

BOARD of SUPERVISORS



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MEMORANDUM

TO: Kiely Hosmon, Director, Youth Commission

FROM: John Carroll, Assistant Clerk,
Public Safety and Neighborhood Services Committee

DATE: October 22, 2018

SUBJECT: LEGISLATIVE MATTER INTRODUCED

The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following hearing, introduced by Supervisor Cohen on October 16, 2018. At the request of the Youth Commission, this item is being referred for comment and recommendation.

File No. 181002

Ordinance amending the Police Code to prohibit private post-secondary educational institutions from using an application form that contains questions about an applicant's criminal history, or asking an applicant about criminal history for the purpose of deciding whether to offer admission; requiring educational institutions to retain relevant records for three years; authorizing the Office of Labor Standards Enforcement to investigate possible violations and impose penalties; and providing for a private right of action.

Please return this cover sheet with the Commission's response to John Carroll, Assistant Clerk, Public Safety and Neighborhood Services Committee.

RESPONSE FROM YOUTH COMMISSION Date: _____

- No Comment
- Recommendation Attached

Chairperson, Youth Commission

1 [Police Code - Prohibiting Criminal History Inquiries in Private College Admissions]

2
3 **Ordinance amending the Police Code to prohibit private post-secondary educational**
4 **institutions from using an application form that contains questions about an**
5 **applicant's criminal history, or asking an applicant about criminal history for the**
6 **purpose of deciding whether to offer admission; requiring educational institutions to**
7 **retain relevant records for three years; authorizing the Office of Labor Standards**
8 **Enforcement to investigate possible violations and impose penalties; and providing for**
9 **a private right of action.**

10
11 **NOTE:** **Unchanged Code text and uncodified text** are in plain Arial font.
12 **Additions to Codes** are in *single-underline italics Times New Roman font*.
13 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.
14 **Board amendment additions** are in double-underlined Arial font.
15 **Board amendment deletions** are in ~~strikethrough Arial font~~.
16 **Asterisks (* * * *)** indicate the omission of unchanged Code
17 subsections or parts of tables.

18 Be it ordained by the People of the City and County of San Francisco:

19 Section 1. The Police Code is hereby amended by adding Article 50, consisting of
20 Sections 5001, 5002, 5003, 5004, 5005, 5006, 5007, 5008, and 5009, to read as follows:

21 **ARTICLE 50: CRIMINAL HISTORY IN ADMISSION**

22 **TO POST-SECONDARY EDUCATIONAL INSTITUTIONS**

23
24 **SEC. 5001. TITLE.**

25 *This Article 50 may be referred to as the "Beyond the Box in College Admissions Ordinance."*

1 SEC. 5002. FINDINGS AND PURPOSE.

2 (a) Around the country, individuals are often plagued by old or minor arrest or conviction
3 records that discourage them from applying for educational opportunities because a “box” on the
4 application requires disclosure of criminal history information that may exclude them from
5 consideration. Research indicates that the collection and use of criminal history information in the
6 application process for post-secondary institutions constitutes a formidable barrier for many
7 individuals with criminal records. Specifically, data suggests that pre-admission inquiries for prior
8 felony convictions is associated with application attrition on college applications.

9 (b) The federal government and the higher education industry have acknowledged this
10 problem. In 2016, the Obama Administration encouraged higher education institutions throughout the
11 country to take the Fair Chance Higher Education Pledge to develop practices to provide formerly
12 incarcerated individuals with a fair shot at educational opportunities. Similarly, the United States
13 Department of Education released a resource guide titled “Beyond the Box,” which provided
14 information for colleges to examine and remove barriers to pursuing a higher education for citizens
15 with criminal records. Several postsecondary educational institutions have voluntarily removed
16 questions about criminal history from their admissions procedures, and The Common Application, Inc.,
17 has announced that it will soon allow its member institutions to omit criminal history questions from
18 their applications.

19 (c) In California, it is estimated that approximately eight million Californians have been
20 arrested or convicted. Thousands of people in our local community are directly impacted by barriers
21 to full reintegration into society based on these records. Pre-admission inquiries into prior felony
22 convictions also magnify racial disparities in the criminal justice system, resulting in a particularly
23 negative impact on applicants of color seeking admission to post-secondary educational institutions.

24 (d) Because a post-secondary education is a key to labor market success, policies that increase
25 educational opportunities for people with arrest and conviction records reduce recidivism, promote the

1 financial stability of our communities, and enhance the City's potential for economic growth. Policies
2 that encourage reintegration and reduce recidivism can also help reduce criminal justice costs. The
3 San Francisco Sheriff's Office predicts it will spend approximately \$90,000 to incarcerate persons in
4 jail in 2017-2018. When a person successfully reintegrates and does not return to the criminal justice
5 system, these costs are avoided, allowing scarce public dollars to be reinvested in programs that make
6 our communities stronger and safer.

7 (e) Many cities and counties in the United States, including San Francisco, have regulated
8 inquiries into criminal history in other contexts, such as in housing and employment decisions. In the
9 higher education context as well, San Francisco should lead the nation in curbing such inquiries. By
10 addressing roadblocks in the pathways to achieving a higher education, this Article 50 will support
11 individuals that have paid their debt to society and served their sentences by assuring them an equal
12 chance to learn and thrive in society. Prohibiting pre-admission inquiries on college applications will
13 provide youth and adults who have been subject to the criminal justice system a fair chance to realize
14 their full potential and become contributing members of society. Given these considerations, it is wise
15 public policy – in the context of the criminal justice system, public health and safety, and the economy –
16 to improve access to post-secondary institutions for individuals with prior arrest or conviction records.

17
18 **SEC. 5003. DEFINITIONS.**

19 For purposes of this Article 50, the following definitions apply:

20 "Admit" or "Admission" means a College's invitation to an Applicant to enroll in the College,
21 including a conditional or deferred invitation, or a decision to place an Applicant on the College's
22 waitlist.

23 "Agency" means the Office of Labor Standards Enforcement, or any successor department or
24 office.

1 "Applicant" means (a) a person who has applied for admission to a College; or (b) a person
2 who has inquired about admission to a College, but only where the inquiry relates to the inquiring
3 party's possible admission to the College, not to inquiries made on behalf of another person.

4 "Arrest" means questioning, apprehending, taking into custody or detention, holding for
5 investigation, charging, indicting, or trying, a person for any felony, misdemeanor, or other criminal
6 offense. "Arrest" includes these actions only when conducted by a law enforcement officer.

7 "College" means any private post-secondary educational institution located in San Francisco
8 that awards degrees signifying satisfactory completion of the requirements of a postsecondary
9 educational program at the associate's level or above. "College" does not include institutions that are
10 part of the State of California, including City College of San Francisco, San Francisco State
11 University, and the University of California.

12 "Conviction" means an adjudication (following a trial, guilty plea, or no-contest plea) that a
13 person was guilty of any felony or misdemeanor. "Conviction" includes: (a) an adjudication that a
14 person was guilty in a juvenile proceeding of, or had a juvenile petition sustained in connection with,
15 any felony or misdemeanor; and (b) convictions that have been judicially dismissed, expunged, voided,
16 invalidated, or otherwise rendered inoperative, by way of example but not limitation, under California
17 Penal Code Sections 1203.4, 1203.4a, or 1203.41.

18 "Criminal History" means an Applicant's record of Arrest or Conviction.

19 "Director" means the Director of the Office of Labor Standards Enforcement, or the Director's
20 designee.

21
22 **SEC. 5004. PROHIBITION ON INQUIRING ABOUT CRIMINAL HISTORY IN**
23 **ADMISSIONS DECISIONS.**

24 (a) A College may not, for the purpose of considering whether to Admit an Applicant, inquire
25 about the Applicant's Criminal History, such as by making any direct or indirect statement, question,

1 prompting, or other communication, orally or in writing, personally or through an agent, using any
2 mode of communication, including, but not limited to, application forms and interviews. "Inquire," as
3 used in this subsection (a), includes providing, or directing the Applicant to, an application form that is
4 subsequently viewed by an Applicant. This subsection (a) applies to application forms devised or
5 administered by third parties that Colleges use for the purpose of considering whether to Admit the
6 Applicant.

7 (b) As subsection (a) indicates, a College may not use application forms that contain a request
8 for information about the Applicant's Criminal History. A College is in violation of this Article 50 if it
9 makes any such application form available to the general public or to potential Applicants in any
10 format, including but not limited to, posting it on the College's website, or distributing paper copies.

11 (c) Nothing in this Article 50 prohibits an Applicant from voluntarily, and without prompting,
12 disclosing the Applicant's Criminal History.

13 (d) A College that receives Criminal History from a person or entity other than the Applicant is
14 not in violation of this Article 50 if the College did not receive the information in response to an inquiry
15 about the Applicant's Criminal History for the purpose of considering whether to Admit the Applicant.

16 (e) Nothing in this Article 50 prohibits a College from requesting, or obtaining, Criminal
17 History from an Applicant after an Applicant has accepted Admission and agreed to enroll in the
18 College.

19
20 **SEC. 5005. IMPLEMENTATION AND ENFORCEMENT.**

21 (a) The Agency is authorized to take appropriate steps to enforce and coordinate enforcement
22 of this Article 50, including the investigation of possible violations of this Article.

23 (b) An Applicant or any other person may report to the Agency any suspected violation of this
24 Article 50. The Agency shall encourage reporting pursuant to this subsection (b) by keeping
25 confidential, to the maximum extent permitted by applicable laws, the name and other identifying

1 information of the Applicant or person reporting the violation; provided, however, that the Agency may
2 disclose the name and identifying information of the Applicant or person as necessary to enforce this
3 Article 50 or for other appropriate purposes.

4 (c) The Director shall establish rules governing the administrative process for determining and
5 appealing violations of this Article 50. The rules shall include procedures for providing the College
6 with the following:

7 (1) Notice that it may have violated this Article 50;

8 (2) A right to respond to the notice;

9 (3) Notice of the Agency's determination of a violation; and

10 (4) An opportunity to appeal the Agency's determination to a hearing officer, who is
11 appointed by the Controller.

12 (d) If the College appeals the Agency's determination of a violation, the Agency's
13 determination shall be considered prima facie evidence of a violation, and the College shall have the
14 burden of proving, by a preponderance of the evidence, that the Agency's determination of a violation
15 is incorrect. The hearing officer's decision of the appeal shall constitute the City's final decision.

16 (e) The Agency may impose upon the College an administrative penalty of \$250 for each
17 Applicant as to whom a violation of Section 5004(a) occurred.

18 (f) The Agency may impose upon the College an administrative penalty of \$250 for each day a
19 violation of Section 5004(b) occurred or continued.

20 (g) The City Attorney may bring a civil action in a court of competent jurisdiction against a
21 College for violating any requirement of this Article 50, and, upon prevailing, shall be entitled to such
22 legal or equitable relief as may be appropriate to remedy the violation, including a civil penalty, and
23 shall be awarded reasonable attorneys' fees and costs.

1 (h) In any administrative or civil action brought under this Article 50, the Agency or court, as
2 the case may be, shall award interest on all amounts due and unpaid at the rate of interest specified in
3 subdivision (b) of Section 3289 of the California Civil Code.

4 (i) In the event the City brings a civil enforcement action for violation of this Article 50, any
5 person or association by or with a direct interest in compliance with this Article may join in that
6 enforcement action as a real party in interest. In the event the City does not institute a civil
7 enforcement action for violation of this Article, a directly interested person or association, after
8 receiving confirmation from the City Attorney that the City does not intend to institute a civil suit, may
9 bring a civil proceeding on its own behalf and on behalf of the City against that College and seek all
10 remedies available for violation of this Article available under state law, including but not limited to
11 monetary, injunctive, and declaratory relief. Should actual damages incurred by such a violation be
12 difficult to determine, liquidated damages may be awarded at the rate of \$1,000 per day of violation, to
13 be distributed equally between a private plaintiff, if any, and the general fund of the City, unless such
14 liquidated damages award is found to be so excessive in relation to the violator's resources as to
15 constitute a penalty.

16 (j) The Director shall have authority to adopt regulations or guidelines that implement the
17 provisions of this Article 50.

18 (k) The remedies, penalties, and procedures provided under this Article 50 are cumulative of
19 any other remedies, penalties, or procedures that may be available to address conduct that is violative
20 of this Article.

21
22 **SEC. 5006. RECORDKEEPING REQUIREMENTS.**

23 (a) Colleges shall retain, for a period of three years, completed applications and any other
24 pertinent data and records about each Applicant; and blank application forms and other admissions
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1 documents that reflect questions posed to Applicants for a period of three years from the last use of the
2 form or document.

3 (b) Colleges shall allow the Agency access to such records, with appropriate notice and at a
4 mutually agreeable time, to monitor compliance with the requirements of this Article 50.

5 (c) It is recommended, but not required, that Colleges retain, for a period of three years,
6 applications that were begun but not completed.

7 (d) Colleges shall provide information to the Agency, or the Agency's designee, as may be
8 required to verify the College's compliance with this Article 50.

9 (e) In no event shall the Agency require a College to provide any information or documents the
10 disclosure of which would violate state or federal law.

11 (f) Where a College does not maintain or retain adequate records documenting compliance
12 with this Article 50 or does not allow the Agency reasonable access to such records, it shall be
13 presumed that the College did not comply with this Article, absent clear and convincing evidence
14 otherwise.

15 (g) Pursuant to its rulemaking authority under this Article 50, the Agency shall adopt rules that
16 establish procedures for Employers to maintain and retain accurate records and to provide annual
17 reporting of compliance to the Agency in a manner that does not require disclosure of any information
18 that would violate State or Federal privacy laws.

19
20 **SEC. 5007. PREEMPTION.**

21 The City recognizes that in some circumstances state or federal law may govern some of the
22 matters addressed in this Article 50. Nothing in this Article shall be interpreted or applied by a court
23 or the Agency or any other part of City government so as to create any requirement, power, or duty in
24 conflict with federal or state law or with a requirement of any government agency, including any
25 agency of City government, implementing federal or state law. Consistent with the foregoing

1 preemption principle, for example, the Agency is authorized to not enforce any provision of this Article
2 upon determining that its application in a particular context would conflict with federal or state law or
3 with a requirement of a government agency implementing federal or state law. Further, this Article
4 does not prevent Colleges from inquiring about Criminal History where such inquiry is required by
5 federal or state law or a government agency implementing federal or state law, but this Article does
6 require that such an inquiry be limited to those aspects of inquiries regarding Criminal History that are
7 necessary to comply with federal or state law. These examples are illustrative and do not limit the
8 scope of the preemption principle stated in this Section 5007.

9
10 **SEC. 5008. SEVERABILITY.**

11 If any section, subsection, sentence, clause, phrase, or word of this Article 50, or any
12 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a
13 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining
14 portions or applications of the Article. The Board of Supervisors hereby declares that it would have
15 passed this Article and each and every section, subsection, sentence, clause, phrase, and word not
16 declared invalid or unconstitutional without regard to whether any other portion of the Article or
17 application thereof would be subsequently declared invalid or unconstitutional.

18
19 **SEC. 5009. CONSTRUCTION.**

20 (a) This Article 50 shall not be construed to require a College to give preference to or admit a
21 student with a Criminal History. Moreover, this Article shall not be construed to limit a College's
22 discretion to choose its students from applicants, consistent with existing law and with this Article.
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Section 2. Effective Date; Operative Date.

(a) This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

(b) This ordinance shall become operative on August 1, 2019.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: 
LEILA K. MONGAN
Deputy City Attorney

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LEGISLATIVE DIGEST

[Police Code - Prohibiting Criminal History Inquiries in Private College Admissions]

Ordinance amending the Police Code to prohibit private post-secondary educational institutions from using an application form that contains questions about an applicant's criminal history, or asking an applicant about criminal history for the purpose of deciding whether to offer admission; requiring educational institutions to retain relevant records for three years; authorizing the Office of Labor Standards Enforcement to investigate possible violations and impose penalties; and providing for a private right of action.

Existing Law

The City has no current laws regarding the use of criminal history information in college admissions. There are, however, City ordinances relating to the use of criminal history and salary history in other contexts:

- Article 49 of the Police Code prohibits the use of prohibits employers and housing providers from inquiring about, or considering, criminal history until after a conditional offer of employment or housing; and
- Article 33J of the Police Code prohibits employers from inquiring about, or considering, an applicant's salary history in determining whether to offer employment or what salary to offer.

Amendments to Current Law

The proposed ordinance would apply a similar restriction in the college admissions context. It would prohibit private post-secondary educational institutions located in San Francisco from inquiring about criminal history in two ways.

First, a college may not make available to the potential applicants, or the general public, application forms that ask any questions about the applicant's criminal history. That prohibition applies to third-party applications, such as the Common Application. A college who violates this provision would be subject to a \$250 administrative penalty for each day the violation occurred or continued.

Second, a college may not directly or indirectly inquire into the criminal history of anyone who has either applied for admission or inquired about admissions. A college may not ask an applicant in an interview, a phone call, or any other context, about the applicant's criminal history. That includes directing the applicant to an application that asks the question.

After an applicant has accepted an offer of admission, the proposed ordinance imposes no restrictions on an institution's ability to inquire about and consider criminal history in making other decisions, such as housing or financial aid.

The proposed ordinance would require colleges to retain applications and related files for a period of three years. The Office of Labor Standards Enforcement is authorized to investigate possible violations and impose penalties. The City Attorney's Office may bring a civil action, and a person or association with a direct interest in compliance may join the litigation, or initiate his or her own action if the City declines to do so.

Background Information

The proposed ordinance is intended to improve access to post-secondary education among persons with a criminal record. It is driven by research showing that application questions about criminal history discourage people with criminal records—even old or minor crimes—from applying in the first place. The City has an interest in encouraging education among this population because the attainment of higher education is linked with a reduction in recidivism.

Several postsecondary educational institutions have voluntarily removed questions about criminal history from their admissions procedures, and The Common Application, Inc., has announced that it will soon allow its member institutions to omit criminal history questions from their applications.

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Print Form

Introduction Form

By a Member of the Board of Supervisors or Mayor

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO

2010 OCT 16 PM 4:45
Time stamp
or meeting date AK

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor [] inquiries"
- 5. City Attorney Request.
- 6. Call File No. [] from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No. []
- 9. Reactivate File No. []
- 10. Topic submitted for Mayoral Appearance before the BOS on []

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Youth Commission
- Ethics Commission
- Planning Commission
- Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.

Sponsor(s):

Cohen

Subject:

Police Code - Prohibiting Criminal History Inquiries in Private College Admissions

The text is listed:

Ordinance amending the Police Code to prohibit private post-secondary educational institutions from using an application form that contains questions about an applicant's criminal history, or asking an applicant about criminal history for the purpose of deciding whether to offer admission; requiring educational institutions to retain relevant records for three years authorizing the Office of Labor Standards Enforcement to investigate possible violations and impose penalties; and providing for a private right of action.

Signature of Sponsoring Supervisor: 

For Clerk's Use Only