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HOUSE BILL NO. 322

Offered January 12, 2022

Prefiled January 11, 2022

A BILL to amend and reenact §§ 19.2-392.5, 19.2-392.12, and 19.2-392.14, as they shall become effective, of the Code of Virginia, relating to criminal records; sealing of records.

Patron—Campbell, J.L.

Committee Referral Pending

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-392.5, 19.2-392.12, and 19.2-392.14, as they shall become effective, of the Code of Virginia are amended and reenacted as follows:

§ 19.2-392.5. (For contingent effective date see Acts 2021, Sp. Sess. I, cc. 524 and 542) Sealing defined; effect of sealing.

A. As used in this chapter, unless the context requires a different meaning, "sealing" means to (i) restricting dissemination of criminal history record information contained in the Central Criminal Records Exchange, including any records relating to an arrest, charge, or conviction, in accordance with the purposes set forth in § 19.2-392.13 and pursuant to the rules and regulations adopted pursuant to § 9.1-128 and the procedures adopted pursuant to § 9.1-134 and (ii) prohibiting dissemination of court records related to an arrest, charge, or conviction, unless such dissemination is authorized by a court order for one or more of the purposes set forth in § 19.2-392.13. "Sealing" may be required either by the issuance of a court order following the filing of a petition or automatically by operation of law under the processes set forth in this chapter.

B. The provisions of this chapter shall only apply to adults who were arrested, charged, or convicted of a criminal offense and to juveniles who were tried in circuit court pursuant to § 16.1-269.1.

C. Records relating to an arrest, charge, or conviction that have been sealed may be disseminated only for purposes set forth in § 19.2-392.13 and pursuant to rules and regulations adopted pursuant to § 9.1-128 and procedures adopted pursuant to § 9.1-134. The court, except as provided in subsection B of § 19.2-392.14, and any law-enforcement agency shall reply to any inquiry that no record exists with respect to an arrest, charge, or conviction that has been sealed, unless such information is permitted to be disclosed pursuant to § 19.2-392.13 and pursuant to rules and regulations adopted pursuant to § 9.1-128 and procedures adopted pursuant to § 9.1-134. A clerk of any court and the Executive Secretary of the Supreme Court shall be immune from any cause of action arising from the production of sealed court records, including electronic records, absent gross negligence or willful misconduct. This subsection shall not be construed to limit, withdraw, or overturn any defense or immunity already existing in statutory or common law or to affect any cause of action accruing prior to the effective date of this section.

D. Except as otherwise provided in this section, upon entry of an order for sealing, the person who was arrested, charged, or convicted of the offense that was ordered to be sealed may deny or not disclose to any state or local government agency or to any private employer in the Commonwealth that such an arrest, charge, or conviction occurred. Except as otherwise provided in this section, no person as to whom an order for sealing has been entered shall be held thereafter under any provision of law to be guilty of perjury or otherwise giving a false statement by reason of that person's denial or failure to disclose any information concerning an arrest, charge, or conviction that has been sealed.

E. A person who is the subject of the order of sealing entered pursuant to § 19.2-392.7, 19.2-392.8, 19.2-392.9, 19.2-392.11, or 19.2-392.12 may not deny or fail to disclose information to any employer or prospective employer about an offense that has been ordered to be sealed if:

1. The person is applying for full-time employment or part-time employment with, or to be a volunteer with, the State Police or a police department or sheriff's office that is a part of or administered by the Commonwealth or any political subdivision thereof;

2. This Code requires the employer to make such an inquiry;

3. Federal law requires the employer to make such an inquiry;

4. The position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any contract with, or statute or regulation of, the United States or any Executive Order of the President; or

5. The rules and regulations adopted pursuant to § 9.1-128 and procedures adopted pursuant to § 9.1-134 allow the employer to access such sealed records.

59 Failure to disclose such sealed arrest, charge, or conviction, if such failure to disclose was knowing
60 or willful, shall be a ground for prosecution of perjury as provided for in § 18.2-434.

61 F. An order to seal an arrest, charge, or conviction entered pursuant to § 19.2-392.7, 19.2-392.8,
62 19.2-392.9, 19.2-392.11, or 19.2-392.12 shall not relieve the person who was arrested, charged, or
63 convicted of any obligation to pay all fines, costs, forfeitures, penalties, or restitution in relation to the
64 offense that was ordered to be sealed.

65 G. Any arrest, charge, or conviction sealed pursuant to § 19.2-392.7, 19.2-392.8, 19.2-392.9,
66 19.2-392.11, or 19.2-392.12 may be admissible and considered in proceedings relating to the care and
67 custody of a child. A person as to whom an order for sealing has been entered may be required to
68 disclose a sealed arrest, charge, or conviction as part of such proceedings. Failure to disclose such sealed
69 arrest, charge, or conviction, if such failure to disclose was knowing or willful, shall be a ground for
70 prosecution of perjury as provided for in § 18.2-434.

71 H. Any arrest, charge, or conviction sealed pursuant to § 19.2-392.7, 19.2-392.8, 19.2-392.9,
72 19.2-392.11, or 19.2-392.12 shall not be (i) disclosed in any sentencing report; (ii) considered when
73 ascertaining the punishment of a defendant; or (iii) considered in any hearing on the issue of bail,
74 release, or detention of a defendant.

75 I. Any arrest, charge, or conviction sealed pursuant to § 19.2-392.7, 19.2-392.8, 19.2-392.9,
76 19.2-392.11, or 19.2-392.12 shall not constitute a barrier crime as defined in § 19.2-392.02, except as
77 otherwise required under federal law.

78 J. ~~A person shall be required to disclose any felony conviction sealed pursuant to § 19.2-392.12 for~~
79 ~~purposes of determining that person's eligibility to be empaneled as a member of a jury. Failure to~~
80 ~~disclose such conviction, if such failure to disclose was knowing or willful, shall be a ground for~~
81 ~~prosecution of perjury as provided for in § 18.2-434.~~

82 **§ 19.2-392.12. (For contingent effective date see Acts 2021, Sp. Sess. I, cc. 524 and 542) Sealing**
83 **of offenses resulting in a deferred and dismissed disposition or conviction by petition.**

84 A. Except for a conviction *or deferral and dismissal of a violation of § 18.2-57.2, 18.2-266, or*
85 *46.2-341.24* or deferral and dismissal of a violation of § 18.2-36.1, 18.2-36.2, 18.2-51.4, *or 18.2-51.5;*
86 ~~18.2-57.2, 18.2-266, or 46.2-341.24~~, a person who (i) has been convicted of a *Class 2, 3, or 4*
87 *misdemeanor*, or (ii) had a charge deferred and dismissed for a ~~(i)~~ (a) misdemeanor offense, ~~(ii)~~ (b)
88 Class 5 or 6 felony, or ~~(iii)~~ (c) violation of § 18.2-95 or any other felony offense in which the defendant
89 is deemed guilty of larceny and punished as provided in § 18.2-95 may file a petition setting forth the
90 relevant facts and requesting sealing of the criminal history record information and court records relating
91 to the charge or conviction, provided that such person has ~~(a)~~ (1) never been convicted of a Class 1 or 2
92 felony or any other felony punishable by imprisonment for life, ~~(b)~~ (2) not been convicted of a Class 3
93 or 4 felony within the past 20 years, or ~~(c)~~ (3) not been convicted of any other felony within the past 10
94 years of his petition.

95 B. A person shall not be required to pay any fees or costs for filing a petition pursuant to this
96 section if such person files a petition to proceed without the payment of fees and costs, and the court
97 with which such person files his petition finds such person to be indigent pursuant to § 19.2-159.

98 C. The petition with a copy of the warrant, summons, or indictment, if reasonably available, shall be
99 filed in the circuit court of the county or city in which the case was disposed of and shall contain,
100 except when not reasonably available, the date of arrest, the name of the arresting agency, and the date
101 of conviction. When this information is not reasonably available, the petition shall state the reason for
102 such unavailability. The petition shall further state the charge or conviction to be sealed; the date of
103 final disposition of the charge or conviction as set forth in the petition; the petitioner's date of birth, sex,
104 race, and social security number, if available; and the full name used by the petitioner at the time of
105 arrest or summons. A petitioner may only have two petitions granted pursuant to this section within his
106 lifetime.

107 D. The Commonwealth shall be made party to the proceeding. The petitioner shall provide a copy of
108 the petition by delivery or by first-class mail, postage prepaid, to the attorney for the Commonwealth of
109 the city or county in which the petition is filed. The attorney for the Commonwealth may file an
110 objection or answer to the petition or may give written notice to the court that he does not object to the
111 petition within 21 days after it is delivered to him or received in the mail.

112 E. Upon receipt of the petition, the circuit court shall order that the attorney for the Commonwealth
113 or a law-enforcement officer, as defined in § 9.1-101, provide the court with a sealed copy of the
114 criminal history record of the petitioner. Upon completion of the hearing, the court shall cause the
115 criminal history record to be destroyed unless, within 30 days of the date of the entry of the final order
116 in the matter, the petitioner or the attorney for the Commonwealth notes an appeal to the Supreme Court
117 of Virginia.

118 F. After receiving the criminal history record of the petitioner, the court may conduct a hearing on
119 the petition. The court shall enter an order requiring the sealing of the criminal history record
120 information and court records, including electronic records, relating to the charge or conviction, only if

the court finds that all criteria in subdivisions 1 through 4 are met, as follows:

1. During a period after the date of (i) dismissal of a deferred charge, (ii) conviction, or (iii) release from incarceration of the charge or conviction set forth in the petition, whichever date occurred later, the person has not been convicted of violating any law of the Commonwealth that requires a report to the Central Criminal Records Exchange under subsection A of § 19.2-390 or any other state, the District of Columbia, or the United States or any territory thereof, excluding traffic infractions under Title 46.2, for:

- a. Seven years for any misdemeanor offense; or
- b. Ten years for any felony offense;

2. If the records relating to the offense indicate that the occurrence leading to the deferral or conviction involved the use or dependence upon alcohol or any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, the petitioner has demonstrated his rehabilitation;

3. The petitioner has not previously obtained the sealing of two other deferrals or convictions arising out of different sentencing events; and

4. The continued existence and possible dissemination of information relating to the charge or conviction of the petitioner causes or may cause circumstances that constitute a manifest injustice to the petitioner.

G. If the attorney for the Commonwealth of the county or city in which the petition is filed (i) gives written notice to the court pursuant to subsection D that he does not object to the petition and (ii) stipulates in such written notice that the petitioner is eligible to have such offense sealed, and the continued existence and possible dissemination of information relating to the charge or conviction of the petitioner causes or may cause circumstances that constitute a manifest injustice to the petitioner, the court may enter an order of sealing without conducting a hearing.

H. Any party aggrieved by the decision of the court may appeal, as provided by law in civil cases.

I. Upon the entry of an order of sealing, the clerk of the court shall cause an electronic copy of such order to be forwarded to the Department of State Police. Such electronic order shall contain the petitioner's full name, date of birth, sex, race, and social security number, if available, as well as the petitioner's state identification number from the criminal history record, the court case number of the charge or conviction to be sealed, if available, and the document control number, if available. Upon receipt of such electronic order, the Department of State Police shall seal such records in accordance with § 19.2-392.13. When sealing such charge or conviction, the Department of State Police shall include a notation on the criminal history record that such offense was sealed pursuant to this section. The Department of State Police shall also electronically notify the Office of the Executive Secretary of the Supreme Court and any other agencies and individuals known to maintain or to have obtained such a record that such record has been ordered to be sealed and may only be disseminated in accordance with § 19.2-392.13 and pursuant to the rules and regulations adopted pursuant to § 9.1-128 and the procedures adopted pursuant to § 9.1-134.

J. Costs shall be as provided by § 17.1-275 but shall not be recoverable against the Commonwealth. Any costs collected pursuant to this section shall be deposited in the Sealing Fee Fund created pursuant to § 17.1-205.1.

K. Any order entered where (i) the court or parties failed to strictly comply with the procedures set forth in this section or (ii) the court enters an order for the sealing of records contrary to law shall be voidable upon motion and notice made within two years of the entry of such order.

L. If a petitioner qualifies to file a petition for sealing of records without the payment of fees and costs pursuant to subsection B and has requested court-appointed counsel, the court shall then appoint counsel to file the petition for sealing of records and represent the petitioner in the sealed records proceedings. Counsel appointed to represent such a petitioner shall be compensated for his services subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia, in a total amount not to exceed \$120, as determined by the court, and such compensation shall be paid from the Sealing Fee Fund as provided in § 17.1-205.1.

M. A petition filed under this section and any responsive pleadings filed by the attorney for the Commonwealth shall be maintained under seal by the clerk unless otherwise ordered by the court. Any order to seal issued pursuant to this section shall be sealed and may only be disseminated for the purposes set forth in § 19.2-392.13 and pursuant to rules and regulations adopted pursuant to § 9.1-128 and procedures adopted pursuant to § 9.1-134.

N. A conviction *or deferral and dismissal of a violation of § 18.2-57.2, 18.2-266, or 46.2-341.24* or deferral and dismissal of § 18.2-36.1, 18.2-36.2, 18.2-51.4, *or 18.2-51.5; 18.2-57.2, 18.2-266, or 46.2-341.24* is ineligible for the sealing of records under this section.

O. Nothing in this chapter shall prohibit the circuit court from entering an order to seal a charge or conviction under this section when such charge or conviction is eligible for sealing under some other

182 section of this chapter.

183 § 19.2-392.14. (For contingent effective date see Acts 2021, Sp. Sess. I, cc. 524 and 542)

184 Disclosure of sealed records; penalty.

185 A. It is unlawful for any person having or acquiring access to sealed criminal history record
186 information or a court record, including any records relating to an arrest, charge, or conviction, that was
187 ordered to be sealed pursuant to § 19.2-392.7, 19.2-392.8, 19.2-392.9, 19.2-392.11, or 19.2-392.12, to
188 maliciously and intentionally disclose such record or any information from such record to another
189 person; ~~except. Disclosure of such record or any information from such record to another person in~~
190 accordance with the purposes set forth in § 19.2-392.13 and pursuant to the rules and regulations
191 adopted pursuant to § 9.1-128 and the procedures adopted pursuant to § 9.1-134 *shall not be a violation*
192 *of this section.*

193 B. A clerk of court shall not be in violation of this section if such clerk informs a person requesting
194 access to a sealed court record that such court record has been sealed and can only be accessed pursuant
195 to a court order.

196 C. Any person who ~~willfully~~ violates this section is guilty of a Class 1 misdemeanor. ~~Any person~~
197 ~~who maliciously and intentionally violates this section is guilty of a Class 6 felony.~~