under equal employment laws.²⁰

To better understand this service, journalist Mat Honan of Gizmodo requested his own internet background check from Social Intelligence which, as he admits, he “flunked hard,” meaning it turned up truthful but objectionable information about him.²¹ The report included screen shots of his blogs, his public LinkedIn and Facebook profiles, an article he wrote for Wired magazine, and his personal website.²² For each of these internet sources, Social Intelligence scored them either “pass” or “negative,” and included comments such as “subject admits to use of cocaine as well as LSD,” and “subject references use of Ketamine [another recreational drug].”²³ Importantly, Social Intelligence blocked out every part of every image that might have revealed Honan’s ethnicity, including his hands in one picture because they show skin color.²⁴ The report also excluded a line on his personal web page that read “I drink too much beer.”²⁵ Honan points out some of the information that Social Intelligence missed in their report, including a tweet he allegedly meant in jest that reads: “Glad I am childless. Would not want a socialist black man telling my kids to work hard & not do drugs. Related: am so goddamn high right now.”²⁶ Honan also noted that Social Intelligence appeared to generate its search terms from the information on his resume—name, university, email and physical address—

19. Kashmir Hill, *Social Media Background Check Company Ensures That Job-Threatening Facebook Photos Are Part Of Your Application*, FORBES (June 20, 2011), <http://www.forbes.com/sites/kashmirhill/2011/06/20/now-your-embarrassingjob-threatening-facebook-photos-will-haunt-you-for-seven-years/>.

20. SOCIAL INTELLIGENCE, <http://www.socialintel.com/hiring/> (last visited Oct. 17, 2011).

21. Mat Honan, *I Flunked My Social Media Background Check. Will You?*, GIZMODO (July 7, 2011), <http://gizmodo.com/5818774/this-is-a-social-media-background-check/>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. @mat, TWITTER, <https://twitter.com/mat/status/3843347713/> (last visited Oct. 21, 2011).

which are pieces of information supplied by the job applicant, giving applicants a measure of control over what the service is able to find.²⁷

IV. GATHERING INTERNET BACKGROUND INFORMATION

The method of gathering internet background information about a job candidate determines the applicable federal and state laws that govern the “information gathering process,” which I define as any formal or informal act of assembling background information from an internet source. This determination is true even if all methods of gathering the information result in exactly the same background report.²⁸ For example, as a third-party internet background screening service, Social Intelligence must comply with a number of federal regulations that do not apply to the interviewer who researches prospective employees on her own.²⁹ This Part analyzes the issues that arise from simply collecting—as opposed to using—internet background information.

There is a related discussion, beyond the scope of this Note, pertaining to situations where an employer demands access to the private, password-protected areas of the prospective employee’s social media accounts. While it is unclear how often this situation actually occurs, several state legislatures have nevertheless responded by outlawing these kinds of requests.³⁰ As of the time of this publication, California, Maryland, and Illinois have already enacted legislation prohibiting this practice, and similar legislation has been introduced in nearly a dozen other states and at the federal level.³¹ Facebook

27. For example, the service was not able to find the second Facebook profile for Gizmodo’s editor-in-chief, which he registered under an alias, because he had not supplied Social Intelligence with that information. See Honan, *supra* note 21.

28. However, internet background reports generated by different information gathering methods will more often be different, for reasons discussed *infra*.

29. See *infra* Sections IV.C–D.

30. See Linda Incoe & Joseph Farrell, *California Limits Employer Access to Employee/Applicant Social Media*, GLOBAL PRIVACY & SECURITY COMPLIANCE LAW BLOG (Oct. 17, 2012), <http://www.globalprivacyblog.com/privacy/california-limits-employer-access-to-employeeapplicant-social-media/>; see also Doug Gross, *ACLU: Facebook password isn't your boss' business*, CNN (Mar. 22, 2012), <http://www.cnn.com/2012/03/22/tech/social-media/facebook-password-employers/index.html> (reporting two instances in which an employer requested a job applicant's password).

31. *Employer Access to Social Media Usernames and Passwords*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 16, 2012), <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx>; Cyrus Farivar, *Congress doesn't "like" it when employers ask for Facebook login details*, ARS TECHNICA (May 9, 2012), <http://arstechnica.com/tech-policy/2012/05/congress-doesnt-like-it-when-employers-ask-for-facebook-login-details/>.

itself has criticized employers for asking prospective employees to share their passwords, and has suggested that they may even initiate legal action to protect their users' security.³² While this Note will not focus on the application of these new password laws, much of the following analysis of internet background reporting based on publicly-accessible information applies equally to situations where the employer or a third party lawfully obtains accesses to password-protected social network information, either by following an exception to these password laws³³ or by acting in a state without such protections. This is true because once the employer or third party has lawfully obtained access to the password-protected information, the method of internet information gathering—the Hiring Committee, Special Department, or Third-Party Approaches—remains the factor that determines the applicable federal and state fair credit reporting laws.

A. THE FAIR CREDIT REPORTING ACT

Congress enacted the Fair Credit Reporting Act (“FCRA”) in 1970 during a time of great development in “elaborate mechanism[s]” for investigating not only a consumer’s creditworthiness, but also a consumer’s “character” and “general reputation.”³⁴ The Act was Congress’s response to abuses in credit reporting.³⁵ Today, internet background checks are arguably the next development in elaborate mechanisms for investigating consumers. It would have been impossible when the FCRA was passed for anyone to contemplate the future development of internet background checks, since the Internet was not invented until the mid-1980s,³⁶ and the World Wide Web did not go live until Christmas Day 1990.³⁷ Though the broad statutory definition of “consumer report” allows the FCRA to account for this new source of “character” and “general reputation” information, the Act does not account for the Internet’s expansion of access to that information to

32. Erin Egan, *Protecting Your Passwords and Your Privacy*, FACEBOOK (Mar. 23, 2012), https://www.facebook.com/note.php?note_id=326598317390057.

33. For example, California’s enacted legislation, Assembly Bill 1844, contains an exception allowing employers to request an employee “to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations.” A.B. 1844, 2012 Cal. State Assemb., 2011–2012 Sess. (Cal. 2012). However, it remains to be seen how this exception, and others like it, would apply to prospective employees.

34. 15 U.S.C. § 1681(a) (2011).

35. *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 883 (5th Cir. 1989).

36. Christopher S. Yoo, *Innovations in the Internet’s Architecture That Challenge the Status Quo*, 8 J. ON TELECOMM. & HIGH TECH. L. 79, 81 (2010).

37. Larry Greenemeier, *Remembering the Day the World Wide Web Was Born*, SCIENTIFIC AMERICAN (Mar. 12, 2009), <http://www.scientificamerican.com/article.cfm?id=day-the-web-was-born>.

practically anyone with a mouse and keyboard.³⁸ Although Congress may have understood that third-party consumer reporting agencies—the legal term of art for regulated entities under the act—would continue to develop technologies to gain access to a consumer’s character information, it may have failed to predict advancements in technology allowing *anyone* exactly the same access to that background information.

B. THRESHOLD DEFINITIONS FOR DETERMINING FCRA
APPLICABILITY: “CONSUMER REPORTING AGENCY” AND
“CONSUMER REPORT”

The majority of the provisions of the FCRA apply to “consumer reporting agencies” that produce “consumer reports.”³⁹ Thus, whether the information gatherer in the Hiring Committee, Special Department, or Third-Party Approaches falls within the definition of a “consumer reporting agency” and produces a “consumer report” is a threshold issue for determining whether the information gatherer must comply with the strict requirements of the FCRA. Though the Act defines these terms individually, both definitions include the other term and are therefore partially circular in their logic.⁴⁰ A “consumer reporting agency,” in other words, is defined as anyone who produces a “consumer report,” while a “consumer report” is defined as the report produced by a “consumer reporting agency” (and satisfying a number of other requirements, discussed *infra*).⁴¹ A consideration of the application of these two definitions to the three paradigmatic methods of internet background information gathering reveals that the FCRA applies to only the Third-Party Approach, and therefore has no bearing on employers that choose the Hiring Committee or Special Department Approaches.

Under the FCRA, a “consumer reporting agency” is defined as:

[1] any person [2] which, for monetary fees, dues, or on a cooperative nonprofit basis, [3] regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers

38. See 15 U.S.C. § 1681(a); see also *Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1095–96 (5th Cir. 1992) (observing that though the drug-screening reports at issue in the case seemed “far from the original purposes behind the [FCRA] . . . Congress has enacted this statutory language which covers a broad range of conduct by its very terms” and therefore the reports were not categorically excluded from the Act).

39. 15 U.S.C. § 1681a(d), (f).

40. CHI CHI WU ET AL., NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING 29 (7th ed. 2010) (noting the circularity of the definitions).

41. 15 U.S.C. § 1681(a), (f).

[4] for the purpose of furnishing *consumer reports*

[5] to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.⁴²

A “consumer report” is, in turn, defined as:

[4a] any written, oral, or other communication of any information by a consumer reporting agency

[4b] bearing on a consumer’s credit worthiness [creditworthiness], credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living

[4c] which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . [inter alia] employment purposes.⁴³

The numbering scheme suggested above endeavors to clarify the two definitions by highlighting the dependent relationship in which “consumer report” merely expands upon element [4] of the “consumer reporting agency” definition.⁴⁴ This is an attempt to resolve the circularity of these two definitions so that they may be applied to the three paradigmatic approaches to internet background information gathering. One of the consequences of the FCRA’s circularity with respect to these definitions is that *all* elements of *both* definitions must be satisfied in order to find that the FCRA applies to the agency in question. Element [1] requires that the consumer reporting agency is a “person,” but under the Act this can include “any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.”⁴⁵ Based on element [2], that person must either charge a fee or perform the service on a “cooperative nonprofit basis,” which, according to the FTC, must still serve a “commercial purpose” to fall within the definition.⁴⁶ According to element [3], the person must engage in information collection regularly, and though the FCRA does not specify what sort of regularity is required, some courts have borrowed the definition from similar statutes such as the Fair Debt

42. *Id.* § 1681a(f) (emphasis added).

43. *Id.* § 1681a(d).

44. Because the definitions are circular, the dependency could also be written the other way, where “consumer reporting agency” is a subdefinition of “consumer reports.”

45. 15 U.S.C. § 1681a(b).

46. *Porter v. Talbot Perkins Children’s Servs.*, 355 F. Supp. 174, 177 (S.D.N.Y. 1973) (quoting the 4 CCH Consumer Credit Guide ¶ 11,305); *see also* CHI CHI WU ET AL., *supra* note 40, at 57.

Collection Practices Act or the Truth in Lending Act, which generally define “regular” as not isolated or occasional.⁴⁷

As it applies to the three methods of internet background information gathering, element [5], requiring disclosure “to third parties” in order to qualify a person as a consumer reporting agency, serves as the critical factor in distinguishing the Hiring Committee and Special Department Approaches from the Third-Party Approach under this definition. The FTC’s published interpretations of the FCRA, known as the 1990 “Official Staff Commentary,” provided broad guidance to courts, forming the basis for much of the case law still in force today.⁴⁸ Even though these were merely interpretive rules, the FTC nevertheless repealed them entirely following the omnibus Dodd-Frank Wall Street Reform and Consumer Protection Act, which transferred most of the FTC’s rulemaking authority under the FCRA to the newly created Consumer Financial Protection Bureau.⁴⁹ However, because these interpretations served as the basis for many judicial opinions prior to repeal—and, moreover, because the Dodd-Frank Act preserves the FTC as the agency charged with enforcing the FCRA—the “Official Staff Commentary” remains strong persuasive authority and an indication of how the FTC might enforce the FCRA in future applications to internet background checks.⁵⁰

Interpreting the meaning of element [5] (“to third parties”) in this definition, the FTC suggested that:

[a]n agent or employee that obtains consumer reports does not become a consumer reporting agency by sharing such reports with its principal or employer in connection with the purpose for which the reports were initially obtained.⁵¹

47. CHI CHI WU ET AL., *supra* note 40, at 57–58.

48. Proposed Interpretations of the Fair Credit Reporting Act, Fed. Trade Comm’n, 16 C.F.R. § 600 (2000).

49. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1088, 124 Stat. 1376 (2010); *see also* Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act, 16 C.F.R. § 600 (2011).

50. *See, e.g., 40 Years of Experience with the Fair Credit Reporting Act*, FED. TRADE COMM’N 7 (July 2011), <http://www.ftc.gov/os/2011/07/110720fcrareport.pdf> (noting that the “Official Staff Commentary” had “no binding effect, but some courts . . . accorded it weight as a policy statement of the primary agency responsible for enforcing the FCRA,” and further expressing the FTC staff’s belief that, even after their repeal, the “[i]nterpretations from the [Official Staff Commentary] on sections of the FCRA that have not been amended . . . are timely, accurate, and helpful.”).

51. Proposed Interpretations of the Fair Credit Reporting Act, Fed. Trade Comm’n, 16 C.F.R. §§ 600, 604(f), item 8 (2000), *repealed by* Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act, 16 C.F.R. § 600 (2011).

This interpretation of element [5] speaks directly to the distinction between the Third-Party Approach and the employer-based (Hiring Committee and Special Department) approaches to information gathering, indicating that the latter two fall outside of the definition of third party under the FCRA.

In *Menefee v. City of Country Club Hills*, the District Court for the Northern District of Illinois confirmed this interpretation of “third party” in the context of consumer reporting agencies.⁵² There, the City of Country Club Hills collected the plaintiff’s criminal and credit history in response to his application for employment to the City.⁵³ This information was later subpoenaed by a party in an unrelated lawsuit, and the City of Country Club Hills produced the credit and criminal background information.⁵⁴ Menefee sued the City of Country Club Hills, alleging, *inter alia*, that the City falls under the FCRA’s definition of “consumer reporting agency,” and therefore failed to comply with certain requirements under the Act.⁵⁵ The court held that the City was not a consumer reporting agency because originally the background information had not been collected “for the purpose of furnishing consumer reports to third parties.”⁵⁶ In other words, the fact that the City itself collected the credit and criminal background information in conjunction with their evaluation of Menefee did not make the City a consumer reporting agency because they did not collect the information for the purpose of eventually turning the information over in the subpoena. Moreover, the court held that this single instance of providing the plaintiff’s information to a third party did not mean that the City was “regularly engaged in assembling credit information” (element [3]), and thus did not make the City a consumer reporting agency.⁵⁷

In contrast, when the information gatherer is separate from the entity using the background information to make a hiring decision, the outside information gatherer is considered a “third party” for purposes of the FCRA. For example, the district court for the District of Connecticut held in *Adams v. National Engineering Service Corp.* that a staffing agency performing a prospective applicant background check for an employer had provided that report “to third parties” within the meaning of the Act.⁵⁸ In that case, the

52. *Menefee v. City of Country Club Hills*, No. 08 C 2948, 2008 WL 4696146, at *3 (N.D. Ill. Oct. 23, 2008).

53. *Id.* at *1.

54. *Id.*

55. *Id.* at *3.

56. *Id.*

57. *Id.*

58. *Adams v. Nat’l Eng’g Serv. Corp.*, 620 F. Supp. 2d 319, 328 (D. Conn. 2009).

employer, Northeast Utilities, contracted with a staffing agency to aid in filling temporary positions.⁵⁹ The staffing agency, in turn, used another agency to perform the background investigation.⁶⁰ The background agency forwarded the report erroneously describing the plaintiff's criminal history to the staffing agency, which in turn forwarded the report to Northeast Utilities.⁶¹ The court held that the staffing agency—and, by implication, the background screening agency—had furnished their background information “to third parties” within the meaning of the FCRA.⁶²

Under the Hiring Committee and Special Department Approaches to gathering information about a prospective employee, the information gatherer does not furnish a consumer report to third parties as that term is used in the FCRA. Much like the city in *Menefee* that assembled its own consumer report of credit and criminal background information about the plaintiff, in the Hiring Committee Approach the information gatherer scours the Internet for information about the prospective employee for her own use as a member of the hiring committee.⁶³ Similarly, according to the FTC's interpretation of this element, and under general principles of principal-agent theory, the information gatherer in the Special Department Approach is not furnishing internet background information to a third party under the FCRA when he delivers his report to those responsible for making the hiring decision.⁶⁴ Because they do not furnish internet background consumer reports to third parties, the information gatherers in the Hiring Committee and Special Department Approaches are not “consumer reporting agencies,” do not produce “consumer reports,” and are therefore not subject to the requirements of the FCRA.⁶⁵

In contrast, the information gatherer in the Third-Party Approach will almost always satisfy element [3] of the FCRA definition. Much like the staffing and background investigation agencies in *Adams*, the third-party internet background checking agency is a separate entity that contracts with the hiring employer and forms an independent contractor relationship that

59. *Id.* at 324.

60. *Id.*

61. *Id.*

62. *Id.* at 328.

63. *See Menefee v. City of Country Club Hills*, No. 08 C 2948, 2008 WL 4696146, at *1 (N.D. Ill. Oct. 23, 2008).

64. *See Proposed Interpretations of the Fair Credit Reporting Act*, Fed. Trade Comm'n, 16 C.F.R. § 604(f), item 8 (2000), *repealed by* Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act, 16 C.F.R. § 600 (2011).

65. *See* 15 U.S.C. § 1681a(d), (f) (2011).

does not rise to the level of employer-employee.⁶⁶ As a result, the Third-Party Approach satisfies this element of the definition of “consumer reporting agency.”

The analysis of whether the information gatherer in the Third-Party Approach is subject to the FCRA does not end there, however, since the information gatherer must also prepare “consumer reports,” which is element [4] of the “consumer reporting agency” definition and is itself a separate entry in the definitions section of the FCRA (elements [4a–c]).⁶⁷ As the Fourth Circuit has noted, element [4a] captures “virtually any information communicated by a ‘consumer reporting agency.’”⁶⁸ This element, therefore, does very little to limit the definition of “consumer report.” Element [4b] has similarly broad application because the seven factors upon which the information may “bear” are listed disjunctively. As the D.C. Circuit has pointed out, “almost any information about consumers arguably bears on their personal characteristics or mode of living.”⁶⁹ Thus, this element excludes very few sources of information from the definition of “consumer report.”

When the consumer report is used in the employment context, element [4c] must be read in conjunction with the separate definition of “employment purposes,” which the Act defines as using a consumer report for “the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.”⁷⁰ At least one circuit has read the term “employee” to encompass more employment situations than the common law definition, including, for example, sole practitioners and independent contractors.⁷¹ This element of the definition turns on how the consumer report is used or how the consumer reporting agency expects it to be used. Most circuits have settled upon a common rule for this element of the definition, articulated by the Ninth Circuit in the following way: “If a consumer reporting agency provides a report based on a *reasonable expectation* that the report will be put to a use permissible under the FCRA, then that report is a ‘consumer report’ under the FCRA and the ultimate use to which

66. See *Adams v. Nat’l Eng’g Serv. Corp.*, 620 F. Supp. 2d 319, 324 (D. Conn. 2009).

67. 15 U.S.C. § 1681a(d), (f) (2011).

68. *Hoke v. Retail Credit Corp.*, 521 F.2d 1079, 1081 (4th Cir. 1975).

69. *Trans Union Corp. v. FTC*, 245 F.3d 809, 813 (D.C. Cir. 2001) (citing *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996)); see also *Hoke*, 521 F.2d 1079, 1081 (noting that this element encompasses “virtually any information communicated by a ‘consumer reporting agency’ for any one of the purposes enumerated in 1681a and 1681b, including but not limited to, ‘employment purposes’”).

70. 15 U.S.C. § 1681a(h) (2011).

71. *Hoke*, 521 F.2d at 1082 n.7.

the report is actually put is irrelevant”⁷² The Act also excludes two sources of information that would otherwise fit within the above definition—so-called “experience information” and information shared among affiliates—which are not particularly relevant to the Third-Party Approach.⁷³

Following an investigation of Social Intelligence, the FTC concluded that the company falls within the definition of a “consumer reporting agency” producing “consumer reports,” and therefore must comply with the FCRA.⁷⁴ In the letter announcing the close of its investigation with “no further action . . . warranted at this time” to ensure compliance with the Act, the Commission briefly reasoned that “because [Social Intelligence] assembles or evaluates consumer report information that is furnished to third parties that use such information as a factor in establishing a consumer’s eligibility for employment,” the company is therefore a “consumer reporting agency” within the meaning of the Act.⁷⁵ The FTC’s determination that Social Intelligence falls within these FCRA definitions implies that the company satisfies all of the elements of these two definitions. As implied by the FTC’s conclusion, the information collected from the Internet and social media sources concerning a prospective employee is thus “written, oral, or other communication” (element [4a]) that has “bearing on” one of the seven factors of element [4b].⁷⁶ Furthermore, Social Intelligence has a reasonable

72. *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1274 (9th Cir. 1990) (citing *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 (7th Cir. 1988), *cert. dismissed*, 490 U.S. 1061 (1989); *Heath v. Credit Bureau of Sheridan, Inc.* 618 F.2d 693, 696 (10th Cir. 1980)) (emphasis added).

73. 15 U.S.C. §1681a(d)(2) (2011); *CHI CHI WU ET AL.*, *supra* note 40, at 49–53 (citing *Am. Bankers Ass’n v. Gould*, 412 F.3d 1081 (9th Cir. 2005) (calling information falling under the § 1681a(d)(2)(A)(i) exception “experience information”). The experience-information provision exempts “any report based on the reporter’s first-hand experience of the subject.” For example, this exemption applies to a retailer’s or bank’s disclosure of its own experience with a customer. *Hodge v. Texaco, Inc.*, 975 F.2d 1093, 1096 (5th Cir. 1992).

74. *See* Mithal, *supra* note 6. Under the FCRA, a consumer reporting agency may also produce “investigative consumer reports,” to which attach even greater statutory requirements. However, “investigative consumer reports” are obtained “through personal interviews with neighbors, friends, or associates of the consumer,” which does not describe the process by which a third-party information gatherer produces an internet background report. *See* 15 U.S.C. § 1681a(e). Therefore, it is unlikely that the FCRA’s investigative consumer reporting requirements apply to Social Intelligence or other third-party internet background reporting agencies.

75. *Id.*

76. *See* 15 U.S.C. § 1681a(d).

expectation that these reports sold to employers will be used for one of the permissible purposes under the Act.⁷⁷

As the FTC letter indicates, a finding that Social Intelligence is a consumer reporting agency triggers a host of regulatory obligations under the FCRA.⁷⁸ The Act sets forth a list of “compliance procedures” for consumer reporting agencies, requiring, *inter alia*, that agencies make reasonable efforts to verify the identity and purposes of users of the consumer report,⁷⁹ ensure the accuracy of the consumer report,⁸⁰ and allow users of the consumer report to disclose the report to consumers in the case of an adverse action against them.⁸¹ Among these many obligations imposed upon the information gatherer in the Third-Party Approach, the issue of accuracy appears most challenging in light of the unique nature of the Internet.

C. THIRD-PARTY INFORMATION GATHERERS MUST ENSURE ACCURACY

Senators Blumenthal and Franken identified a number of accuracy-related challenges through the questions they asked in their letter to Social Intelligence, most of which are particularly relevant to the Internet as a source of background information.⁸² While any information gatherer using the Internet to construct a background report—whether in the Hiring Committee, Special Department, or Third-Party Approaches—would face these challenges, the FCRA only requires the information gatherer in the Third-Party Approach to meet an accuracy standard.⁸³ For these third-party internet background checking agencies, for example, how can the information gatherer differentiate among “Googlegangers”?⁸⁴ How is the information gatherer able to judge whether the internet source is credible or whether the source is “parody, defamatory, or otherwise false”?⁸⁵ How does the information gatherer deal with internet sources that are out-of-date but

77. *See id.*; *see also Comeaux*, 915 F.2d at 1273–74 (citing *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978)); *Ippolito*, 864 F.2d at 449–50, *cert. dismissed*, 490 U.S. 1061 (1989); *Credit Bureau of Sheridan*, 618 F.2d at 696.

78. Mithal, *supra* note 6.

79. 15 U.S.C. § 1681e(a).

80. *Id.* § 1681e(b).

81. *Id.* § 1681e(c).

82. *See* Blumenthal, *supra* note 5.

83. *See supra* Section IV.B.

84. According to the Urban Dictionary, “Googleganger” describes other “individual[s] with the same name as you whose records and/or stories are mixed in with your own when you Google yourself.” *Googleganger*, URBAN DICTIONARY (Oct. 6, 2007), <http://www.urbandictionary.com/define.php?term=googleganger>.

85. *See* Blumenthal, *supra* note 5.

still accessible through a search engine?⁸⁶ As applied to internet background checks, it is unclear exactly how to implement the accuracy standard required by the FCRA.

The FCRA requires that “[w]henver a consumer reporting agency prepares a consumer report it shall follow *reasonable* procedures to assure *maximum possible accuracy* of the information concerning the individual about whom the report relates.”⁸⁷ Accuracy is an objective standard, and consumer reports are either accurate or inaccurate.⁸⁸ “Reasonable procedures” that ensure the required standard of accuracy are those that “a reasonably prudent person would [undertake] under the circumstances.”⁸⁹ Moreover, “[j]udging the reasonableness of an . . . agency’s procedures involves weighing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.”⁹⁰ Whether a procedure is reasonable is generally question for the jury.⁹¹

In evaluating whether a consumer reporting agency followed reasonable procedures to ensure maximum accuracy, two federal circuit courts have arrived at opposite conclusions based on roughly similar consumer reporting agency procedures for ensuring accuracy. In *Thompson v. San Antonio Retail Merchants Association*, the Fifth Circuit upheld the lower court’s finding that the Association’s computer database requiring no “minimum points of correspondence” between a given consumer’s file and a furnisher of new credit information was not a reasonable procedure for ensuring accuracy.⁹² In this case, the plaintiff, William Douglas Thompson, III, was denied credit because his file had been mixed with that of William *Daniel* Thompson, Jr., who had a delinquent account. As a result of the mismerger, the plaintiff’s file had become a “potpourri of information” on the two men.⁹³ Using the Association’s computer system, when a furnisher of credit information input some sort of consumer identifier, the system would return a number of matches and near-matches.⁹⁴ The furnisher then had complete discretion

86. *See id.*

87. 15 U.S.C. § 1681e(B) (2011) (emphasis added).

88. *See* CHI CHI WU ET AL., *supra* note 40, at 109 (citing *Cushman v. Trans Union Corp.*, 115 F.3d 220, 225 (3d Cir. 1995); *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1158 (11th Cir. 1991)).

89. *Philbin v. Trans Union Corp.*, 101 F.3d 957, 963 (3d Cir. 1996) (quoting *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984) (per curiam)).

90. *Id.*

91. *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1068 (9th Cir. 2000).

92. *Thompson v. San Antonio Retail Merch. Ass’n*, 682 F.2d 509, 513 (5th Cir. 1982).

93. *Id.* at 511.

94. *Id.*

over which consumer's file to update.⁹⁵ By not requiring a minimum number of matching identifiers, the court upheld the lower court's finding that the Association was negligent under the FCRA's standard.⁹⁶ Furthermore, the court held that the Association's "spot audits" to verify social security numbers did not cure the situation.⁹⁷

Nearly twenty years after *Thompson*, Judge Posner of the Seventh Circuit held in *Crabill v. Trans Union* that a computer program that continued to mix up the files of two brothers with similar names nevertheless satisfied the "reasonable procedures" requirement of the FCRA.⁹⁸ In this case, Jerry Crabill alleged that he was harmed when Trans Union mixed his credit information with that of his brother John, who has the same first initial and whose social security number differs by only one digit.⁹⁹ Trans Union defended its procedures on the basis that often "two files with similar though not identical identifying data may actually be referring to the same person."¹⁰⁰ Creditors, Trans Union continued, find it useful to have both files, allowing them to use their own judgment to determine whether the information refers to two people or one.¹⁰¹ The court agreed, holding that "the statutory duty to maintain reasonable procedures to avoid inaccuracy does not require a credit agency to disregard the possibility that similar files refer to the same person."¹⁰²

In the context of internet background reports, mixed files in which real applicant data is mixed with Googleganger data has a great potential to cause inaccuracies in a consumer's internet background report. It is unclear, however, exactly what the standard of "reasonable procedures to assure maximum possible accuracy" will mean as applied to a third-party information gatherer preparing an internet background report. Following the approach of the Fifth Circuit in *Thompson*, which stressed that procedures must require a minimum number of correspondence points beyond the "identifier" (i.e., name), a court would likely require that the internet source matches the consumer file based on more than just the consumer's name.¹⁰³ For social media sources, the consumer's birthday, educational background,

95. *Id.*

96. *Id.* at 513.

97. *Id.*

98. *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 663 (7th Cir. 2001).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See Thompson v. San Antonio Retail Merch. Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982).

physical or email address might serve as a second factor in identifying the match, provided that the consumer has shared those pieces of information to the public. Notably, however, the consumer's profile picture would, in many cases, be irrelevant to the *Thompson* test. When the employer hires the third-party agency to perform the internet background check, it is unlikely that the employer would have the prospective employee's picture, as the employer's request for pictures from job applicants would risk the appearance of discrimination that the employer seeks to avoid in the first place by using a third-party agency.

Under the Seventh Circuit's more relaxed standard in *Crabill*, however, the information gatherer in the Third-Party Approach would have little difficulty satisfying the "reasonable procedures to assure maximum possible accuracy" standard of the FCRA. Like the credit report in *Crabill* that contained a hodgepodge of credit information about two consumers, an internet background report that contains a mix of true applicant information with Googleganger internet hits would require the employer to use its own judgment to determine whether the report contains false data.¹⁰⁴ According to the court's holding, it would be reasonable for the third-party information gatherer to include information sources with similar—but not identical—identifying information, because the accuracy standard does not require the agency "to disregard the possibility that similar files refer to the same person."¹⁰⁵ Under the Seventh Circuit's approach, therefore, the Third-Party internet background reporting agency would have little difficulty demonstrating that they had followed reasonable procedures.

D. HEIGHTENED FCRA STANDARD FOR "MATTERS OF PUBLIC RECORD"

On top of the normal requirements the FCRA imposes on the third-party information gatherer, the Act includes additional requirements for consumer reports that contain "public record information [used] for employment purposes."¹⁰⁶ Section 1681k of the FCRA provides that:

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are *matters of public record* and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—

104. See *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 663 (7th Cir. 2001).

105. *Id.*

106. 15 U.S.C. §1681k (2011).

(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or

(2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.¹⁰⁷

The critical issue with respect to the application of this section of the FCRA is how to define "matters public record," which the Act does not define directly. However, subsection two of this provision enumerates a nonexhaustive list of information sources that, by implication, qualify as matters of public record, including records relating to "arrests, indictments, convictions, suits, tax liens, and outstanding judgments."¹⁰⁸ The Internet provides free and public access to records falling into most of these categories. For example, websites such as GOOGLE SCHOLAR and JUSTIA (not to mention courts' own websites) provide free access to state and federal legal opinions and dockets that contain information relating to nearly all of the enumerated categories of public records.¹⁰⁹ A court might also expand the meaning of "matters of public record" beyond the types of information included in subsection two of this provision to include other internet sources providing access to government records.¹¹⁰

In the event that the internet background report includes any information relating to matters of public record, the third-party information gatherer must comply with one of the two heightened requirements described in subsections one and two of this provision if the information is "likely to have an adverse effect on the consumer's ability to obtain

107. *Id.* § 1681k(a) (emphasis added).

108. *Id.* § 1681k(a)(2); *see also* CHI CHI WU ET AL., *supra* note 40, at 153.

109. *See* Google Scholar, GOOGLE, <http://scholar.google.com/> (last visited Oct. 28, 2011); *see also* JUSTIA, <http://www.justia.com/> (last visited Oct. 28, 2011).

110. Based on the plain meaning of the term "public record," however, a court would likely restrict any additional information sources to additional *government* sources. *See* BLACK'S LAW DICTIONARY 1387 (9th ed. 2009) (defining "public record" as "[a] record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse. Public records are generally open to view by the public.>").

employment.”¹¹¹ These subsections require that the information gatherer either notify the job applicant of the fact that this public record information is being reported, or maintain “strict procedures” to ensure that the information is “complete and up to date.”¹¹² Exactly what constitute “strict procedures” remains unclear, although courts have noted that the difference between “strict” and “reasonable procedures” (as are required for consumer reports generally) is “clearly not without significance.”¹¹³

The FCRA, therefore, imposes a number of requirements on third-party information gatherers that do not apply to the Hiring Committee and Special Department Approaches. Although the Act’s precise definitions of the terms “reasonable procedures to assure maximum possible accuracy” (required for all consumer reports) and “strict procedures” (required for matters of public record) remain uncertain, an agency would have to point to *some* procedure that satisfies these standards, in contrast to the employer-based approaches.¹¹⁴

E. STATE FAIR CREDIT REPORTING LAWS—CALIFORNIA’S APPROACH

While the FCRA expressly preempts many state law causes of action, including defamation, invasion of privacy, and negligence claims arising out of consumer reports, some state fair credit reporting laws impose additional requirements on consumer reporting beyond the reach of the preemption clause.¹¹⁵ While a survey of state fair credit reporting laws is beyond the scope of this Note, California’s Investigative Consumer Reporting Agencies Act illustrates how state law can expand FCRA-like requirements to information gatherers in the Hiring Committee and Special Department Approaches.

California Civil Code section 1786.53(a) adds procedural and notice requirements to information gatherers in the Hiring Committee and Special Department Approaches. The law requires:

Any person who collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates information on a consumer’s character, general reputation, personnel characteristics, mode of

111. 15 U.S.C. §1681k(a). The FCRA also does not define “adverse effect,” but does define “adverse action” to mean, in the employment context, “a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.” *Id.* § 1681a(k)(1)(B)(ii).

112. *Id.* § 1681k(a).

113. *See Dalton v. Capital Associated Indus., Inc.*, 254 F.3d 409, 417 (4th Cir. 2001) (quoting *Equifax v. FTC*, 678 F.2d 1047, 1049 n.4 (11th Cir. 1982)).

114. *See supra* Section IV.B.

115. 15 U.S.C. § 1681h(e).

living, for employment purposes, *which are matters of public record*, and does not use the services of an investigative consumer reporting agency, shall provide that information to the consumer pursuant to subdivision (b).¹¹⁶

Subdivision (b) requires the information gatherer to provide a copy of the public record to the applicant within seven days, provide a checkbox on the job application to opt-out of receiving the public record, allows the information gatherer to temporarily withhold the information if the consumer is under investigation, and requires the employer to provide a copy of the public record if any adverse action is taken, regardless of whether the consumer opted out.¹¹⁷ Notably, section 1786.53(a) only applies to information collection from “public record[s],” which, here, the statute defines as “records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment.”¹¹⁸ Contrast this with the FCRA’s definition of “consumer report,” which includes essentially any form of information bearing on one of seven broad factors, including, for example, the consumer’s character or general reputation.¹¹⁹

In *Moran v. Murtaugh, Miller, Meyer & Nelson, LLP*, a California court of appeal, confronted with a case involving the termination of an employee upon the discovery of his criminal background, held that under California Civil Code section 1786.53 the employer must provide the employee with a copy of the public record upon which they based their termination decision.¹²⁰ Although this case involved the use of internet background reports in an employee termination, rather than in a hiring, section 1786.53 applies equally when the consumer report is used for many “employment purposes,” including “employment, promotion, reassignment, or retention.”¹²¹ The employer, a law firm, terminated the plaintiff, a paralegal, after an associate anonymously placed printouts of judicial opinions in which the plaintiff was convicted of several felonies, including grand theft and second-degree burglary, on the chairs of two of the firm’s partners.¹²² According to the taxonomy of information gatherers described in Part II, *supra*, the associate in this case, who used a “computerized legal database” to research the plaintiff, is closely analogous to the Special Department

116. CAL. CIV. CODE § 1786.53(a) (West 2011) (emphasis added).

117. *Id.* § 1786.53(b).

118. *Id.* § 1786.53(a)(3).

119. 15 U.S.C. § 1681a(d).

120. *Moran v. Murtaugh, Miller, Meyer & Nelson, LLP*, 24 Cal. Rptr. 3d 275, 284 (Cal. Ct. App. 2005).

121. CAL. CIV. CODE § 1786.2(f) (West 2011).

122. *Moran*, 24 Cal. Rptr. 3d at 277.

Approach in the hiring process, since here the associate, an employee of the same firm, was not likely the one responsible for making the decision to terminate the plaintiff.¹²³ However, nothing in section 1786.53 suggests that it would not apply equally to the information gatherer in the Hiring Committee Approach. *Moran*, therefore, illustrates how California's section 1786.53 can extend the reach of fair credit reporting requirements to non-third-party information gatherers, and thus beyond the reach of the FCRA.

V. USING INTERNET BACKGROUND INFORMATION

Once an employer has acquired the job applicant's internet background information through one of the three paradigmatic approaches to information gathering, a separate set of federal and state laws governs how an employer may use that information to make an employment decision. Equal employment laws largely focus on what information may or may not serve as a basis for making a hiring decision.¹²⁴ With the notable exception of the Americans with Disabilities Act ("ADA"), these laws generally do not interact with the information gathering process. In other words, laws such as Title VII of the Civil Rights Act of 1964 do not mandate one information gathering approach over the other. This Part focuses on the application of several illustrative equal employment laws—Title VII, the ADA, and several state laws—to internet background checks, and demonstrates how the Third-Party Approach has certain *structural* advantages over the employer-based approaches, even when the law imposes no requirements on how the information is acquired.

A. TITLE VII PROTECTIONS AGAINST RELIGIOUS DISCRIMINATION IN THE HIRING PROCESS

In the most highly publicized lawsuit to date alleging employment discrimination based on the employer's internet background check, C. Martin Gaskell, an astronomy professor, alleged that the University of Kentucky violated Title VII of the Civil Rights Act of 1964 when it decided not to hire him because of articles and lecture notes he posted on his personal website espousing "creationist" views.¹²⁵ Title VII prohibits employers from refusing to hire an applicant "because of" a number of protected categories, including

123. *See id.*

124. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (2011).

125. *See Gaskell v. Univ. of Kentucky*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. Nov. 23, 2010); *see also* Mark Oppenheimer, *Astronomer Sues the University of Kentucky, Claiming His Faith Cost Him a Job*, N.Y. TIMES, Dec. 18, 2010, <http://www.nytimes.com/2010/12/19/us/19kentucky.html?pagewanted=print>.

“[an] individual’s . . . religion.”¹²⁶ Born out of John F. Kennedy’s speech to the nation on June 11, 1963, the Civil Rights Act included a number of broad prohibitions on discrimination.¹²⁷ Under Title VII of the Act, it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.¹²⁸

The Act defines religion as “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”¹²⁹ Under this section, a plaintiff may assert a claim for discrimination in the hiring process by showing either direct or indirect evidence.¹³⁰ The Sixth Circuit described this distinction in the following way:

[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions Such evidence does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group.¹³¹

Beyond obvious examples of direct discrimination, which include remarks such as “I won’t hire you because you’re a woman,” courts have also characterized evidence that “reflect[s] a propensity by the decision-maker to

126. 42 U.S.C. § 2000e-2(a).

127. John F. Kennedy, President of the United States, “Radio and Television Report to the American People on Civil Rights” (June 11, 1963), *available at* <http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/Radio-and-Television-Report-to-the-American-People-on-Civil-Rights-June-11-1963.aspx>.

128. 42 U.S.C. § 2000e-2(a).

129. *Id.* § 2000e(j).

130. *Tepper v. Potter*, 505 F.3d 508, 515 (6th Cir. 2007).

131. *Id.* at 516 (internal quotations omitted).

evaluate employees based on illegal criteria” as direct evidence for purposes of a Title VII claim.¹³²

Absent direct evidence, a plaintiff can proceed by showing that indirect evidence satisfies the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*.¹³³ To make a prima facie case under *McDonnell Douglas*, the plaintiff must first establish that the challenged employment action was either intentionally discriminatory or had a discriminatory effect.¹³⁴ A plaintiff can establish a prima facie case if he can show that “(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination.”¹³⁵ If the plaintiff can establish a prima facie case, the burden then shifts to the employer to offer a legitimate and nondiscriminatory reason for employment action.¹³⁶ The plaintiff may then rebut the employer’s justification with evidence that it is a pretext for the sort of discrimination prohibited by Title VII.¹³⁷

The *Gaskell* case illustrates the risk of Title VII liability in the context of the Hiring Committee Approach to internet background checks.¹³⁸ The University of Kentucky (“UK”) sought a founding director to oversee a new astronomical observatory.¹³⁹ Of the twelve people who applied for the position, there was no dispute that Gaskell was the most qualified; as one member of UK’s search committee put it, “Martin Gaskell is clearly the most experienced”; and another remarked that Gaskell “has already done everything we could possibly want the observatory director to do.”¹⁴⁰

During the hiring process, however, one of the committee members conducted an internet search and found Gaskell’s personal website, where the plaintiff had posted an article entitled “Modern Astronomy, the Bible, and Creation.”¹⁴¹ Members of the search committee became concerned that

132. *Gaskell v. Univ. of Kentucky*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572, at *7 (E.D. Ky. Nov. 23, 2010) (citing *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990); *Robinson v. PPG Indus., Inc.*, 23 F.3d 1159, 1164–65 & nn.2–3 (7th Cir. 1993)).

133. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

134. *Id.* at 802.

135. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004).

136. *McDonnell Douglas Corp.*, 411 U.S. at 802.

137. *Id.* at 804.

138. *Gaskell v. Univ. of Kentucky*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572, at *1–5 (E.D. Ky. Nov. 23, 2010).

139. *Id.* at *1.

140. *Id.* at *3.

141. *Id.* at *4.

statements in his article “blended religious thought with scientific theory,” and, moreover, that Gaskell’s current university web profile linked directly to his personal web page, which might indicate his intent to use this position to promote his own religious beliefs.¹⁴² The search committee later obtained Gaskell’s lecture notes from a talk he had delivered at UK, which members of the UK’s biology department said contained “creationist” views.¹⁴³

During the review process, one search committee member, in an email entitled “The Gaskell Affair,” expressed his concern that Gaskell would be denied the job “because of his religious beliefs” and that “no objective observer could possibly believe” that the decision was made on any other grounds.¹⁴⁴ After several committee members offered other reasons why Gaskell should not be hired, the search committee ultimately recommended Timothy Knauer, a former student and employee of UK’s Department of Physics & Astronomy.¹⁴⁵ In response, another UK professor, not a member the search committee but involved in the interview process, filed a complaint with the UK Equal Employment Office.¹⁴⁶ Gaskell filed a complaint with the EEOC, which issued a Notice of Right-to-Sue letter, and then filed the complaint with the Kentucky district court alleging that UK based its decision not to hire him on his religion and religious beliefs in violation of Title VII.¹⁴⁷

Deciding cross motions for summary judgment, the court denied both motions, holding first, with respect to UK’s motion, that Gaskell’s allegations of direct evidence of discrimination raised “a triable issue of fact as to whether his religious beliefs were a substantial motivating factor in UK’s decision not to hire him”; and second, with respect to Gaskell’s motion, that UK had produced “more than a scintilla of evidence to support its argument that religion was not a motivating factor in its decision.”¹⁴⁸ The university argued that under the *McDonnell Douglas* three-part framework for indirect evidence of discrimination, Gaskell had failed to show that UK’s proffered reasons for not hiring him were a pretext.¹⁴⁹ UK argued, alternatively, that even if Gaskell’s religion played a role in their decision, the university could not reasonably accommodate his beliefs in conjunction with a position that required public outreach for fear that he would use his affiliation to promote

142. *Id.*

143. *Id.* at *5.

144. *Id.*

145. *Id.* at *6.

146. *Id.*

147. *Id.*

148. *Id.* at *10–11.

149. *Id.* at *7.

his beliefs.¹⁵⁰ Under the so-called “safe harbor” provision of the definition of “religion” under Title VII, an employer may demonstrate that it would cause “undue hardship” to accommodate a prospective employee’s “religious observance or practice.”¹⁵¹ The court rejected that the safe harbor provision applied in this case, and denied summary judgment on UK’s claim that Gaskell failed to show that their reasons were a pretext.¹⁵²

In his cross motion for summary judgment, Gaskell, following a “mixed motives” theory, argued, *inter alia*, that UK was at least partly motivated not to hire him because of his religion.¹⁵³ Congress amended Title VII in 1991 to “eliminate the employer’s ability escape liability in mixed-motives cases by proving that it would have made the same decision in the absence of the discriminatory motivation.”¹⁵⁴ Thus, following § 2000e-2(m), a plaintiff can establish an “unlawful employment practice” when one of Title VII’s protected categories “was a motivating factor for any employment practice, even though other factors motivated the practice.”¹⁵⁵ Gaskell presented direct evidence—including evidence that members of the search committee had searched his personal web page—to support his mixed motives claim.¹⁵⁶ However, the court held that UK had presented enough evidence in response to survive summary judgment.¹⁵⁷ Soon after, the parties reached a settlement awarding Gaskell \$125,000 with no admission of liability.¹⁵⁸

Gaskell illustrates the risk of Title VII liability associated with the Hiring Committee Approach to information gathering. Here, Sally Shafer, a member of UK’s search committee, performed the internet background search herself, leading her to discover information regarding Gaskell’s religious views that she likely would not have known based on the applicant’s interviews and other materials.¹⁵⁹ Upon discovery of Gaskell’s allegedly creationist beliefs, Shafer emailed links to his personal webpage—which contained Gaskell’s article and lecture notes espousing the religious views that caused her concern—to two of her colleagues on the search committee,

150. *Id.*

151. 42 U.S.C. § 2000e(j) (2011).

152. *Gaskell*, 2010 U.S. Dist. LEXIS 124572, at *9.

153. *Id.* at *10.

154. *Id.* (quoting *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004)).

155. 42 U.S.C. § 2000e-2(m).

156. *Gaskell*, 2010 U.S. Dist. LEXIS 124572, at *10.

157. *Id.* at *11.

158. *Kentucky: Discrimination Suit Is Settled at University*, N.Y. TIMES, Jan. 19, 2011, http://www.nytimes.com/2011/01/19/education/19brfs-DISCRIMINATI_BRF.html.

159. *See Gaskell*, 2010 U.S. Dist. LEXIS 124572, at *4.

and they were eventually shared with the entire group.¹⁶⁰ One of the consequences of the Hiring Committee Approach to information gathering was that Shafer, as both an information gatherer and a hiring decision maker, was exposed to information about the applicant that, if the decision was not to hire, had great potential to lead to allegations of employment discrimination.

Contrast the Hiring Committee Approach with an approach that separates the information gatherer from the information user. If UK had followed the Special Department Approach, a member of the university's staff, playing no role in the hiring decision, would have conducted the internet background check independently and presented his findings to the search committee. Because of the separation between the information gatherer and the decision makers, there would have been an opportunity to redact information about Gaskell's religious beliefs. Although nothing in Title VII would compel the information gatherer to remove references to Gaskell's religion, because the Act only declares it unlawful to *use* that information as the basis for a hiring decision, the university might adopt a policy of expunging information from the internet background report that could lead to claims of employment discrimination.¹⁶¹ This type of policy would limit the UK search committee's liability under Title VII, but would not be mandatory under current law. Thus, the Special Department Approach only guarantees, by virtue of its structure, that the search committee would not *automatically* learn information relating to a protected aspect of an employee's identity, and any policies to remove protected class information would be entirely voluntary.

As a theoretical matter, Title VII similarly would not compel a third-party internet background reporting agency to redact references to Gaskell's religious beliefs, because the burden ultimately rests on the employer to base its decision not to hire an applicant on lawful grounds.¹⁶² However, as a practical matter, filtering out information related to the applicant's status as a member of a protected class is *a core service that third-party internet background reporting agencies are providing*. Consider, for example, Social Intelligence's sales pitch from the front page of their website: "Federal and state protected class information is redacted from the reports we provide. Employers are only exposed to information that is job relevant and may legally be considered in

160. *Id.* at *9.

161. *See* 42 U.S.C. § 2000e-2(a) (2011).

162. *See* 15 U.S.C. § 1681e(b) (2011).

the hiring process.”¹⁶³ In the same way that Social Intelligence blocked the GIZMODO journalist’s face and hands from the pictures included in his report to hide his ethnicity, a third-party internet background reporting agency would seek to remove the references to Gaskell’s religion from his personal website had it prepared a report for UK’s search committee.¹⁶⁴ Thus, this approach would have limited UK’s liability under Title VII and many other federal and state equal employment laws, especially because third-party internet background reporting agencies are well-positioned to develop an expertise in this area of employment law in a way that employers might not be.

B. ADA PROHIBITION ON PREEMPLOYMENT INQUIRIES

In contrast to Title VII, the Americans with Disabilities Act of 1990 (“ADA”) prohibits certain types of questions an employer may ask a candidate during the hiring process, and therefore governs both information use and, to a certain extent, the manner in which information is gathered. Congress passed the ADA for the purpose of “provid[ing] clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”¹⁶⁵ One of these standards includes a prohibition on making preemployment inquiries about an applicant’s disability. Unlike Title VII, which does not prohibit an employer from *asking* about information relating to the job applicant’s status as a member of a protected class—it only controls how the employer *uses* the information—the ADA prohibits these types of inquiries relating to an applicant’s disability.

The relevant section of the ADA reads: “[A] covered entity [employer] shall not . . . make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”¹⁶⁶ Congress prohibited such inquiries to ensure that “[i]ndividuals with disabilities [have] a fair opportunity to be judged on their qualifications, ‘to get past that initial barrier’ where an employment judgment might be unfairly made based on disabilities rather than abilities.”¹⁶⁷ There are three exceptions to this general rule against preemployment inquiries, which the Ninth Circuit summarized in the following way:

163. *Executive Employment Screening*, SOCIAL INTELLIGENCE, <http://www.socialintel.com/hiring> (last visited Oct. 17, 2011).

164. See Honan, *supra* note 21.

165. 42 U.S.C. § 12101(b)(2).

166. *Id.* §§ 12111(2), 12112(d)(2)(A).

167. *Harris v. Harris & Hart, Inc.*, 26 F.3d 838, 841 (9th Cir. 1999) (citing 135 Cong. Rec. § 10768 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin)).

- (1) when pre-employment inquiries relate to the ability of an applicant to perform job-related functions;
- (2) when an employer could reasonably believe that an applicant's known disability will interfere with the performance of a job related function; and
- (3) when an applicant requests reasonable accommodation for the application process or for the job.¹⁶⁸

Even with these exceptions, a preemployment inquiry into to a job-related function should be “narrowly tailored and it should not be phrased in terms of [the] disability.”¹⁶⁹ One circuit has even held that non-disabled job applicants may bring suit under this provision of the ADA for making improper inquiries.¹⁷⁰

In the brick-and-mortar world, as opposed to the world of the Internet, courts have applied the ADA's prohibition on preemployment inquiries regarding an individual's disability to questions arising in the context of face-to-face job interviews and job applications. For example, in *Equal Employment Opportunity Commission v. Wal-Mart Stores, Inc.*, the Tenth Circuit upheld the district court's finding that a Wal-Mart manager's interview question—“What current or past medical problems might limit your ability to do a job?”—was a prohibited preemployment inquiry under the ADA because it “did not concern [the plaintiff's] ability to perform specific job-related functions.”¹⁷¹ However, if an applicant volunteers information, courts have held that an employer may then discuss the applicant's disability. In *Cole v. Staff Temps*, the Supreme Court of Iowa ruled that a discussion of an applicant's medical restrictions in which she volunteered information about her physical restrictions did not fall within this provision of prohibited inquiries under the ADA.¹⁷²

In the context of internet background reports, it is possible that the ADA's prohibition on preemployment inquiries could be extended to

168. *Id.* at 841–42 (9th Cir. 1999) (citing 42 U.S.C. § 12112(d)(3), (4); 29 C.F.R. § 1630.14(1)); *see also* Equal Employment Opportunity Comm'n, Enforcement Guidance: Preemployment Disability-Related Inquiries and Medical Examination Under the Americans with Disabilities Act of 1990, EEOC Notice 915.002 (outlining the EEOC's position on permitted and prohibited preemployment inquiries under the ADA).

169. *Cole v. Staff Temps*, 554 N.W.2d 699, 706–07 (Iowa 1996) (citing 45A Am. Jur. 2d Job Discrimination § 564 at 528).

170. *See* *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595 (10th Cir. 1998). *But see* *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998).

171. *E.E.O.C. v. Wal-Mart Stores, Inc.*, No. 98-2122, 1999 U.S. App. LEXIS 33144, at *12 (10th Cir. Dec. 21, 1999) (unpublished opinion).

172. *Cole*, 554 N.W.2d at 707.

prohibit certain types of internet searches. For example, like the prohibited interview question in *Wal-Mart* asking about the employee's past medical problems, an internet search for the employee's name plus the word "disability" might constitute a prohibited preemployment inquiry.¹⁷³ Such a search query might return links to the applicant's posts on internet message boards discussing the disability, links to any information about the applicant's advocacy work for people with that disability, or even links to the applicant's prior litigation concerning disability discrimination. The District Court for the Eastern District of New York recently heard a case in which the plaintiff claimed disability discrimination based on his allegation that the employer performed an internet background check and found out about the plaintiff's string of previous lawsuits involving his disability.¹⁷⁴ The court dismissed the claim as baseless because the plaintiff did not plead any facts to support his theory (and warned the plaintiff that further abuse of the legal system would result in sanctions). Therefore, it remains an open question whether an internet background check would have qualified as a preemployment inquiry had there been evidence that the employer searched the plaintiff.¹⁷⁵ It also remains uncertain what kind of search query would be considered an "inquiry" under the ADA; would the employer need to include the word "disability" or some other magic words, or would simply searching the applicant's name be enough? Would it require clicking a search result that seemed to indicate it would reveal something about the applicant's disability?

The employer-based methods of internet background information gathering—the Hiring Committee and Special Department Approaches—expose employers to the risks associated with this uncertainty in a way that the Third-Party Approach may not. The ADA defines the term "covered entities," to which the prohibition on preemployment inquiries applies, to mean "employer, employment agency, labor organization, or joint labor-management committee."¹⁷⁶ According to the plain meaning of this definition, there is little doubt that the information gatherer in the Hiring Committee and Special Department Approaches would be considered agents of the "employer" and therefore "covered entit[ies]" subject to the prohibition on preemployment inquiries. However, it is less clear whether the information gatherer in the Third-Party Approach would fall into any of the categories of "covered entity." The closest category under the definition

173. See *E.E.O.C.*, 1999 U.S. App. LEXIS 33144, at *12.

174. *Digianni v. Am. Int'l Grp.*, No. 08CV4355, 201 U.S. Dist. LEXIS 34015, at *9 (E.D.N.Y. Mar. 31, 2010).

175. *Id.* at *13–14.

176. 42 U.S.C. § 1211(2) (2011).

would be “employment agency,” but that incorrectly implies that the third-party internet background reporting agency plays a role in matching employees to employers. Thus, the third-party information gatherer has a strong claim to being exempt from the prohibition on preemployment inquiries under the ADA, making this a less risky alternative for internet background checks from the perspective of ADA liability. Moreover, as a practical matter and as discussed in the Title VII context,¹⁷⁷ the third-party information gatherer would sanitize the applicant’s internet background report of any reference to his disability, since third-party agencies typically eliminate *all* categories of information that would be unlawful bases upon which to make an employment decision.

C. STATE PROHIBITIONS ON LIFESTYLE DISCRIMINATION

In addition to these two major federal statutes, and the panoply of other federal equal employment laws, states have enacted a number of laws banning employment discrimination in many forms, including prohibitions on so-called “lifestyle discrimination” that are particularly relevant to internet background reporting. From the employer’s perspective, some off-duty conduct can affect the employer’s financial interests. As Professor Sugarman points out, the employer may justify a decision not to hire an employee because of his lifestyle “on the ground that the consequences of the off-duty behavior in some way spill over to the workplace, affecting the employer’s legitimate interests.”¹⁷⁸ Employers are, therefore, motivated to avoid employees with behaviors that could cost them in terms of decreases in individual’s productivity, the creation of interpersonal tensions, tarnish to an organization’s reputation, or increased premiums for healthcare or other benefits.¹⁷⁹ Off-duty activities that can clash with an employer’s interests include the employee’s social/sexual relationships (e.g., having an extramarital relationship), civil/political activities (e.g., speaking out at public hearings), dangerous leisure activities (e.g., hang gliding or skydiving), moonlighting (e.g., working a second job as a “centerfold” model), illegal acts (e.g., crimes committed outside of work), and daily habits (e.g., drinking and smoking).¹⁸⁰ In response to the possible employer motivation to discriminate against an employee’s daily habits, approximately 50% of states have

177. *See supra* Section V.A.

178. Stephen D. Sugarman, “Lifestyle” Discrimination in Employment, 24 BERKELEY J. EMP. LAB. L. 377, 379 (2003).

179. *See id.* at 383.

180. *Id.* at 384–95.

prohibited discrimination based on an employee's status as a smoker.¹⁸¹ Illinois, Missouri, and Wisconsin have extended this to include protection from discrimination based on the lawful consumption of alcohol.¹⁸²

State prohibitions on lifestyle discrimination are yet another area where the employer-based methods of internet background information gathering expose employers to the risk of a discrimination lawsuit, especially because the Internet (and social networks, in particular) are so full of records documenting a prospective employee's lifestyle. For example, Facebook pictures of an applicant posing with a beer or smoking a cigarette are direct evidence of the applicant's lifestyle choices and, at the same time, are illegal bases upon which to make an employment decision in the states with prohibitions on this sort of lifestyle discrimination. Moreover, because of the heterogeneity of state prohibitions on lifestyle discrimination, third-party background screening services might be better positioned to develop the expertise necessary to comply with the state-to-state variations.

VI. RECOMMENDATION: THE LEGAL AND STRUCTURAL ADVANTAGES OF THE THIRD-PARTY APPROACH

Thus far, this Note has addressed the varied legal and structural consequences of the employer's choice of internet background information search method under fair credit reporting and equal employment laws. As discussed in Part III, *supra*, the FCRA only regulates the information gathering process of the Third-Party Approach, leaving the Hiring Committee and Special Department Approaches subject only to additional state credit reporting regulations.¹⁸³ This means, among other things, that only the information gatherer in the Third-Party Approach must maintain procedures that ensure the accuracy of the internet background reports it produces. Moreover, as examined in Part V, *supra*, although state and federal equal employment laws generally do not require any single approach to information gathering, these three approaches have different structural consequences that vary the risk of employment discrimination. Because the information gatherer in the Hiring Committee Approach is the same person who ultimately uses the internet background information, that person is doomed to discover information relating to inappropriate bases upon which

181. See 1–9 Employment Screening § 9.07 n.1, *Tobacco Usage and Other Off-Duty Activities*, MB (2011) (citing twenty-one different states with laws prohibiting employers from refusing to hire an applicant because he smokes).

182. 820 ILL. COMP. STAT. § 55/5 (2011); MO. REV. STAT. § 290.145 (2011); WIS. STAT. ANN. § 111.321 (2011).

183. See, e.g., CAL. CIV. CODE § 1786.53(a) (West 2011).

to make an employment decision, simply by virtue of that approach's structure. Though the structure of the Hiring Committee Approach, without more, does not violate most equal employment laws,¹⁸⁴ the Hiring Committee's automatic exposure to the protected class information creates a basis upon which a plaintiff could allege employment discrimination. In light of these conclusions drawn from the legal analysis of information gathering and information use, this Part will suggest recommended practices under the current law.

Both employers and prospective employees benefit from a system that produces accurate internet background reports. For the employer, an inaccurate internet background report increases search costs in the hiring process by leading the employer to decline applicants who would otherwise be fit for the job. This limits the search pool, making eligible candidates artificially scarce, and correspondingly raises the overall cost of finding a suitable substitute applicant. For the prospective employee shut out of the job, an inaccurate internet background report subjects him to an increase in *his* search costs associated with finding a suitable replacement position. Moreover, the job applicant could be rejected by all employers that use information gathering methods that produce an inaccurate internet background report, which could occur, for example, when unsophisticated information gatherers attribute offensive Googleganger internet sources to the applicant himself.

Because of the high value of accuracy for both employers and prospective employees in the hiring process, employers should adopt the FCRA standard of "reasonable procedures to assure maximum possible accuracy" regardless of their approach to internet information gathering.¹⁸⁵ Furthermore, despite the uncertainty resulting from the circuit split on how to interpret this accuracy standard, employers should implement the Fifth Circuit's approach by requiring "minimum . . . points of correspondence" between the job applicant's file and the internet source.¹⁸⁶ In practice, this approach would require "two factor" matching, meaning that the applicant's name *plus* one other identifying category (birthday, educational background, physical location, email address, etc.) must match the internet source before that source can be considered part of the applicant's internet background report. Two-factor matching would necessarily decrease the amount of Googleganger data ending up in an applicant's internet background report

184. *See supra* Section V.B.

185. *See* 15 U.S.C. § 1681e(b) (2011).

186. *See* *Thompson v. San Antonio Retail Merch. Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982).

because of the decreased probability that two factors will match a false source of internet information. The result would be increased accuracy in the information gathering process that would redound to the benefit of both employers and prospective applicants.

Although increasing internet background reporting accuracy appears to have positive externalities, accuracy, by itself, does little to uphold the core function of equal employment laws to prevent employment discrimination. After all, a fully accurate internet background report might nevertheless include information relating to the job applicant's status as a member of a protected class, which might improperly influence the hiring decision maker. From the job applicant's perspective, an internet background report that reveals information relating to his protected class status that the applicant deliberately did not disclose in his other materials might raise concerns about the fairness of the process (and perhaps about an invasion of privacy). From the employer's perspective, an internet background report that raises questions about the impartiality of the hiring process only increases the risk of a lawsuit, which can be expensive in terms of costs and bad publicity, as the University of Kentucky discovered in *Gaskell*.¹⁸⁷

In light of these concerns about impartiality resulting from internet background reports that contain protected class information, the information gatherer should be a separate person from the information user, and the information gatherer should redact all protected class information from the report. Both the Special Department and Third-Party Approaches to information gathering could adopt these policies, because structurally the information gatherer is always a different person from the information user in these approaches. As long as the barrier between employer's staff member conducting the internet information gathering and the hiring committee remains impermeable, the Special Department Approach could, in theory, provide the same structural benefits from separation as the Third-Party Approach in many circumstances.

However, in practice the Third-Party Approach better avoids the risk of employment discrimination for at least two reasons. First, as discussed in Section V.B, *supra*, the ADA prohibits the employer from making preemployment inquiries about the job applicant's disabilities, even if the applicant is not disabled.¹⁸⁸ Courts could reasonably extend this prohibition to include internet searches about the applicant that would likely reveal information about the applicant's disability status. Although it remains

187. *See supra* Section V.A.

188. 42 U.S.C. §§ 12111(2) & 12112(d)(2)(A) (2011).

unclear what kind of internet search would constitute a prohibited preemployment inquiry, it is possible that simply searching the applicant's name and then clicking through links that suggest information about the applicant's disability could suffice. After all, it would be easy to circumvent a rule against searching the applicant's name *plus* some magic word (such as "disability"), since undoubtedly the results of this narrower search (name plus disability) would be buried throughout the broader search for only the applicant's name. Thus, in the Special Department Approach, even if the insulated information gatherer eventually redacted information relating to the applicant's disability, this approach might still expose the employer to liability for violating this provision. However, because the ADA's prohibition does not likely apply to third-party information gatherers (because they fall outside of the definition of "covered entities" under the Act), the Third-Party Approach avoids this risk.¹⁸⁹

Second, the Third-Party Approach better avoids the risk of employment discrimination because specialized internet background reporting agencies can develop an expertise in this area of law. The mosaic of federal and state equal employment laws—including state prohibitions of lifestyle discrimination—is complicated to navigate, and the application of these laws to internet background reporting can be uncertain, as this Note has explored. Given the two-layered complexity consisting of the laws themselves and their application to internet background reporting, the third-party information gatherer is in a better position to develop the expertise necessary to avoid unintentional violations. Of course, this reason for preferring the Third-Party Approach over the Special Department Approach is case-specific; a sophisticated employer with the resources to develop a Special Department with the necessary legal expertise might produce internet background reports that fully comply with all state and federal equal employment laws. Nevertheless, during this early period in the application of these laws to internet background reporting, and in light of the ADA's prohibition on preemployment inquiries that applies to employers but likely not to third-party information gatherers, the Third-Party Approach appears most prudent for employers.

VII. CONCLUSION

This Note analyzed the legal and normative issues surrounding internet background checks. After concluding that, at a minimum, a fifth to a quarter of employers use internet search engines or social networks to screen

189. *See id.* § 1211(2).

candidates at some point during the hiring process, this Note suggested a taxonomy of three different approaches to internet information gathering. It then considered how fair credit and equal employment laws might apply to these three approaches. Based on this analysis, this Note concluded that the major federal regulatory requirements of the FCRA apply only to the Third-Party Approach to internet background information gathering, though state fair credit reporting laws may reach the Hiring Committee and Special Department Approaches. Furthermore, although equal employment laws generally do not mandate any particular information gathering approach, the ADA prohibits an employer's preemployment inquiries regarding disabilities, which suggests that the employer-based approaches expose the employer to greater liability than the Third-Party Approach. This Note then concluded with recommended best practices for employers in light of this legal analysis, ultimately suggesting that the Third-Party Approach both helps ensure the accuracy of the internet background report and, at the same time, reduces the risk of discrimination by virtue of its structure. The importance of internet background reporting can only increase. As our life on the Internet becomes a true parallel to our life in the real world, our internet background report will become the full "background of our being," to borrow a phrase,¹⁹⁰ documenting everything.

190. *Cf.* RALPH WALDO EMERSON, SELF-RELIANCE: THE OVER-SOUL AND OTHER ESSAYS 57 (Coyote Canyon Press Ed., 2010).

