

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SB 1612

INTRODUCER: Senator Detert

SUBJECT: Public Records/Criminal History Records

DATE: April 6, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kim	McVaney	GO	<b>Pre-meeting</b>
2.			FP	

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**I. Summary:**

SB 1612 is the public records exemption companion to CS/SB 488. CS/SB 488 makes substantial changes to Florida’s expunge and seal laws by creating a nonjudicial process for the expunction and sealing of criminal history records. CS/SB 488 retains the court-ordered expunction process, but limits its application to the expunction of a record related to a case in which a court issued a withhold of adjudication.

This bill is subject to review and repeal on October 2, 2020, unless saved from repeal by the Legislature.

Because this bill expands and creates a public records exemption, it will require a two-thirds vote of each house in order to pass.

**II. Present Situation:**

**Criminal History Record Sealing and Expunging**

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 FDLE can administratively expunge non-judicial records of arrest that are made contrary to law or by mistake.

When a record is expunged, it is physically destroyed and no longer exists if it is in the custody of a criminal justice agency<sup>1</sup> other than the FDLE. Criminal justice agencies are allowed to make

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<sup>1</sup> Section 943.045(11), F.S., defines a criminal justice agency as follows: a court; the FDLE; the DJJ; the protective investigations component of the Department of Children and Families (DCF), which investigates the crimes of abuse and neglect; or any other governmental agency or subunit thereof that performs the administration of criminal justice pursuant to a statute or rule of court and that allocates a substantial part of its annual budget to the administration of criminal justice.

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, criminal justice agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.<sup>2</sup>

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 licensure or employment,<sup>3</sup> petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.<sup>4</sup>

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.<sup>5</sup>

In 1992, the Legislature amended the sealing and expunction statute to require a person seeking a sealing or expunction to first obtain a certificate of eligibility from FDLE and then, if the person meets the statutory criteria based on the department's criminal history check and receives a certificate, he or she can petition the court for a record sealing or expunction.<sup>6</sup> It is then up to the court to decide whether the sealing or expunction is appropriate.

To receive a certificate of eligibility<sup>7</sup>, a person must:

- Submit to FDLE a written, certified statement from the appropriate state attorney or statewide prosecutor indicating that:
  - An indictment, information, or other charging document was not filed or issued in the case; or if filed, was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction;<sup>8</sup>
  - None of the charges related to the record the person wishes to expunge resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt;<sup>9</sup> and

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<sup>2</sup> Including the following: a criminal justice agency; the Florida Bar; working in a sensitive position involving direct contact with children, the developmentally disabled, or the elderly through the DCF, Division of Vocational Rehabilitation within the Department of Education (DOE), the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, or the Department of Juvenile Justice; or persons seeking to be employed or licensed by the DOE, any district school board, any university laboratory school, any charter school, any private or parochial school, or any local governmental entity licensing child care facilities; a Florida seaport; the Division of Insurance Agent and Agency Services within the Department of Financial Services; or the Bureau of License Issuance of the Division of Licensing within the Department of Agriculture and Consumer Services. Sections 943.0585(4) and 985.059(4), F.S.

<sup>3</sup> *Id.*

<sup>4</sup> Section 943.0585(4)(a), F.S.

<sup>5</sup> Section 943.0585(4)(c), F.S.

<sup>6</sup> Section 943.0585(2), F.S.

<sup>7</sup> A certificate of eligibility for expunction or sealing is valid for 12 months after the date stamped on the certificate. If the certificate expires then a person must reapply for a new certificate of eligibility. The new certificate of eligibility must be based on the status of the applicant and the law in effect at the time of the reapplication. Sections 943.0585(2) and 943.059(2), F.S.

<sup>8</sup> Only required for an expunction.

<sup>9</sup> *Id.*

- The criminal history record does not relate to a violation of specified listed offenses regardless of whether adjudication was withheld<sup>10</sup>;
- Pay a \$75 processing fee;
- Submit a certified copy of the disposition of the record desired to be sealed or expunged;
- Have not previously been adjudicated guilty of any offense or adjudicated delinquent for any felony or misdemeanor specified in s. 943.051(3)(b), F.S.;<sup>11</sup>
- Have never been adjudicated guilty or delinquent for any of the acts stemming from the arrest or alleged criminal activity of the record desired to be sealed or expunged;
- Have never had a prior sealing or expunction of a criminal history record (unless it is the required ten year sealing for the offense desired to be expunged); and
- No longer be under any court supervision related to the disposition of the record desired to be sealed or expunged.

In addition to the certificate, a petition to seal or expunge a criminal history record must also include the petitioner's sworn statement that he or she:

- Has not previously been adjudicated guilty of any offense or adjudicated delinquent for any felony or misdemeanor offense specified in s. 943.051(3)(b), F.S.;
- 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 (unless it is the required ten year sealing for the offense desired to be expunged); and
- Is eligible to the best of his or her knowledge and has no other pending expunction or sealing petitions before the court.<sup>12</sup>

The statute also requires that the record 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.<sup>13</sup> 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 for ten years. If the charges are dropped, the record can be immediately expunged.<sup>14</sup>

<sup>10</sup> These listed 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; voyeurism; 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 sex trafficking or prostitution, or sexually explicit conduct; offenses by public officers and employees; drug trafficking; and, other dangerous crimes such as arson, aggravated assault or battery, illegal use of explosives, child abuse or aggravated child abuse, elderly or disabled abuse, aggravated elderly or disabled abuse, aircraft piracy, sexual activity with a child, terrorism, manufacturing controlled substances, kidnapping, murder, manslaughter, robbery, home invasion robbery, carjacking, stalking, domestic violence, burglary and any violation specified as a predicate offense for sexual predator or sexual offender registration.

<sup>11</sup> These misdemeanors include: assault; battery; carrying a concealed weapon; unlawful use of destructive devices or bombs; negligent treatment of children; assault or battery on a law enforcement officer, firefighter, or other specified officers; open carrying of a weapon; exposure of sexual organs; unlawful possession of a firearm; petit theft; cruelty to animals; arson; and unlawful possession or discharge of a weapon or firearm at a school- sponsored event or on school property.

<sup>12</sup> Section 943.0585(1)(b), F.S.

<sup>13</sup> Section 943.0585(1)(b), F.S.

<sup>14</sup> Section 943.0585(2)(h), F.S.

<sup>14</sup> This also includes when an indictment, information, or other charging document is not filed or is dismissed by the state attorney, or dismissed by the court, because it was found that the person acted in lawful self-defense under the provisions related to justifiable use of force in ch. 776, F.S. Section 943.0585(5), F. S.

Any person knowingly providing false information on the sworn statement commits a felony of the third degree.<sup>15</sup>

To summarize, a person is not currently eligible to have a record expunged or sealed if the person was convicted for any of the charges to which the petition to expunge or seal pertains. Similarly, a person who has a previous unrelated conviction is ineligible to have a record expunged or sealed. In addition, a court may not seal or expunge a record that relates to any of the prohibited listed offenses in which the defendant was found guilty of or pled guilty or nolo contendere to such offense, or if the defendant, as a minor, was found to have committed, or pled guilty or pled nolo contendere to committing the offense as a delinquent act.<sup>16</sup>

### **Automatic Expunction of Criminal History Records of Minors**

Section 943.0515, F.S., requires FDLE to automatically expunge the criminal history records of specified juveniles at age 24 or 26. For juveniles who are classified as serious or habitual juvenile offenders, or that have been committed to a juvenile correctional facility or juvenile prison, the FDLE must retain their record until the age of 26, at which time it is automatically expunged.<sup>17</sup> For all other juveniles, FDLE must retain the record until the juvenile reaches the age of 24, at which time it is automatically expunged.<sup>18</sup>

A juvenile's record is prohibited from being automatically expunged if:

- A person 18 years of age or older is charged with or convicted of a forcible felony and the person's criminal history record as a minor has not yet been destroyed;
- At any time, a minor is adjudicated as an adult for a forcible felony; or
- The record relates to a minor who was adjudicated delinquent for a violation committed on or after July 1, 2007, as provided in s. 943.0435(1)(a)1.d., F.S.<sup>19,20</sup>

In these three instances, the person's record as a minor must be merged with and retained as part of their adult record.<sup>21</sup>

### **III. Effect of Proposed Changes:**

#### **Criminal History Record Sealing and Expunging As Provided in CS/SB 488**

CS/SB 488 creates a nonjudicial process for the expunction and sealing of criminal history records. CS/SB 488 retains the court-ordered expunction process, but limits its application to the expunction of a record related to a case when a court withholds adjudication.

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<sup>15</sup> Section 943.0585(1), F.S.

<sup>16</sup> This restriction applies regardless to whether adjudication was withheld on any of the listed offenses. Sections 943.0585(1) and 943.059(1), F.S.

<sup>17</sup> Section 943.0515(1)(a), F.S.

<sup>18</sup> Section 943.0515(1)(b), F.S.

<sup>19</sup> Sections 943.0515(2) and (3), F.S.

<sup>20</sup> Section 943.0435, F.S., defines a "sexual offender" and proscribes when a sexual offender is required to register with FDLE.

<sup>21</sup> *Id.*

CS/SB 488 permits a person to obtain:

- An unlimited number of “nonjudicial expunctions” for records that resulted in a no-information, a dismissal, a dismissal based on the lawful self-defense exception, or a not guilty verdict, regardless of whether the person has previous misdemeanor or felony convictions;
- One court-ordered expunction of a record that resulted in a withhold of adjudication, regardless of whether the person has a previous misdemeanor conviction; and either
- One “nonjudicial sealing” of a record that resulted in a withhold of adjudication, regardless of whether the person has a previous misdemeanor conviction, or
- One “nonjudicial sealing” of a record that resulted in a conviction for a specified “nonviolent misdemeanor,” regardless of whether the person has a previous misdemeanor conviction.

### *Nonjudicial Expunction*

CS/SB 488 creates s. 943.0584, F.S., requiring specified records to be expunged without petitioning the court. CS/SB 488 requires FDLE to approve the nonjudicial expunction of an unlimited number of criminal history records of a minor or adult relating to cases in which a:

- No-Information was issued;
- Dismissal was granted by the state attorney or statewide prosecutor, or by a court of competent jurisdiction;
- Dismissal was granted by the state attorney or court based on the lawful self-defense exception; or
- Not-guilty verdict was rendered subsequent to a trial or adjudicatory hearing.

It should be noted that a person may not obtain a nonjudicial expunction unless all charges stemming from the arrest or alleged criminal activity to which the application for expunction pertains were not filed or issued, dismissed or discharged, or resulted in an acquittal.

Additionally, a record may not be approved for nonjudicial expunction if the:

- Case was dismissed pursuant to ss. 916.145 or 985.19, F.S., as a result of the person never being restored to competency; or
- Verdict at trial was not-guilty by reason of insanity.

CS/SB 488 removes the current requirement that a record related to a not guilty verdict be sealed for ten years prior to such record being eligible for expunction.

CS/SB 488 does not alter current law as it relates to obtaining an expunction when the dismissal was based on the lawful self-defense exception, but moves this from a court-ordered process to the newly-created nonjudicial expunction process.

Upon receiving a complete application, FDLE must approve the nonjudicial expunction of all records pertaining to the applicant that are eligible for the nonjudicial expunction.

Upon approval of a nonjudicial expunction, FDLE must serve a certified copy of the form approving the nonjudicial expunction to the state attorney or statewide prosecutor, the arresting agency, the clerk of the court, and the Federal Bureau of Investigation (FBI). The arresting agency must forward the approval form to any other agency that it disseminated the criminal

history record information to which the form pertains. Lastly, the clerk of the court must forward a copy of the form to any other agency which the records of the court reflect has received the criminal history record from the court.

CS/SB 488 provides that records that are approved for nonjudicial expunction pursuant to s. 943.0584, F.S., must have the same effect and be disclosed in the same manner as current law requires for records expunged pursuant to a court order under s. 943.0585, F.S. (i.e., that the record must be destroyed by all parties except FDLE, and a person may not lawfully deny the existence of the record to specified parties).

CS/SB 488 provides FDLE with authority to adopt a rule pursuant to ch. 120, F.S., for the nonjudicial expunction of any criminal history record of a minor or an adult described in this section.

### ***Court-Ordered Expunction***

Codified in s. 985.0585, F.S., CS/SB 488 leaves the general process of court-ordered expunction intact. However, CS/SB 488 limits its application to the expunction of a record related to a case in which a court issued a withhold of adjudication. A person must still obtain a certificate of eligibility from FDLE and petition the court to expunge the record. CS/SB 488 does not alter current law as it relates to the processing of an order to expunge, how the record is treated once an order to expunge is granted, or the persons that have access to a record that has been expunged.

CS/SB 488 amends s. 943.0585, F.S., to permit one record related to a withhold of adjudication to be expunged. A person no longer is required to first seal the withhold of adjudication for ten years to be eligible for an expunction. However, a court is prohibited from expunging a record pertaining to a withhold of adjudication if:

- The person seeking the expunction has, at any time prior to the date of filing the certificate of eligibility, been adjudicated guilty for a felony offense or adjudicated delinquent for an offense which, if committed by an adult, would be a felony; or
- The record relates to a prohibited listed offense where the person was convicted of, adjudicated delinquent of, or pled nolo contendere to the offense, regardless of whether adjudication was withheld.

### ***Nonjudicial Sealing***

CS/SB 488 amends s. 943.059, F.S., requiring specified records to be sealed without petitioning the court. A person may apply to FDLE for the nonjudicial sealing of one criminal history record of a minor or adult relating to cases in which a person:

- Received a withhold of adjudication from the court; or
- Was convicted of a “nonviolent misdemeanor,” as defined by the CS/SB 488.

CS/SB 488 authorizes FDLE to approve the nonjudicial sealing under s. 943.059, F.S., of a record related to one arrest or one incident of alleged criminal activity, unless the state attorney or statewide prosecutor provides supporting documentation that additional arrests are directly related to the arrest sought to be sealed. If FDLE approves the sealing of such additional arrests, the approval form must express the intent to do so.

Upon approval of a nonjudicial sealing, FDLE must forward a certified copy of the form approving the nonjudicial sealing to the state attorney or statewide prosecutor, the arresting agency, the clerk of the court, and the FBI. The arresting agency must forward the approval form to any other agency that it disseminated the criminal history record information to which the form pertains. Lastly, the clerk of the court must forward a copy of the form to any other agency which the records of the court reflect has received the criminal history record from the court.

CS/SB 488 does not alter current law as it relates to how the record is treated once an order to seal is granted, or the persons that have access to the record that has been sealed (i.e. that the record continues to be maintained by FDLE and other criminal justice agencies, specified persons can access the sealed record, and the list of entities to which the person may not lawfully deny the existence of the sealed record).

### **Automatic Expunction of Criminal History Records of Minors**

CS/SB 488 amends s. 943.0515, F.S., to require all records maintained by FDLE related to minors that are not classified as serious or habitual juvenile offenders to be automatically expunged when the minor reaches the age of 21, so long as one of the following exceptions does not apply:

- A person 18 years of age or older is charged with or convicted of a forcible felony and the person's criminal history record as a minor has not yet been destroyed;
- At any time, a minor is adjudicated as an adult for a forcible felony; or
- The record relates to a minor who was adjudicated delinquent for a violation committed on or after July 1, 2007, as provided in s. 943.0435(1)(a)1.d., F.S.<sup>22</sup>

The automatic expunction of records related to juveniles who are classified as serious or habitual juvenile offenders remains at 26 years of age.

### **SB 1612 Public Records Exemptions for and Technical Amendments to CS/SB 488**

SB 1612 provides public records exemptions for CS/SB 488. SB 1612 also makes some technical changes related to the placement of language in CS/SB 488.

#### ***Public Records Exemption for Non-Judicial Expunctions:***

SB 1612 provides that the criminal history records of an adult or minor who is eligible for nonjudicial expunction under CS/SB 488 are made confidential and exempt from public disclosure. There are no exceptions to this exemption so a court order will be necessary to release records related to nonjudicial expunction.

#### ***Public Records Exemptions for Court Ordered Expunctions:***

SB 1612 also makes confidential and exempt court expunctions that have been court ordered as provided for in CS/SB 488. A criminal justice agency is permitted to retain a notation that it has complied with the court order to expunge. Information relating to the existence of an expunged criminal history is also confidential and exempt; however, the existence of such records may be

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disclosed to certain agencies for licensing purposes, those seeking expunction for human trafficking violations or sealing of criminal history records, those seeking to be a guardian, and to criminal justice agencies. Unlawful release of the existence of an expunged criminal history is a first degree misdemeanor.

***Public Records Exemption for Non-judicial Sealing of Criminal History Records:***

SB 1612 makes confidential and exempt the criminal history record of adults or minors who are eligible to have their criminal records sealed under SB/CS 488. Those records can be released to the following people: the subject of the record, a criminal justice agency and, a judge. The records may also be released for certain licensing purposes. The information relating to the existence of a sealed criminal history is also confidential and exempt. Unlawful disclosure of the existence of a sealed criminal history is a first degree misdemeanor.

All of these exemptions are subject to review according to the OGSR and will repeal on October 2, 2020, unless saved from repeal through reenactment.

SB 1612 takes effect on the same date as SB 488 or similar legislation takes effect. As filed, SB 488 takes effect on October 1, 2015.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

**Vote Requirement**

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates and expands public record exemptions for sealed and expunged criminal records; thus, it requires a two-thirds vote for final passage.

**Public Necessity Statement**

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption for expunged criminal record and it includes a public necessity statement. The public necessity statement provides that an adult whose prosecution has been abandoned, were found not guilty after a jury trial or who have completed any sanctions find it difficult to find employment. The presence of the criminal history record creates unnecessary barriers and the Legislature finds that it is in the best interest of the public that a person become a contributing member of society.

**Breadth of Exemption**

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill makes confidential and exempt limited types of criminal records. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

More persons will be eligible to have their criminal history records sealed or expunged under the bill, resulting in a potentially positive economic benefit to them as they look for employment.

**C. Government Sector Impact:**

FDLE will have to expend resources to train staff on when and to whom records may be released for each of these new exemptions.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends sections 943.0585 and 943.059 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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