

**RE-ENTRY TASK FORCE**  
FINAL RECOMMENDATION PRESENTED TO THE  
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE  
August 11, 2017

**FY17-RE #04. Promote housing opportunities for people with non-conviction, sealed, and expunged records.**

**Recommendation**

Promote community safety and economic growth by:

- Preventing adverse housing action on the basis of arrests that did not result in conviction, or criminal justice records that have been sealed or expunged.
- Allowing prospective tenants denied housing due to a criminal history or credit record to obtain a copy of the record.
- Correcting a statutory omission regarding landlords' inquiry into sealed records.
- Enacting protections for landlords in civil cases.

**Discussion**

Obtaining housing is a lifelong challenge for those with a criminal record, and a significant hurdle facing individuals returning from incarceration.<sup>1</sup> This is of widespread concern, as nearly one in three Americans of working age have some form of criminal record.<sup>2</sup> In Colorado alone, over 190,000 people were arrested in 2015,<sup>3</sup> and there are more than 1.5 million individuals in the state's criminal record database.<sup>4</sup>

The inability of large numbers of people to obtain housing adversely affects the public's safety and welfare. On an individual level, stable housing is a key factor that enables people to avoid future arrests and incarceration.<sup>5</sup> More broadly, the community as a whole is negatively

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<sup>1</sup> U.S. Dept. of Housing & Urban Dev. (2016, April 4). *Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real-Estate Related Transactions*. Washington, DC (see pp. 1-2 at [portal.hud.gov/hudportal/documents/huddoc?id=hud\\_ogcguidappfhastandcr.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf)); *The Piton Foundation* (2007, Spring). Study portrays struggles people face after prison. *The Piton Perspective*. Denver, CO (at [cdpsdocs.state.co.us/ccjj/Resources/Ref/PitonPerspective-Spr2007.pdf](http://cdpsdocs.state.co.us/ccjj/Resources/Ref/PitonPerspective-Spr2007.pdf)); Tran-Leung, M.C. (2015, February), *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*. Chicago, IL: The Shriver Center (see pp. 1-3 at [povertylaw.org/files/docs/WDMD-final.pdf](http://povertylaw.org/files/docs/WDMD-final.pdf)); Maureen Cain, Policy Director, Colorado Criminal Defense Institute (Aug. 24, 2016), presentation to the CCJJ Collateral Consequences Working Group; and Richard Morales, Deputy Executive Dir., Latino Coalition for Community Leadership, (Aug. 10, 2016) presentation to the CCJJ Collateral Consequences Working Group.

<sup>2</sup> Bureau of Justice Statistics (2014, January), *Survey of State Criminal History Information Systems*, Washington, DC: U.S. Dept. of Justice (see Table 1 on p. 14 at [ncjrs.gov/pdffiles1/bjs/grants/244563.pdf](http://ncjrs.gov/pdffiles1/bjs/grants/244563.pdf)); and McGinty, J. C. (2015, Aug. 7), How many Americans have a police record?, *The Wall Street Journal* (at [wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802](http://wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802)).

<sup>3</sup> Colorado Bureau of Investigation, *Crime in Colorado 2015*, [crimeinco.cbi.state.co.us/cic2k15/state\\_totals/statewide\\_adult\\_arrests.php](http://crimeinco.cbi.state.co.us/cic2k15/state_totals/statewide_adult_arrests.php) (last visited Feb. 1, 2017).

<sup>4</sup> *Survey of State Criminal History*, *supra* note 2, at p. 14, Table 1.

<sup>5</sup> Letter from United States Attorney General Eric Holder, Jr., to Colorado Attorney General John Suthers (Apr. 18, 2011); *Office of General Counsel Guidance*, *supra* note 1, at p. 1; and National Research Council. (2008). *Parole, Desistance from Crime, and Community Integration. Committee on Community Supervision and Desistance from Crime*. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press (see pp. 23-24 at [cdpsdocs.state.co.us/ccjj/Resources/Ref/NCR2007.pdf](http://cdpsdocs.state.co.us/ccjj/Resources/Ref/NCR2007.pdf)).

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impacted by restrictions that concentrate individuals in low-rent, distressed neighborhoods.<sup>6</sup> Numerous studies have shown that the housing related consequences of a criminal record may disparately impact individuals and communities of color.<sup>7</sup> It is thus necessary to ensure that Colorado's justice-involved population has an opportunity to obtain secure and affordable housing.

Many landlords regularly rely on criminal background checks as a means for screening rental applicants, and may refuse to rent to individuals with criminal records based on concerns about public safety or the perception that those individuals are less likely to meet rental obligations.<sup>8</sup> A criminal history thus poses a significant barrier to finding quality rental housing in Colorado.<sup>9</sup> Housing options may also be limited by inaccurate or incomplete criminal records from either public<sup>10</sup> or private<sup>11</sup> record reporting services.

Colorado currently places no restrictions on a private landlord's ability to withhold or terminate housing based on an individual's criminal record.<sup>12</sup> Landlords are prohibited from asking

<sup>6</sup> *Parole*, *supra* note 5, at p. 54-55; and Roberts, J. (2011). Why misdemeanors matter: Defining effective advocacy in the lower criminal courts. *U.C. Davis Law Review*, 45(2), 277-372 (see pp. 300-301 at [lawreview.law.ucdavis.edu/issues/45/2/Articles/45-2\\_Jenny\\_Roberts.pdf](http://lawreview.law.ucdavis.edu/issues/45/2/Articles/45-2_Jenny_Roberts.pdf)).

<sup>7</sup> Carson, E. A. (2015, September). *Prisoners in 2014*. Washington, DC: U.S. Dept. of Justice, Bureau of Justice Statistics (reporting on p. 15 that as of December 31, 2014, black men are imprisoned in state and federal facilities at a rate of 2,724 per 100,000, Hispanic men are imprisoned at a rate of 1,091 per 100,000, and white men are imprisoned at a rate of 465 per 100,000; similar disparities exist for women) (at [bjs.gov/content/pub/pdf/p14.pdf](http://bjs.gov/content/pub/pdf/p14.pdf)); and *Office of General Counsel Guidance*, *supra* note 1, at p. 2.

<sup>8</sup> Vallas, R. & Dietrich, S. (2014, December). *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*. Washington, DC: Center for American Progress, (see p. 19 at [cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf](http://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf)).

<sup>9</sup> Enterprise Community Partners (2017, February). *Protecting Colorado's Renters: A Call for State & Local Policy Action* (at [enterprisecommunity.org/download?fid=15091&nid=19246](http://enterprisecommunity.org/download?fid=15091&nid=19246)); and Chiriboga-Flor, A. & Williams, Z. (2016, September), *Warning Gentrification in Progress: Community Perspective on the Denver Metro Housing Crisis*, Denver, CO: 9to5 Colorado (see p. 8 at [9to5.org/wp-content/uploads/2016/09/HOUSING-REPORT-1.pdf](http://9to5.org/wp-content/uploads/2016/09/HOUSING-REPORT-1.pdf)).

<sup>10</sup> Bureau of Justice Statistics (2015, December). *Survey of State Criminal History Information Systems- 2014*, Washington, DC: U.S. Dept. of Justice (see p.2-3 and Table 1 on p. 14 at [ncjrs.gov/pdffiles1/bjs/grants/249799.pdf](http://ncjrs.gov/pdffiles1/bjs/grants/249799.pdf)) (noting the various states have different rates of reporting final dispositions for arrests, and that in Colorado 19% of arrests have associated dispositions).

<sup>11</sup> Elejalde-Ruiz, A. (2015, Oct. 29). \$13M penalty for background check errors that cost jobs, hurt reputations. *Chicago Tribune* (at [chicagotribune.com/business/ct-background-check-penalties-1030-biz-20151029-story.html](http://chicagotribune.com/business/ct-background-check-penalties-1030-biz-20151029-story.html)).

<sup>12</sup> In Oregon, "a landlord may not consider a previous arrest of the applicant if the arrest did not result in a conviction" unless the arrest resulted in charges that have not been dismissed. Only certain types of convictions can be considered. Oregon Rev. Stat. § 90.303. Several municipalities have similar laws. Both Champaign and Urbana, Illinois, prohibit housing discrimination on the basis of an arrest record. Champaign, IL, Code Ch. 17, Art. V, § 17-71 (at [municode.com/library/il/champaign/codes/code\\_of\\_ordinances?nodeId=MUCO\\_CH17HURI\\_ARTVDIHOCOSP](http://municode.com/library/il/champaign/codes/code_of_ordinances?nodeId=MUCO_CH17HURI_ARTVDIHOCOSP)); Urbana, IL Code Ch. 12, Art. III, §§ 12-37, 12-64 (at [municode.com/library/il/urbana/codes/code\\_of\\_ordinances?nodeId=COOR\\_CH12HURI\\_ARTIIDI](http://municode.com/library/il/urbana/codes/code_of_ordinances?nodeId=COOR_CH12HURI_ARTIIDI)); Newark, New Jersey prohibits landlords and real estate brokers from inquiring about or taking adverse action on the basis of a non-pending arrest that did not lead to conviction, and records that have been erased or expunged. City of Newark, NJ, (2012, September), Legislation File #12-1630, Version 1 (at [newark.legistar.com/LegislationDetail.aspx?ID=1159554&GUID=6E9D1D83-C8D7-4671-931F-EE7C8B2F33FD&FullText=1](http://newark.legistar.com/LegislationDetail.aspx?ID=1159554&GUID=6E9D1D83-C8D7-4671-931F-EE7C8B2F33FD&FullText=1), last visited May 23, 2017); San Francisco, California, does not permit affordable housing providers to consider most arrests that did not lead to a conviction, convictions that have been dismissed or

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individuals to disclose sealed conviction records.<sup>13</sup> The law currently has no mechanism, however, for enforcing that prohibition.<sup>14</sup> Landlords are not prohibited from asking individuals to disclose sealed records not relating to convictions.<sup>15</sup>

Under federal law, however, a landlord's consideration of a tenant's criminal history may give rise to liability. Because criminal record exclusions can have a disparate impact based on race and national origin, they are regulated under the federal Fair Housing Act.<sup>16</sup> A housing provider violates the Fair Housing Act when the provider's policy or practice has an unjustified discriminatory effect, even when the provider has no intent to discriminate.<sup>17</sup>

Arrests alone are not proof of criminal activity.<sup>18</sup> Housing providers who impose exclusions based solely on an arrest without conviction cannot prove that the exclusion actually assists in protecting resident safety or property.<sup>19</sup> Policies and practices that impose exclusions based on conviction records must be necessary to achieve a substantial, legitimate, nondiscriminatory interest.<sup>20</sup> Guidance from the federal Department of Housing and Urban Development states that conviction based exclusions should account for the nature and severity of the conviction, the time that has passed since the conviction, and whether the conviction demonstrates a risk to resident safety or property.<sup>21</sup>

**This recommendation includes five statutory elements:**

- 1. Enact subsection 24-34-502(1)(I) (unfair housing practices prohibited).**
- 2. Amend section 24-34-501 (definitions).**
- 3. Enact section 38-12-701 (proposed title: access to records).**
- 4. Amend section 24-72-702 (sealing of arrest and criminal records other than convictions).**
- 5. Enact section 38-12-512 (proposed title: protection for landlords).**

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expunged, or convictions more than seven years old. San Francisco, CA, Police Code, Article 49, § 4906 (at [sf-hrc.org/sites/default/files/ARTICLE%2049\\_%20Final.pdf](http://sf-hrc.org/sites/default/files/ARTICLE%2049_%20Final.pdf)); Seattle, Washington, has passed a resolution recommending that landlords not exclude residents on the basis of arrests not resulting in convictions. City of Seattle, Office of the City Clerk (2016, June), Resolution 31669, Version 3 at [seattle.legistar.com/LegislationDetail.aspx?ID=2737445&GUID=4E0573F5-8990-47D2-BE8D-85BE81C1E83B](http://seattle.legistar.com/LegislationDetail.aspx?ID=2737445&GUID=4E0573F5-8990-47D2-BE8D-85BE81C1E83B) (last visited May 23, 2017).

<sup>13</sup> § 24-72-703(4)(d)(I), C.R.S. 2016.

<sup>14</sup> Cf. § 24-72-309, C.R.S. 2016 (before Colorado's record sealing statutes were moved to part 7 of chapter 72 of title 24, it was a misdemeanor to violate their provisions).

<sup>15</sup> § 24-72-702(1)(f), C.R.S. 2016.

<sup>16</sup> *Office of General Counsel Guidance*, *supra* note 1, at p. 2; and U.S. Dept. of Housing & Urban Dev. (2015, November 2), *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions* (see p. 5 at [portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf)).

<sup>17</sup> *Office of General Counsel Guidance*, *supra* note 1, at 2.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 6-7.

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**Proposed Statutory Language**

These recommendations would prevent adverse housing decisions on the basis of non-pending arrests that did not result in a conviction, or convictions that have been sealed or expunged. They would also prohibit creating restrictive covenants based on the same. Their language parallels the language of recommendation FY17-RE #02, which applies to private employers.

These recommendations would also allow individuals denied housing to obtain a copy of the report that served as the basis for denial, and would correct an existing omission that allows landlords to inquire about sealed non-conviction records. Finally, they would protect landlords from civil liability based on tenants' criminal history in the same way employers are currently protected. Together, these recommendations aim to ensure record-based restrictions on housing are both fair to individuals and productive to the safety and welfare of Colorado society.

**1. Enact subsection 24-34-502(1)(I):**

This recommendation gives meaning to Colorado's current record sealing laws, and applies existing Fair Housing Act guidance. It would prevent adverse housing action against an individual based on non-pending arrests that did not result in conviction, sealed records, and expunged records. Under all of those circumstances, either the individual has not been convicted of a crime, or a judge has already determined that the record in question should not be available to the public.<sup>22</sup>

The proposed provisions would be enforceable by the Colorado Department of Regulatory Agencies, Civil Rights Division.<sup>23</sup> The civil rights commission could, after following existing notice and hearing procedures, issue a cease and desist order if it found a landlord was engaging in prohibited practices.<sup>24</sup> It could also order damages, penalties, injunctions, or other equitable remedies as provided by current law.<sup>25</sup> The recommendation would also allow aggrieved individuals to initiate a civil action seeking similar remedies.<sup>26</sup>

(1) It shall be an unfair housing practice and unlawful and hereby prohibited:

(I) For any person to make any inquiry about, or to act adversely to an individual on the basis of, a record of any arrest or charge that did not result in a conviction

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<sup>22</sup> With the exception of certain controlled substance and human trafficking related offenses, the sealing of a record reflects that a judge has already determined that the harm to the individual's privacy outweighs the public's interest in the availability of the record. §§ 24-72-702(1)(b)(II)(B), -704(1)(c), -705, -706, -708(3), C.R.S. 2016.

<sup>23</sup> § 24-34-306, C.R.S. 2016.

<sup>24</sup> § 24-34-306(9), C.R.S. 2016.

<sup>25</sup> § 24-34-508(1), C.R.S. 2016.

<sup>26</sup> §§ 24-34-306(11), -306(14), -306(15), 24-34-505.6, C.R.S. 2016.

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and the criminal case is not actively pending, or any criminal justice record that has been sealed or expunged, in connection with showing, selling, transferring, renting, leasing, or providing financial assistance or loans for any housing.

**2. Amend section 24-34-501 as follows:**

(4) "Restrictive covenant" means any specification limiting the transfer, rental, or lease of any housing because of disability, race, creed, color, religion, sex, sexual orientation, marital status, familial status, national origin, ~~or~~ ancestry, **OR A RECORD OF ANY ARREST OR CHARGE THAT DID NOT RESULT IN A CONVICTION AND THE CRIMINAL CASE IS NOT ACTIVELY PENDING, OR ANY CRIMINAL JUSTICE RECORD THAT HAS BEEN SEALED OR EXPUNGED.**

**3. Enact section 38-12-701:**

In many cases, rental applicants pay the cost of their criminal background check as a component of a non-refundable rental application fee. Several states have enacted policies that allow applicants to obtain a copy of their criminal or consumer credit report through landlords.<sup>27</sup> This gives applicants the opportunity to review their report for accuracy, and notify the record repository of any inaccuracies that may be unduly undermining their access to housing.

If a landlord denies an application for a rental agreement and that denial is based in whole or in part on a tenant screening company, criminal history report, or consumer credit reporting agency report on that applicant, the landlord shall give the applicant notice of that fact and, upon request, provide the applicant with a copy of the report. If a copy of the report is requested, the landlord shall promptly give written notice to the applicant of the name and address of the company or agency that provided the report upon which the denial is based, unless written notice of the name and address of the screening company or credit reporting agency has previously been given.<sup>28</sup> A landlord may satisfy this requirement by providing an electronic copy of a report, unless a written copy is requested.

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<sup>27</sup> California Civil Code § 1950.6(f); Oregon Rev. Stat. § 90.295(4), (5); Washington Rev. Code § 59.18.257(1)(a)(iii), (1)(c).

<sup>28</sup> This language is based on an Oregon statute that requires landlords to notify applicants if their denial was based on a consumer or credit screening report, and permits the landlord to provide a copy of the report to the applicant. Oregon Rev. Stat. § 90.295(4), (5).

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**4. Amend section 24-72-702 as follows:**

(1)(f)(I) Employers, **LANDLORDS**, educational institutions, state and local government agencies, officials, and employees shall not, in any application or interview or in any other way, require an applicant to disclose any information contained in sealed records. An applicant need not, in answer to any question concerning arrest and criminal records information that has been sealed, include a reference to or information concerning the sealed information and may state that no such action has ever occurred. Such an application may not be denied solely because of the applicant's refusal to disclose arrest and criminal records information that has been sealed.

**5. Enact section 38-12-512:**

(1) Information regarding the criminal history of a tenant or former tenant may not be introduced as evidence in a civil action against a landlord or the landlord's employees or agents that is based on the conduct of the tenant or former tenant if:

- (a) The nature of the criminal history does not bear a direct relationship to the facts underlying the cause of action; or
- (b) Before the occurrence of the act giving rise to the civil action, a court order sealed any record of the criminal case or the tenant or former tenant received a pardon; or
- (c) The record is of an arrest or charge that did not result in a criminal conviction; or
- (d) The tenant or former tenant received a deferred judgment at sentence and the deferred judgment was not revoked.<sup>29</sup>

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<sup>29</sup> This proposed statutory language is based on an existing limitation on the admission of criminal history information in civil actions against employers. See § 8-2-201(2), C.R.S. 2016.