

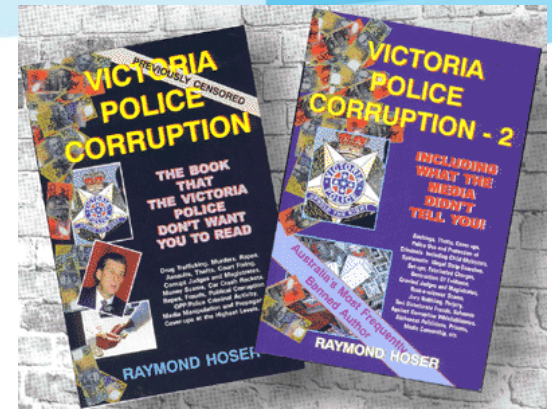


---

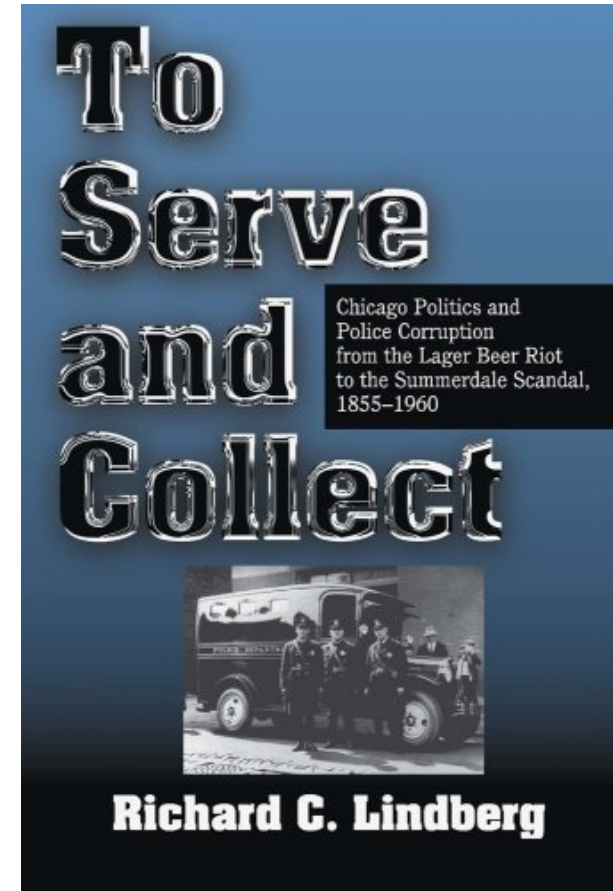
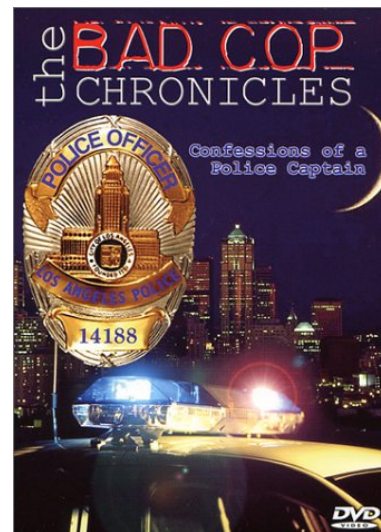
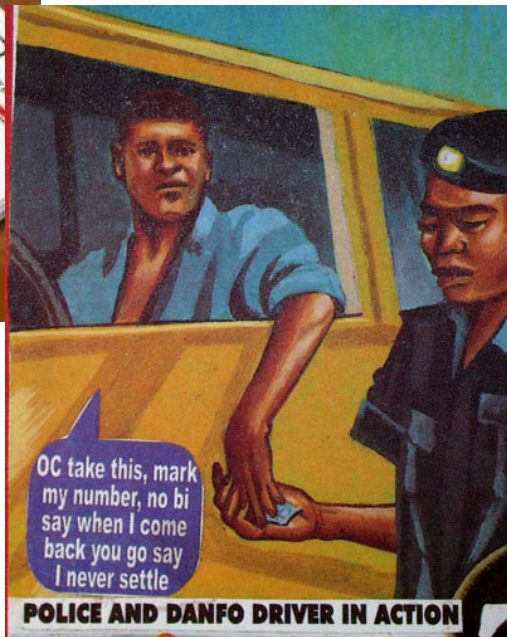
# **Are We Following the Law During Background Investigations?**

Michael Berkow  
October, 2010

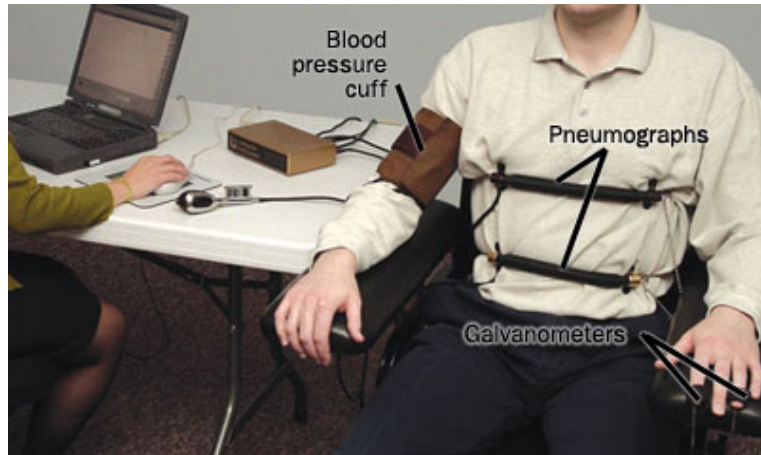




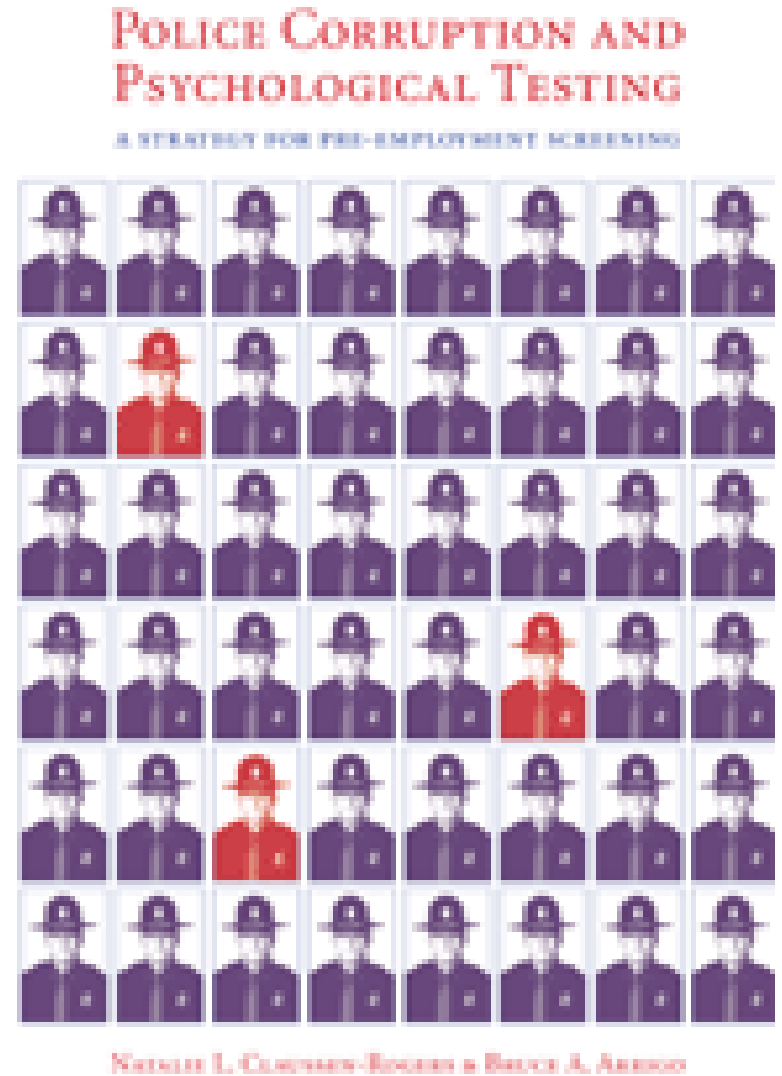
# Most Common Defense Against Misconduct?



# Best Predictor of Future Performance is Past Performance



**surehire**  
Physical Pre-Employment Screening  
and Occupational Testing



# How Is It Done

1. Internally
2. Externally
3. Combination





Fair Credit Reporting Act (FCRA) was enacted April 25, 1971. The FCRA created the first federal regulation of the consumer reporting industry citing "a need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality and a respect for the consumer's right to privacy."

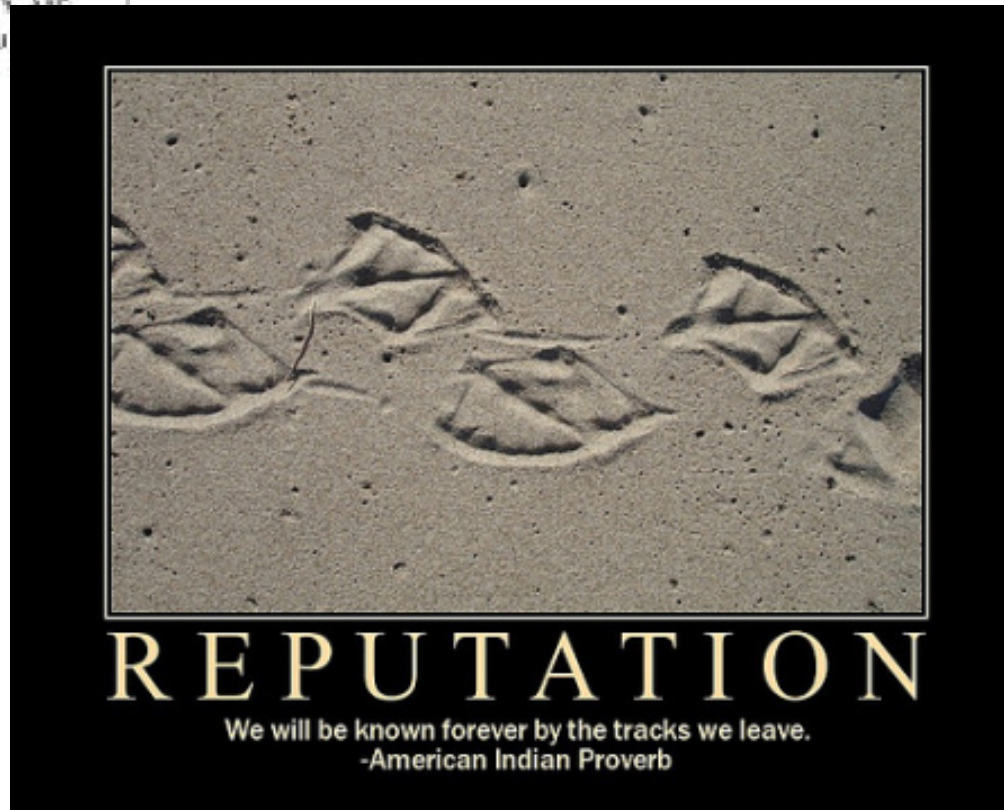
A consumer report is defined under the Act as "a written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living" used in whole or in part as a factor in establishing a consumer's eligibility for credit, employment, insurance or other benefits.

FCRA also detail our responsibilities for a category of reports called investigative consumer reports

An investigative consumer report is a type of report containing information pertaining to the consumer's character, general reputation, personal characteristics or mode of living **that is derived through personal interviews with friends or associates of the consumer.**

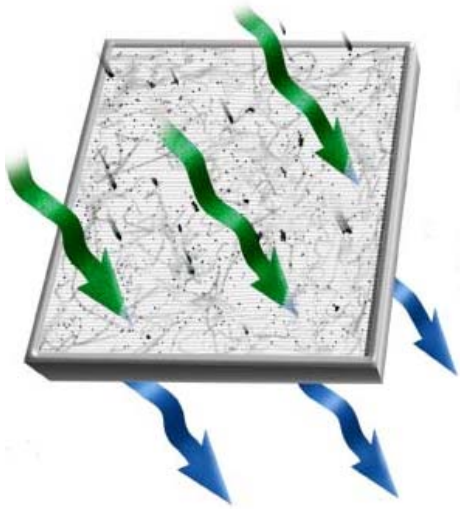
**THEREFORE, LIMITATIONS APPLY TO OUR REPORTING OF THIS INFORMATION**

# Investigative Consumer Reports (ICRS)



## Combination of FCRA and State CRA Statutes Create Filters or Screens for Information

FCRA provides that consumer reports and investigative consumer reports may not contain adverse information **MORE THAN SEVEN YEARS OLD**, except that:



### Bankruptcies may be reported for ten years

Convictions may be reported without limitation EXCEPT in : CA, KS, MO, MA, MT, NV, NH, NM, NY and WA where the time limitation is still seven years.

Civil suits and civil judgments

Arrests (issues with dispositions/convictions)

EXCEPT in: where there is a salary clause that IF the job pays more than , the conviction can be reported without limitation

In California, an employer may not inquire about a marijuana conviction that is more than two years old.

**In Sum: It's Complicated!**



# Fair Credit Reporting Act Compliance Overview



This presentation contains general definitions and information only and are not intended to be comprehensive nor to provide specific legal advice. The information is not a substitute for professional advice, and should not be acted on or relied upon or used as a basis for any decision or action that may affect your hiring practices.

**ALWAYS CONSULT YOUR  
LEGAL COUNSEL FOR  
BEST PRACTICES**



# Employer's Responsibilities under the FCRA

- ☐ In general, prior to initiating a background verification, Employer must:
- ☐ Notify applicant in writing that a background report is being requested on the applicant
- ☐ Obtain written consent
- ☐ Include a statement informing applicant of their right to request additional disclosures in accordance with the FCRA

**NOTE:** You must use a Consent Agreement which references the company you are using as the CRA.

# Police Department USE the information.....

Users of the information for employment purposes (including background checks) have the following responsibilities under the FCRA:

1. They must notify the consumer when an adverse action is taken on the basis of such reports.
2. Users must identify the company that provided the report, so that the accuracy and completeness of the report may be verified or contested by the consumer

DID SOMEONE STICK A KNIFE  
IN YOUR ONLINE REPUTATION?

- DISCREET BAD NEWS BURIAL SERVICE



# Compliance: Consent

## Consent forms:

1. Paper-based form (“wet signature”)
2. E-signature consent form

Applicant has an option to electronically sign the consent form

If applicant declines to provide electronic consent, background check is on hold.

Most institutions accept e-consent. However, few institutions still require hard signature.

# Compliance: State Requirements for CA, MN and OK

## State requirements for applicants in CA, MN and OK:

These states require that employer provides an applicant with an opportunity to request a free copy of the background report.

- » Email option (mail option will be used as a default if applicant does not have email)
- » Mail option via Standard mail



# Compliance: Employer's Responsibilities-Adverse Action

If you rely on a consumer report for an "adverse action" - denying a job application, reassigning or terminating an employee, or denying a promotion — be aware that:

**Step 1:** Before you take the adverse action, you must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" — a document prescribed by the Federal Trade Commission. The CRA that furnishes the individual's report will give you the summary of consumer rights.

<http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.htm>

After giving the applicant “reasonable time” to dispute the results (typically 3-5 days), if employer decides to deny employment to the applicant, employer must provide the applicant with a formal denial (“Adverse Action”)

# Do I have to provide a copy of the report?

**Step 2:** After you've taken an adverse action, you must give the individual notice — orally, in writing, or electronically — that the action has been taken in an adverse action notice. It must include:

- \*the name, address, and phone number of the CRA that supplied the report;
- \*a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- \*a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

# Some Police Department ARE following.....

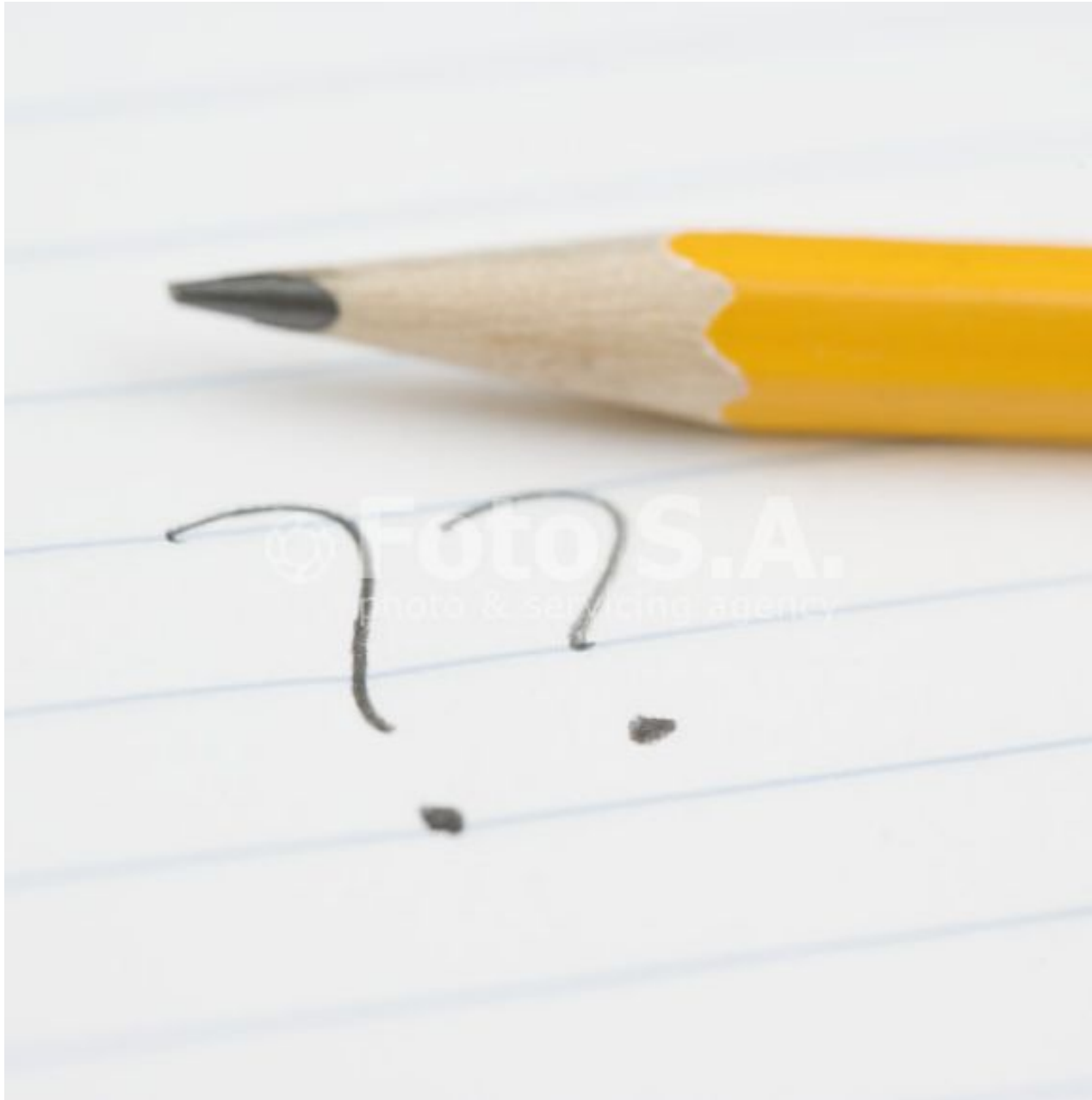
I, \_\_\_\_\_, am aware that my entire background is to be investigated and hereby authorize and request the release of any and all information you have concerning me, excluding bank or savings and loan association balances, to the Sierra Vista Police Department or its agent. I hereby designate Sierra Vista Police Department as my authorized representative for the purpose of obtaining such information.

I understand that a consumer report may be procured by the Sierra Vista Police Department or its agent for employment purposes. I have received a copy of the "Summary of Your Rights Under the Fair Credit Reporting Act", and authorize the Sierra Vista Police Department or its agents to procure said report.

I hereby release anyone addressed above, who gives information about me in the course of an investigation covered by this authorization, from any and all liability for damages of whatever kind to me, my family, heirs or associates as a result of giving such information; except that I do not release anyone who gives information that he knows is false, deliberately intending to harm me or one of my family, heirs or associates.

# Trends

1. Federal and state governments placing a lot of emphasis on creating jobs and employment opportunities
2. Fully staffed EEOC – will be investigating discrimination and disparate impact with regard to hiring practices
3. Legislative activity limiting the use of credit reports and criminal record data in hiring decisions (disparate impact)
4. Litigation
5. Newly created regulator – Consumer Financial Privacy Bureau (CFPB)  
Will have rule making authority over consumer reporting agencies
6. Huge interest and movement towards using social networks (Facebook, My Space, and blogs) to mine for “digital dirt.”



Michael Berkow

[michael.berkow@altegrity.com](mailto:michael.berkow@altegrity.com)