

News

Public Has Right to Ex-Offender Info, Lawyers Say

Free speech experts raise concerns about allowing suits over reporting on sealed records

Kathleen Baydala Joyner, Daily Report

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Hollie Manheimer says the government cannot "erase history." John Disney/Staff

Some free speech lawyers are concerned about a recommendation by the governor's criminal justice reform council to let people sue consumer reporting agencies that report items in the plaintiffs' criminal histories that have been sealed by the courts.

Hollie Manheimer of the Georgia First Amendment Foundation says she sympathizes with the goal to help rehabilitated ex-offenders find jobs and housing, making them more productive members of society. But she said giving a private cause of action to people whose criminal histories are reported accurately raises significant concerns about free speech.

She said the council's convict re-entry goals shouldn't come at the expense of the public's right to know what happens to people who enter the state's criminal justice system.

"The First Amendment does not allow the government to erase history, including arrest histories," Manheimer said. "No organization—whether it's a media organization or a consumer reporting agency—should be punished for publishing accurate information about the fact that our government saw fit to place a person under arrest.

"If the government is uncomfortable with the number of arrests it is carrying out, it should take a hard look at whether it's exercising its arrest powers in an appropriate way," she added. "It should not try to punish organizations for providing accurate information to the public."

The proposal came in a 41-page report on ex-convict re-entry issued recently by the council—made up of judges, lawmakers, lawyers and law enforcement officers appointed by the governor. As with the council's previous criminal justice reform recommendations, those in the report may be adopted by legislators and dropped into bills this session.

The council justified the recommendations on the state's growing corrections costs and its unwavering recidivism rate, saying someone released from state custody has a 30 percent risk of reoffending within three years.

Bills based on council recommendations passed in 2012 and 2013 reduced penalties for some nonviolent crimes, created a statewide system of accountability courts and rerouted youth offenders from detention centers to community-based rehabilitation and treatment programs.

Other bills passed allowed courts to seal or restrict public access to some criminal records, including charges that never resulted in prosecution or conviction. Under Georgia law, some first offenders may also be eligible for records restriction.

Records restrictions are meant to give innocent or rehabilitated people a clean slate and to eliminate obstacles in finding jobs, the council said.

"The council appreciates the need to balance an employer's right to know about the background of potential employees against the potential employee's right to receive the appropriate protection already accorded to them by state law," the council said in its recent report.

The recommendation regarding records restrictions states that the Legislature should develop procedures through which an individual could "demand that a consumer reporting agency correct any report containing any aspect of that person's criminal history which is inaccurate or does not appropriately restrict information as required by existing state law." The council also recommended creating a private cause of action "with treble damages against consumer reporting agencies if said reports are published by the agency and do not reflect the demanded corrections. This council further recommends that the General Assembly clarify the venue provisions for this new cause of action, as a long-arm statute may be appropriate."

David E. Hudson, a partner at Hull Barrett in Augusta and a media lawyer for the Georgia Press Association, was less concerned than Manheimer about the proposals.

He said federal crediting reporting law already requires credit reporting agencies to correct information on a consumer that is incorrect. "Thus, I do not see that it breaks any new ground for Georgia to require that a consumer reporting agency correct any inaccurate information about a consumer's criminal history," Hudson said.

"And as with federal credit reporting laws, it would not be unusual to create a civil remedy for a consumer reporting agency that fails to correct criminal history information," he added. "The key is determining in the legislation exactly what would be required as proof by a consumer about an error in his or her criminal history that would require the consumer reporting agency to make a change."

Hudson also said that such a law wouldn't hurt traditional media, such as newspapers, magazines and television broadcasters, because they are not considered by definition to be consumer reporting agencies.

First Amendment attorney Cynthia Counts said she has no problem with penalizing agencies that report inaccurate information. But she is concerned about the portion of the recommendation that could lead to penalties for reporting past arrests and the potential for policy creep. Counts cited a move in Europe to establish broader privacy rights, including a "right to be forgotten," which would give residents greater control over what information about them is available online.

"It's seeking to erase history," Counts said. "I know people can be embarrassed by certain arrests, but the public needs to know who's been arrested and why and what the government has done about it. It's about accountability and transparency."

Counts said the dialogue in state government over records restrictions makes her worry that one day reporting criminal backgrounds could be considered akin to public reporting of private facts. In many states, she said, individuals may sue entities that report information about them that is offensive or not of legitimate public concern, even though that information is true. The right to sue for reporting private facts has typically applied to very sensitive information such as sexual orientation or HIV status.

Counts said she is skeptical that government can mandate truly forgiving and forgetting when it comes to criminal histories.

"It's never going to be a reality. What about in small towns where everybody knows everyone's business anyway?" Counts said, adding that the solution for wrongful arrest isn't sweeping it under a rug. "The cure for that is more speech. If you're falsely accused, restricting society's ability to scrutinize the government's response isn't going to help."

Counts said she believes the best way to address the bias businesses may have about hiring people with criminal backgrounds is education and, eventually, a cultural change.

"We need to educate people about recidivism and encourage the hiring of people with past records," she said, pointing to another recommendation in the criminal justice reform council's report that would establish negligent hiring liability protection for businesses that hire ex-cons.

"I am sympathetic, but I don't know if government can constitutionally restrict the publication of truthful information," she said.

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