

Report

Verification and Trust: Background Investigations Preceding Faculty Appointment

The statement that follows, prepared by a subcommittee of the Association's Committee A on Academic Freedom and Tenure, was approved by Committee A for publication. It will be on the agenda of the committee's June 2004 meeting for further discussion. Comments are welcome and should be addressed to the Association's Washington office.

Many employers in the United States have responded to the terrorist attacks of September 11, 2001, by initiating or expanding policies requiring background checks of prospective employees. Their ability to perform such checks has been abetted by the growth of computerized databases and of commercial enterprises that facilitate access to personal information. Employers now have ready access to public information that had heretofore been difficult to collect without an expenditure of considerable effort and money—criminal records, litigation history, worker compensation claims, marriage records, bankruptcy liens, court judgments, and more. They also have ready access to private information—credit-card history, airline use, certain telephone records and bank-account histories, pharmacy records, and even records of medical visits. Inquiry into either type of information by a third party is commonly understood to be an intrusion upon an individual's privacy and we take it to be such. There are few legal limits on access to these data (outside of criminal records), and it appears that the potential for promiscuous—or voyeuristic—investigation is limited only by an employer's concern for expense and ethics.¹

Higher education has not been immune to this siren call for background information. Legislation mandating background checks for all employees of certain public institutions (which may include all or some of public higher education) has been adopted in at least one state. The purchasing consortium of the Committee on Institutional Cooperation (a consortium made up of the University of Chicago and the Big Ten universities) now makes available at a discount the services of a background checking company; it is for each participating institution to decide whether and how those services will be used. Some universities and colleges have initiated or expanded back-

ground investigations of candidates for professorial appointments. This interest in background checks has arisen despite the absence of any systematic study of the need for the information such checks might produce. The interest has been stimulated by the extraordinary recent discovery that a respected member of the faculty at Pennsylvania State University had for decades been on parole for murders committed in another state when he was a teenager. Moreover, the misrepresentation of faculty credentials or experience is not totally foreign to higher education.² But such sensational incidents are fortunately few, and they have little to do with the national security concerns that have emerged since September 11, 2001.³

Because universities and colleges are now considering extensive and intrusive background checks with an urgency that seems quite out of proportion to the actual problems facing the academy, the AAUP's Committee A on Academic Freedom and Tenure appointed the undersigned subcommittee to consider the question of the standards that should guide academic institutions in the implementation of background checks.

Fortunately, we need not write on a clean slate. Almost three decades ago, the Privacy Protection Study Commission, created by the federal Privacy Act of 1974, addressed the tension between individual privacy and institutional needs for

2. This assertion is based on the subcommittee's request for a review of the prevalence of cases of misrepresentation or wrongful nonrepresentation in the Association's files. The staff reported a case of what today would be called "identity theft," an episode occurring more than two decades ago, that would have been headed off by more careful screening by normal means. Occasionally, such cases have reached the courts. For example, *Fuller v. DePaul University*, 12 N.E.2d 213 (Ill. App. 1938) (a professor at a Catholic university had concealed the fact that he had been a priest and was dismissed), and *In Re Hadzi-Antich*, 497 A.2d 1062 (D.C. App. 1985) (a former law professor who falsified his resume in applying for a teaching position was subject to sanction by the bar).

3. A case in which national security has been invoked, that of Professor Sami Al-Arian at the University of South Florida, would not have been affected or forestalled by a policy that mandates extensive background checks. See "Academic Freedom and Tenure: University of South Florida," *Academe: Bulletin of the AAUP* (May-June 2003), 59-73.

1. These limits are set out in Matthew Finkin, *Privacy in Employment Law*, 2nd ed. (Washington, D.C.: BNA Books, 2003), chapter 4.

information in the context of employment.⁴ It focused on two central issues of relevance here: the scope of background investigations and the procedures employed when such investigations are conducted. It concluded, rightly in our estimation, that the former must be guided by a norm of proportionality and the latter by concerns for both accuracy and fairness. We believe these governing principles to be applicable to higher education, and we address them below.

I. Scope of Investigation

Because colleges or universities must repose a high degree of trust in their faculties, they are justified in attempting to ascertain whether candidates are worthy of that trust. For this reason, universities and colleges routinely check references with a candidate's present and prior colleagues. To ensure the accuracy of a candidate's curriculum vitae, institutions also check educational credentials, prior employment, professional experience, and the like. No doubt such background checks entail some compromise of the privacy of candidates, but this is justified in light of reasonable institutional needs.

We recommend that this principle of proportionality be preserved. The privacy of a candidate should be compromised only as necessary in order to secure information that may ensure that applicants are qualified to meet the particular obligations of specific positions. Thus, for example, appointments involving access to federally classified data may require governmental approval, which may justify background investigations of sufficient scope to ensure that a candidate will meet government standards. Similarly, appointments requiring the bonding of an appointee may require a background check of sufficient scope as to satisfy a bonding authority.

Our primary recommendation is that the principle of proportionality prohibits the adoption of a general policy of searching the criminal records, if any, of all applicants for all faculty positions. The mere fact of an applicant's having been swept up into the criminal justice system is not, by itself, relevant to his or her suitability for a faculty position. Think in this context of the many faculty members today who, as students, were convicted of civil disobedience during the civil rights struggle, and of those later arrested in protest of the Vietnam War.

While it is possible that a search of criminal records might disclose information that could reasonably be thought to have a negative bearing on a particular candidate's suitability for a faculty position, such a discovery must surely be rare. At the same time, the moral cost of adopting a general policy of making such searches in order to identify the rare special case is great. Undertaking such searches is highly invasive of an applicant's privacy and potentially very damaging. The probative

value of criminal records is often small because such records are notoriously imprecise. They contain information that ranges from arrest to indictment, from conviction to deferred prosecution and deferred sentencing, from completion of probation to the expunging of conviction. Context is often all important to understand this information, and context is never supplied. Casting a wide net in order to acquire such information in the hope that it might turn up matters of relevance to an appointment would risk great damage for small and speculative gain, and it would cede unacceptable discretion to those entrusted with assessing the significance of this information in the absence of a proper context. This potential unfairness led the Privacy Protection Study Commission to recommend that only criminal justice information "directly relevant to a specific employment decision" be acquired by employers.⁵

We agree. We recognize accordingly that there may be instances where the nature of a particular appointment might justify an investigation of the criminal record of an applicant. For example, some states require criminal checks of persons to be employed in specific capacities, most notably in child care. But we conclude that in the case of an ordinary faculty appointment, the likely benefits of a background criminal investigation of an applicant are dwarfed by the grave invasions of privacy caused by such investigations, as well by the great potential of such investigations to facilitate the misuse of sensitive information. Such investigations are accordingly inconsistent with the principle of proportionality.

To enforce the general principle that the scope of a background check be limited by the specific requirements of a particular position, we recommend that whenever a college or university contemplates pursuing background checks that are more extensive than those now customary within the academy, it should specify the information it seeks and explain the reasons why it believes such information is necessary. We hope this requirement of transparency will provoke discussion that will help ensure that academic institutions do not unduly and unnecessarily expand the scope of background checks.

II. Concerns for Fairness and Accuracy


We do not in this report assess the procedures that accompany the informal forms of reference checking that are now commonly applied to candidates for ordinary faculty positions. We instead address the very different concerns for fairness and accuracy that arise when institutions of higher education seek to conduct extensive background investigations of sensitive information, including criminal records. Positive law already offers useful guidance on the question of proper procedures. The federal Fair Credit Reporting Act governs the procedures that must be used when employers retain businesses to conduct background checks. In summary: (a) the candidate must

4. U.S. Privacy Protection Study Commission, *Personal Privacy in an Information Society* (Washington, D.C., 1977), chapter 6.

5. *Ibid.*, 246.

be informed of the proposed background check and give written authorization for it; (b) the candidate must be given a copy of the final report; and (c) no adverse action may be taken on the basis of the report unless and until the prospective employee has had an opportunity to contest or clarify its accuracy. There is a good deal of technical complexity in this law that we find unnecessary to consider. Suffice it to say we recommend that these basic elements be adopted as governing principles whether a background investigation is conducted by a third party or by an academic institution itself.

Following a search, records should be discarded except with regard to successful candidates. If the report is to remain in a candidate's file, it should be corrected to remove all inaccura-

cies. All irrelevant personally identifiable information in a faculty member's file should be destroyed; relevant but harmful information should be kept confidential, perhaps in files segregated on that basis (if state law allows), and kept for a period no longer than justified by institutional need. 

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Institutions Sanctioned for Infringement of Governance Standards

Reports of an Association investigation at the institutions listed below have revealed serious infringements of generally accepted standards of college and university government endorsed by this Association, as set forth in the *Statement on Government of Colleges and Universities* and derivative governance documents. Institutions are placed on or removed from this sanction list by vote of the Association's annual meeting.

The publication of these sanctions is for the purpose of informing Association members, the profession at large, and the public that unsatisfactory conditions of academic government exist at the institutions in question.

The sanctioned institutions and the date of sanctioning are listed, along with the citation of the report which formed the basis for the sanction.

Lindenwood University (Missouri) (<i>Academe</i>, May-June 1994, 60-69)	1994
Elmira College (New York) (<i>Academe</i>, September-October 1993, 42-52)	1995
Miami-Dade College (Florida) (<i>Academe</i>, May-June 2000, 73-88)	2000