

## Fair Credit Reporting

The author, Carl R. Ernst, is Editor in Chief of BRB Publications and is a nationally recognized expert in public record searching. He has been analyzing the amended Fair Credit Reporting Act with the goal of explaining its practical implications to the day-to-day business activities of private investigators, public record retrievers, and others who access public records to help their clients make business decisions. The author is not an attorney. He reminds us that the FCRA is poorly drafted, which makes compliance determination especially difficult. Competent legal advice should be sought before performing any services that may run afoul of the Act.

### **Introduction—The Question**

The Fair Credit Reporting Act (FCRA) was most recently amended effective September 30, 1997 by The Consumer Credit Reporting Reform Act of 1996 (which I'll call the 1996 amendments). The 1996 amendments significantly alter some provisions of the FCRA, especially with respect to consumer reports used for employment purposes.

**Does the FCRA somehow apply to the investigation of crimes in the workplace?** In the event it is necessary for a company to investigate a crime against it, the company has two choices: it may (1) use only internal resources (its own employees) to investigate the crime, or it may (2) hire an outside investigator to perform the investigation on its behalf.

In the first instance, there can be no FCRA issue under any interpretation of the Act because the FCRA only applies to the procurement and use of a consumer report, and it is well established that a company cannot create consumer reports for itself.

In the second instance, some companies think the 1996 amendments require prior notice to, and authorization to investigate by, a suspected employee-felon before an outside investigator is used to conduct the investigation of the crime. According to this interpretation of the FCRA, (1) the investigation itself constitutes an investigative consumer report. (2) the investigator is acting in an employment screening capacity, that is, as a consumer reporting agency, and (3) the employee is being investigated regarding "retention," a purpose covered by the Act.

Since it obviously makes sense not to disclose a criminal investigation until the results are known, these companies are using in-house alternatives for their investigations. Private investigators, who are best trained to scrutinize these types of matters, are being passed over for investigations they ought to be performing.

This article is written to help private investigators point out to their clients reasons why the FCRA does not necessarily apply to such investigations.

There are important several terms, defined below, used within the FCRA :

**Consumer Report** "...means any 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 which is used...as factor in establishing...(A) credit or insurance... (B) employment purposes; or (C) any other purpose authorized under Section 604."

**Investigative Consumer Report** "...means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or whom may have knowledge concerning such items of information."

## **A Source of the Confusion**

In its commentary on Section 604(3)(B)—which declares that a consumer reporting agency may issue a consumer report to "a person which it has reason to believe... intends to use the information for employment purposes"—the FTC states that "An employer may obtain a consumer report on a current employee in connection with an investigation of the disappearance of money from employment premises, because 'retention as an employee' is included in the definition of 'employment purposes' (section 603(h))." A cursory reading of this comment seems to indicate that the FTC is saying that such an investigation is subject to the FCRA as, for example, an investigative consumer report. However, a more careful reading leads me to believe that this comment deals narrowly with the question of whether an employer can legally obtain a consumer report in a particular situation, and not with the definition of investigative consumer report, for two reasons: (1) the comment is in the permissible purposes section of the FTC commentary, not in the section about investigative consumer reports, and (2) the comment uses the term "in connection with," denoting that the criminal investigation is a type of activity that happens in a business that could lead to firing an employee, whether or not a consumer report was involved.

The question to which the FTC was responding was not, "Is an investigation of a crime that possibly was committed by an employee subject to the FCRA as an investigative consumer report?"

The question being addressed was, "Is it permissible under the FCRA to obtain a consumer report on an employee as part of an investigation of a crime that possibly was committed by the employee?"

Thus, the FTC is merely blessing the concept that the use of a consumer report on a **current** employee as a potential part of the process of investigation is a permissible purpose. (On the other hand, a US District Court made clear that a **former** employer investigating a suspected embezzlement does not have a permissible purpose in obtaining a consumer report because there is no longer an employment purpose.)

The 1996 amendments did alter the requirements for obtaining a consumer report in connection with such an investigation, but the change, discussed below, does not bear on the issue of using an outside investigator.

## The 1996 Employment Purposes Amendments—A Review

Section 603(h) of the FCRA states that "the term 'employment purposes' when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." In other words, pretty much any action that an employer may take regarding an employee **may** be subject to the FCRA **if** a consumer report was involved in the decision process.

Among the statutory changes in the FCRA that affect the relationship between employers and applicants/employees are the following:

1. Before procuring a consumer report on an applicant or employee, an employer must (a) give the applicant/employee the required disclosure form and (b) get written authorization from the employee (Section 604(b)).
2. The consumer reporting agency that prepares the consumer report has become the FCRA watchdog over the employer. It must get certification from the employer that requirement (1) above has been fulfilled, and that item (3) below will be fulfilled, when applicable, for each applicant/employee (Section 604(b)).
3. Before taking "adverse action," which is defined as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee," which is based "in whole or in part on the report," an employer must provide the person with (a) a copy of the report, and (b) a notice of the person's rights with respect to the report (Sections 603(k), 604(b)(3)).
4. After taking adverse action against an applicant/employee based on a consumer report, the employer must also provide additional information to the person regarding the consumer's ongoing right to dispute the adverse statements contained in the report (Section 615(a), but not Section 615(b)).

## The 1970 Disclosures

Since the original FCRA was enacted in 1970, Section 606 has always required certain additional procedures to protect the subject of an investigative consumer report because the information is more subjective and personal than that included in a regular consumer report. Therefore, the original Act required, and still requires, separate disclosure to an applicant/employee that such a report is being prepared "not later than three days after the date on which the report was first requested." The disclosure must include a notice that the subject has a right to know "the nature and scope of the investigation."

## The 1996 Amendments

Paralleling the certification required from employers using regular consumer reports, the 1996 amendment requires the consumer reporting agency that prepares an investigative consumer report to obtain certification from the employer that the employer has made the 1970 disclosures.

The 1996 amendments add a few other clarifications regarding these special reports, including requirements (1) to verify public record information included with such a report within 30 days of the report, and (2) to follow reasonable procedures with respect to confirming the accuracy of information gleaned from personal interviews.

The 1996 amendments also deletes a provision in the old law that exempted companies from any disclosures with respect to "employment purposes for which the consumer did not apply." Obviously someone who has embezzled would not apply to be fired! Therefore, it is possible to say that the new law is more stringent on the employer, since it does require the authorization of the employee before any type of consumer report can be procured for any purpose. Those companies that are concerned about using outside investigators to investigate crimes today are, I suspect, assuming that private investigators were acting as consumer reporting agencies under the old law, but that disclosure and authorization were not required in the past under this now-deleted provision.

Under the 1996 amendments, specific written approval is required from an employee before obtaining a consumer report, whether the purpose is related to promotion or to firing. (See "But You Can't Pull a Credit Report" below for further discussion of this issue. However, the view of those companies still begs the real question that has caused the misunderstanding of the relationship between employers and private investigators: Does the investigation of a crime constitute a consumer report?

In order to complete my analysis of the FCRA, let's take a look at what private investigators actually do as investigative agencies.

## **What Private Investigators (PI's) Do**

Private investigators have many different kinds of specialties. Some specialize in locating dead beat dads while others specialize in covert surveillance. The variety is as great as the kinds of problems that one person can have with another. All these activities, however, fall within the categories designated in PI licensing statutes.

Private investigator licensing statutes categorize what PI's do according to the following roles:

5. Investigate crimes

6. Investigate lost or stolen property
7. Investigate fires, libels, losses, accidents, etc. to persons or property
8. Secure evidence to be used in court
9. Investigate the private, personal affairs of (or information about) **people**

**People are the primary subject of only one of these roles, category (5).**

Category (5) can be further split into specialties such as (a) locating people, (b) surveillance and (c) backgrounding people. Backgrounding can be further classified into specialties such as (1) employment screening, (2) tenant screening, and (3) asset location.

Those PI's who concentrate on backgrounding in the niche specializing in employment screening or tenant screening need to be aware of the specific requirements of the Fair Credit Reporting Act because they act as consumer reporting agencies. These firms must, for example, provide FTC-approved notices to both users of their reports (such as employers) and to sources of information in their reports (such as landlords) under the 1996 amendments.

**However, most of the roles defined for a private investigator involve the investigation of things and actions, not people.**

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A company that suspects employee malfeasance does not call in an employment screening firm; it calls in a fraud or other crime investigation specialist. Does this expert or the company who hires him or her have to think about the Fair Credit Reporting Act? The subject probably never came up prior to the 1996 amendments for the reason I will explain below.

One thing should be clear today to every private investigator. Those of you who are not employment or tenant screening specialists should not get involved in FCRA-related work because the statute is too complicated to make it worth while to learn what hoops to jump through on each FCRA-subject assignment.

**On the other hand, common sense keeps raising the annoying question, Why should the FCRA get in the way of those private investigators that specialize in attacking fraud, theft, etc. in the workplace? Maybe it doesn't.**

**Solution #1—PI's Investigate Crimes, Not People**

A crime in the workplace occurs when it is determined that something is missing, whether it is cash, inventory, or something else of value such as trade secrets.

In many cases, it is necessary first to determine whether a crime has occurred. One of the types of things that PI's do is make just such a determination, that is whether property is "lost or stolen." Does this type of investigation have as its purpose the retention of an employee? It is not even known at the inception of the investigation if any wrong-doing has occurred.

Therefore, it is reasonable to state that the FCRA will not come into play, if at all, until it is determined, after initial investigation, that an employee **may** be involved in the crime. The facts that people happen to be the perpetrators of crimes, and that employees are likely to be involved in certain types of workplace crimes, does not automatically constitute a link between the two. Investigation is required.

## **Surveillance**

Surveillance is one of the techniques of investigation of workplace crimes utilized by PI's mentioned by the FTC in its commentary. Regarding the issue of whether surveillance constitutes an investigative consumer report, the FTC commentary states:

"A report that consists solely of information gathered from observation by one who drives by the consumer's residence is not an 'investigative consumer report,' because it contains no information from 'personal interviews.'"

By analogy, if a PI uses passive surveillance techniques to watch the actions of an employee while investigating a crime, the FTC agrees that activity is outside the purview of the FCRA.

## **Interviewing the Subject**

Interviewing an employee suspected of malfeasance is not conducting any activity within the FCRA because the Act only applies to persons other than the subject of the inquiry.

## Solution #2—The FTC Commentary Comes to the Rescue, Too

Attorneys who review FCRA issues must remember that the FTC has no statutory authority to interpret the FCRA. The FTC does however have enforcement authority, in conjunction with which it has issued its "official" commentaries on the Act. It also issues informal letters responding to requests from the public for clarification of provisions of the FCRA. Neither these informal nor formal comments have the force of trade regulations or rules under the statute. Therefore, it is not necessary for attorneys to agree with the conclusions of the FTC, although courts may give the arguments of the FTC some extra weight. On the other hand, when an attorney can make an argument that coincides with what the FTC commentary states, the attorney's level of comfort with his or her opinion will obviously be higher than when either (1) he or she disagrees with the FTC or (2) the FTC is silent on the matter.

The FTC commentary on the FCRA mentions private investigators (detectives) a number of times. In discussing Section 603(f), the definition of consumer reporting agency, item 6 of the FTC commentary reads,

"6. Private investigators and detective agencies that regularly obtain consumer reports and furnish them to clients may thereby become consumer reporting agencies."

On the other hand, the following commentary appears later in the discussion of Section 604 (3)(E) under item 6 ("Agents") (my emphasis):

"A. General. An agent<sup>3</sup> of a party with a 'permissible purpose' may obtain a consumer report on behalf of his principal, where he is involved in the decision that gives rise to the permissible purpose. Such involvement may include the agent's making a decision (or taking action) for the principal, or assisting the principal in making the decision (e.g., by evaluating information). In these circumstances, **the agent is acting on behalf of the principal**. In some cases, the agent and principal are referred to as "joint users." See discussion in section 603(f), supra (item 8).

<sup>3</sup> Of course agents and principals are bound by the Act?"

"C. Private detective agency. A private detective agency may obtain a consumer report **as agent for its client** while investigating a report subject that is a client's

prospective employee, or in connection with advising a client concerning a business transaction with the report subject or in attempting to collect a debt owed its client by the subject of the report. In these circumstances, the detective agency is acting on behalf of its client."

Here, I think, is another overlooked key to dispelling the notion that hiring a private investigator to look into employee fraud subjects the employer to the FCRA. As I emphasized in bold above, the FTC recognizes a form of agency relationship in its interpretation of the FCRA by indicating that a private detective may act (if its agreement with the principal so provides) as agent on behalf of its principal, **rather than as a consumer reporting agency**, when it obtains a consumer report for the principal.

Based on this analysis, it is rational to draw the following conclusion: Even if investigation of a crime on behalf of a company by a private investigator were subject to the FCRA (which according to solution #1 I believe would not be the case), **all that is needed for a PI to avoid being subject to the FCRA is a properly drafted agreement between the PI and the client employer—an agreement that clarifies and establishes that the private investigator is acting as agent on behalf of the employer in its investigation of the crime and of any employee who might have committed it.**

## **A Suggested Investigative Services Agreement**

Some associations of PI's provide a generic form of services agreement to members, like the following example that states in part (my emphasis),

"The undersigned retains [investigative agency] to conduct an investigation into the matter of [fill in the blank] subject to this agreement. [Investigative agency] **is an agent of the undersigned** and all reports and public records shall be confidential and shall not be divulged to third parties without the consent of the undersigned."

The suggested form includes a disclaimer that you should seek the advice of your attorney before using it. The important point for you to understand is that the bolded words in this form of agreement clearly indicate the principal-agent relationship referred to in the FTC commentary, as discussed above.

I recommend that the organizations of legal investigators get together and allocate the funds necessary to have a formal, standardized form of services agreement for the purpose of investigating workplace crime prepared by an attorney competent in FCRA and contract law.

## **But, You Can't Pull a Credit Report**

As noted above, if the employer wants to obtain a consumer report, usually a credit report, the employer will be subject to the user requirements of the 1996 amendments. It would be wise **never** to have the investigating PI pull the report, just to make sure no one will try to cast the PI as a consumer reporting agency. And, when deciding whether to pull a credit report, consider whether the disclosure and authorization requirements may be more burdensome to the employer than the benefits of pulling the report. My advice to an employer considering an investigation of employee fraud would be to seriously consider avoidance of obtaining any credit report during its investigation. And, never pull a credit report on an employee without his or her written authorization.

If the employer does not pull a credit report, but only relies on its own investigation, it is a well established principle that the FCRA does not apply to information developed about an employee directly by an employer. The information does not constitute a consumer report because it is not produced by a consumer reporting agency, since the definition of consumer reporting agency requires that reports be prepared for third parties. Therefore, this principle would apply to the private investigator agent as well.

Some time ago in this article we stated, "pretty much any action that an employer may take regarding an employee may be subject to the FCRA if a consumer report was involved in the decision process." You have now seen that it is reasonably possible for an employer to avoid obtaining a consumer report during an employee investigation. If, then, the private investigator acts as the employer's agent and the employer avoids pulling a credit report, the employer avoids being subject to the FCRA.

## **Further Protection For the Employer—Make the Disclosure Now**

The FCRA does not require that a company wait until it wishes to initiate an investigative or regular consumer report to make the disclosures under Sections 604(b) and/or 606. The company can make the appropriate disclosures and obtain authorization to procure consumer reports at any time prior to requesting the report (informal opinion letter, dated 12/18/97, to Harold R. Hawkey at <http://www.ftc.gov/os/statutes/fcra/hawkeycb.htm>). Therefore, every company with employees should add the appropriate wording to its employment application for new employees, and can include appropriate wording in a new disclosure given to all present employees along with the form to sign authorizing obtaining a consumer report at any time.

In this case, the employer will not have to make any disclosure to the employee prior to obtaining any type of consumer report.

## **Conclusion**

The investigation of crimes in the workplace continues to be a proper function for licensed private investigators. The investigation of the crime does not in itself constitute a consumer report, even if some activities, such as the acquisition of a credit report on a suspected employee by the employer, may be constrained by the FCRA.