



The Florida Senate

Issue Brief 2009-314

October 2008

Committee on Criminal Justice

OVERVIEW OF SEALING AND EXPUNGING CRIMINAL HISTORY RECORDS

Statement of the Issue

During the 2008 Regular Session, members of the Senate Criminal Justice Committee became interested in sealing and expunging criminal history records. This issue arose as members considered ways to assist ex-offenders who have paid their debt to society, but frequently find it difficult to be gainfully employed after being charged with and/or having an adjudication of guilt or delinquency withheld for committing a crime (a person convicted of a crime is disqualified from receiving a sealing or expunction). To this end, members voted favorably to support CS/CS/SB 2152, 1st engrossed, a Senate Criminal Justice Committee bill, which ultimately died in the House. The proposed legislation attempted to change the sealing and expunging laws to address some of the issues raised by ex-offenders testifying before the Committee concerning barriers to employment. It also tried to provide clarity in this area of the law.

The purpose of this issue brief is to present an overview of sealing and expunging criminal history records in Florida so it can serve as a compilation of information relevant to legislative members as they continue to address this important issue.

Discussion

Provisions for Sealing and Expunging Criminal History Records

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. The courts have jurisdiction over their own judicial records containing criminal history information and over their procedures for maintaining and destroying those records. The Florida Department of Law Enforcement (FDLE) can administratively expunge non-judicial records of arrest that are made contrary to law or by mistake, such as an arrest warrant that was issued in the wrong name.¹

When a record is expunged, it is physically destroyed and no longer exists if it is in the custody of a criminal justice agency other than the FDLE. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. The FDLE, on the other hand, is required to retain expunged records. When a record is sealed it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, state court judges to assist them in case-related decision making responsibilities,² and other specified agencies for their respective licensing and employment purposes.³

Records that have been sealed or expunged are confidential and exempt from the public records law. It is a first-degree misdemeanor to divulge their existence, except to specified entities for licensing or employment purposes.⁴ However, it became clear to members during public testimony that it was easier to keep these records confidential before the advent

¹ s. 943.0581, F.S., ch. 2008-249, L.O.F. (HB 7113), recently amended this section to expand who may request an administrative expunction to include either the arresting agency or the agency where the arrest warrant is issued. This change should facilitate administrative expunctions.

² ch. 2008-249, L.O.F. (HB 7113).

³ These specified agencies include: law enforcement; the Florida Bar; the Department of Children and Family Services working with children, the developmentally disabled, or the elderly; the Department of Juvenile Justice; the Department of Education; any district school board; any local governmental entity licensing child care facilities; a Florida seaport; the Agency for Health Care Administration; and the Agency for Persons with Disabilities.

⁴ s. 943.0585(4)(c), F.S.

of the electronic age. Prior to that, records were not as widely disseminated. They were usually sought after in person rather than being searched for on the Internet. There was not as much opportunity for widespread dissemination like there is today with private companies providing background screening services to employers or anyone desiring background information on a person via computer.

Unlike records maintained by the FDLE, there is no requirement for these private companies to refresh their files. So, it is possible that an applicant for a job has gotten his or her record recently sealed but when the potential employer has the private background company do the check, the company sends the record in its system which does not reflect the recent sealing because when the company got the original record from the FDLE, the applicant had not yet gotten his or her record sealed. Once sealed, the FDLE reflects that in its system, and the record becomes off limits to the general public. However, as a practical matter, if the original record has already been disseminated, the sealed record's confidentiality is jeopardized.

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are applying for certain types of employment,⁵ petitioning the court for a record sealing or expunction, or are defendants in a criminal prosecution.⁶ However, if an applicant for employment does legally deny an arrest that has been sealed or expunged, as a practical matter, if the potential employer receives from a private background company an outdated criminal history record showing the arrest before it was sealed, the applicant is then put in an awkward position of explaining the arrest, and the discrepancy between his or her answer and the arrest record.

In 1992, the Legislature significantly amended the sealing and expunction statute to require a person seeking a sealing or expunction to first obtain a certificate of eligibility from the FDLE. If the person meets the statutory criteria based on the department's criminal history background check and receives a certificate, he or she can petition the court for a record sealing or expunction.⁷ After that, it is up to the court to decide whether the sealing or expunction is appropriate.

These changes were in response to a series of newspaper articles in the St. Petersburg Times reporting numerous statewide abuses of the law. For example, it was very difficult for the court to verify how many actual record sealings or expunctions a person had applied for and received prior to petitioning for another one, contrary to the statute. (Apparently, it was common practice for petitioners to pick and choose different judges in different courts for just that purpose.)⁸

The legislation repealed the sealing and expungement law that had been in existence since 1980,⁹ and instead, created two separate sealing and expunction statutes¹⁰ that basically reflect what exists today.¹¹ (The origin of the statute prior to 1980 can be found in the "Florida Comprehensive Drug Abuse Prevention and Control Act," which was created in 1973.¹²)

⁵ These types of employment include: law enforcement; the Florida Bar; working with children, the developmentally disabled, or the elderly through the Department of Children and Family Services; the Department of Juvenile Justice; the Department of Education; any district school board; any local governmental entity licensing child care facilities; a Florida seaport; the Agency for Health Care Administration; and the Agency for Persons with Disabilities (the last two agencies were added by ch. 2008-249, L.O.F.).

⁶ s. 943.0585(4)(a), F.S.

⁷ s. 943.0585(2), F.S.

⁸ "A Report on Sealing and Expungement of Criminal History Records Law," Senate Committee on Criminal Justice, July 1991.

⁹ s. 943.058, F.S.

¹⁰ s. 943.0585, F.S. (sealing law), and s. 943.059, F.S. (expunction law).

¹¹ ch. 92-73, L.O.F., 1992 Fla. Laws 692.

¹² ch. 73-331, L.O.F., 1973 Fla. Laws 783. (One of its provisions allowed first-time offenders who were convicted of third degree felony or first degree misdemeanor drug possession, to receive a record expungement, if they had been discharged and dismissed without an adjudication of guilt upon completion of probation.)

A criminal history record may be expunged by the court if the petitioner obtains a FDLE certificate of eligibility, remits a \$75 processing fee, and swears that he or she:

- has not previously been adjudicated guilty of any offense or adjudicated delinquent for certain offenses;
- has not been adjudicated guilty or delinquent for any of the charges he or she is currently trying to have sealed or expunged;
- has not obtained a prior sealing or expunction; and
- is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before the court.¹³

In addition, the record must be sealed for 10 years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court, regardless of the outcome of the trial.¹⁴ In other words, if the formal adjudication of guilt is withheld by the court, or the applicant is acquitted, the record must first be sealed. If the charges are dropped, the record can be immediately expunged. A conviction disqualifies a record from being expunged or sealed. The criteria only allow for one record sealing and expungement.

It was pointed out by law enforcement during public testimony that being found “not guilty” or acquitted at trial means the prosecutor failed to meet the burden of proving guilt beyond a reasonable doubt; it is not necessarily equivalent to a finding of innocence. The same was said to apply when charges are dismissed because there are reasons other than innocence that can explain why an arrest may not result in a conviction. Examples given during testimony include witnesses being uncooperative, evidence being suppressed, or charges being dropped to secure a plea of guilty against another defendant.

The same criteria set out above apply when seeking to seal a criminal history record under s. 943.059, F.S. Any person knowingly providing false information on the sworn statement commits a felony of the third degree.¹⁵

The Legislature also prohibits criminal history records relating to certain offenses in which a defendant (adult or juvenile) has been found guilty or has pled guilty or nolo contendere, regardless of whether adjudication was withheld, from being sealed or expunged.¹⁶

According to the FDLE, there are 5.4 million people who have state criminal history records; of those, 200,000 people have sealed or expunged records. Fifteen hundred application requests for record sealing and/or expungements are received monthly, and the volume of work to process them has increased more than 75 percent in the last five years.¹⁷

Provisions Specific to Expunging Juvenile Criminal History Records

Juveniles have a few more options than adults do when choosing to have a record expunged. If a juvenile successfully completes a prearrest, postarrest, or teen court diversion program after being arrested for a nonviolent misdemeanor, he or she is eligible to have the arrest expunged providing there is no other past criminal history. This expunction does not prohibit the juvenile from requesting a regular sealing or expunction under s. 943.0585 or s. 943.059, F.S., if he or she is otherwise eligible.¹⁸

¹³ s. 943.0585(1)(b), F.S.

¹⁴ s. 943.0585(2)(h), F.S.

¹⁵ s. 943.0585(1), F.S.

¹⁶ These offenses include the following: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child; lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.

¹⁷ “Seal and Expunge Considerations,” FDLE presentation to Senate Criminal Justice Committee, January 23, 2008.

¹⁸ s. 943.0582, F.S.

Juvenile delinquency criminal history records maintained by the FDLE are also expunged automatically when the juvenile turns 24 years of age (if he or she is not a serious or habitual juvenile offender or committed to a juvenile prison) or 26 years of age (if he or she was a serious or habitual juvenile offender or was in a juvenile prison), as long as the juvenile is not arrested as an adult or adjudicated as an adult for a forcible felony. This automatic expungement does not prohibit the juvenile from requesting a sealing or expungement under s. 943.0585 or s. 943.095, F.S., if he or she is otherwise eligible.¹⁹

Criminal history records are public records under Florida law and must be disclosed unless they have been sealed or expunged or have otherwise been exempted or made confidential.²⁰ Fingerprints are exempt and are not disclosed by the FDLE. Juvenile criminal history information that has been compiled and maintained by the FDLE since July 1, 1996, is also considered by the department to be public, including felony and misdemeanor criminal history.²¹ However, an ongoing lawsuit was filed by the Public Defender's Office in the Eleventh Judicial Circuit Court in Miami-Dade County, which challenges the department's position based upon the general confidentiality provisions for juvenile records in s. 985.04 (1), F.S.²²

Legislation Relating to Confidentiality of Certain Juvenile Criminal History Records

In July 2007, Governor Crist authorized the creation of the Juvenile Justice Blueprint Commission to develop recommendations to reform the juvenile justice system. Two of those recommendations dealt with juvenile records. Motivated by a concern that juveniles have meaningful employment and other opportunities, the Commission suggested that juvenile arrest records be made confidential when no charges have been filed and when the arrest records are for first-time nonviolent offenders who remain crime free.²³

In response to this suggestion, the House filed and heard legislation making the criminal history record of a minor confidential and exempt from the public records law, unless the minor has been arrested for, or found to have committed, regardless of adjudication,

- a felony offense; or
- a misdemeanor offense, after having been arrested for, or found to have committed, regardless of adjudication, misdemeanors on at least three prior occasions.

It also provided that the record may be disclosed to certain specified persons and entities authorized to receive sealed criminal history information, to each judge in the state courts system to assist in case-related decision making responsibilities, and to others currently authorized to receive certain specified juvenile information.²⁴

Legislation Relating to Sealing and Expunging Criminal History Records

The other piece of legislation that also did not pass but would have affected both adult and juvenile criminal history records maintained by the FDLE was the Senate Criminal Justice Committee bill, previously mentioned in the first section of this report.²⁵ It tried to make information about the actual process of sealing and expunging records more accessible to the general public, clarified how a potential applicant can answer a "have you ever been convicted"

¹⁹ s. 943.0515(1) and (2), F.S.

²⁰ s. 119.07(1), F.S., s. 24(a), Art. I, State Constitution.

²¹ s. 943.053(3)(a), F.S., ch. 96-388, L.O.F. (SB 156).

²² *G.G. v. FDLE*, Case No.: 07-00599 CA 21 (Miami-Dade Circuit Court); Section 985.04(1), F.S., provides that juvenile records are confidential, subject to specified exceptions, and limited disclosure to certain enumerated entities or upon court order. Subsection (2) generally allows for the disclosure of an arrest report for a juvenile arrested for a felony or an arrest report for a juvenile found by a court to have committed three or more misdemeanor offenses.

²³ "Getting Smart About Juvenile Justice in Florida," a report of the Blueprint Commission, Florida Department of Juvenile Justice, January 2008.

²⁴ HB 7089, 1st Engrossed (died in Senate messages); Compare Senate Criminal Justice Committee Amendment, creating a limited public records exemption for misdemeanor criminal history records of minors (bar code # 480094) to SB 832 (temporarily postponed in Criminal Justice Committee on 3-13-08).

²⁵ CS/CS/SB 2152, 1st Engrossed (died on House Calendar).

question on a job application relating to sealed or expunged records, as well as allowed a person to obtain a second criminal history record sealing, if such person remained crime-free for five years.²⁶

The bill balanced the desire of members to allow for a second chance while maintaining public safety by ensuring that law enforcement and the other statutorily enumerated entities who serve vulnerable populations would still have access to these sealed records. It also eliminated the current requirement that the subject of the record obtain a court order directing the FDLE to give the subject a copy of his or her expunged record (currently such expunged record is not available to the subject without a court order).

Another provision in the bill directed the Office of Program Policy Analysis and Government Accountability (OPPAGA), in cooperation with the FDLE, to study the accuracy, completeness, and consumer readability of criminal history records and report its findings to the Legislature by February 2009. The OPPAGA was also required to assess the feasibility of creating appropriate privacy safeguards to protect job or license applicants before the criminal history record is given to a potential employer and adverse action is taken against an applicant. The members heard public testimony in committee meetings of the need to improve the accuracy and completeness of criminal history records because some job applicants have been denied employment based on misinformation and inaccurate records. Although the legislation died in the House, because it is was an important issue with committee members, the OPPAGA intends to conduct this review and report its findings to the Legislature before the 2009 Legislative Session.

Recent Suggestions by the FDLE for Improving the Sealing and Expunction Statutes

In addition to the previously discussed proposed legislation for enhancing the sealing and expunction statutes, the FDLE offers the following suggestions for change:

- Make juvenile criminal history records maintained by the FDLE confidential and exempt, unless the juvenile has been arrested for a felony or a second or subsequent misdemeanor, in which case the record would become public. The record would, however, remain accessible to entities currently allowed to receive sealed criminal history records. (Projected to limit dissemination of 140,000 person's records.)²⁷
- Allow more juveniles to become eligible to receive a record expungement after successfully completing a juvenile prearrest, postarrest, or teen court diversion program.
- Eliminate notifications by the FDLE to all statutorily enumerated entities (except criminal justice agencies) that a record has been expunged, so that the public and other agencies (except criminal justice agencies) would not see a record nor an indication that a record once existed. (Projected to limit dissemination of 108,000 person's records.)
- Clarify that a juvenile record that is automatically expunged by the FDLE when the subject reaches 24 or 26 years of age would not disqualify the subject for a later court-ordered record sealing or expungement.
- Make a criminal history record belonging to a person who has been found not guilty by reason of insanity or because he or she is mentally incompetent to stand trial ineligible for a sealing or expungement.
- Allow disclosure of information about a sealed or expunged record to the subject's attorney.
- Simplify the expungement process by removing a requirement that an applicant obtain a certified statement from the prosecutor relating to his or her eligibility and instead, require the FDLE to notify the prosecutor when it issues a certificate of eligibility to expunge.

Accordingly, as legislators go forward with ways to improve the sealing and expungement process, they will have these suggestions to consider as well as the additional benefit of OPPAGA's timely review.

²⁶ *Id.*

²⁷ This suggestion differs from HB7089, 1st engrossed, in that the record would become public upon a second arrest, rather than a third arrest, for a misdemeanor offense.