

To: The Virginia Crime Commission

From: Chip Dicks, Judy Worthington and Patrice Lewis
On behalf of the Virginia Court Clerks Association

Date: November 15, 2021

Re: HB 2113 and SB 1339
Sealing and Expungement Legislation

Background. Ladies and Gentlemen, on behalf of the Virginia Court Clerks Association (the “VCCA”), which represents the elected Circuit Court Clerks as local constitutional officers in the Commonwealth of the Virginia, we make this presentation to the Honorable Members of the Virginia Crime Commission. The VCCA was expressly referenced in HB 2113 and SB 1339 (the “Sealing Legislation”) in Enactment No. 12 to provide a report to the Crime Commission to help determine the necessary staffing and technology costs to implement the Sealing Legislation.

The VCCA Work. The VCCA formed a special subcommittee which has met more than 8 times during 2021, with numerous draft documents being prepared between meetings in order to take a deep dive on the real-world steps necessary to implement the Sealing Legislation. While the VCCA respects the policy objectives for criminal justice reform, the Sealing Legislation has impacts beyond electronic sealing that pose significant obstacles for the Circuit Court Clerks who maintain official records, some in electronic format and some in paper format.

The VCCA Supports Delay of Implementation of the Sealing Legislation and a Study by the Crime Commission with Stakeholder Participation. HB Bill 2312 and SB 1406 (the “Marijuana Legislation”) contain some conflicts with provisions of the Sealing Legislation. The Marijuana Legislation, pursuant to its enactment provisions, is back before the 2022 General Assembly for further consideration. The VCCA recommends a study by the Crime Commission of what amendments and funding may be appropriate to the Sealing Legislation as part of its 2022 Work Plan. The Sealing Legislation contains delayed effective dates for many of its provisions so a study by the Crime Commission with stakeholder input would be consistent with the legislative intent of the Sealing Legislation.

The VCCA Projected Fiscal Impacts of Existing Sealing Legislation. As per the enactment provisions of the Sealing Legislation, the VCCA was directed to provide a projected fiscal impact to implement the Sealing Legislation as enacted. Attached, as **Exhibit A**, is the VCCA projected fiscal impact. The VCCA also considered a series of amendments to the existing provisions of the Sealing Legislation to reduce the projected fiscal impact which we can discuss in detail during a study by the Crime Commission of the Sealing Legislation in 2022. Those proposed amendments would likely change depending upon the final policy provisions contained in the Marijuana Legislation and the Sealing Legislation.

To give a broad overview of that fiscal impact statement, the Circuit Court Clerks maintain a broad range of criminal and civil records, in accordance with statutory mandates set out in Title

17.1 of the Code of Virginia. In fact, each Circuit Court Clerk has more than 850 statutory duties and the status of criminal convictions extends to many different divisions within Circuit Court Clerks' Offices.

Pursuant to Section 17.1-208 of the Code of Virginia, all records of the Circuit Court Clerk are public records, available for public inspection and production to a requestor in a document production process similar to that applicable to public records subject to the Freedom of Information Act. There is a policy balance to be struck by the General Assembly between the public's right to access public records and the privacy rights of citizens whose criminal records are being sealed or expunged by the Sealing Legislation.

For example, real estate records contain every judgment docketed by a Circuit Court Clerk for criminal fines, costs and restitution pursuant to Section 8.01-446 of the Code of Virginia. Every judgment lien docket in the Circuit Court Clerks' Offices where such matters are recorded is required to be open for public inspection and no redactions are permitted, even if the judgment against a criminal defendant has been satisfied and the case sealed. Sealing criminal judgments for unpaid fines, costs and restitution prohibits complete title searches which are necessary for real estate closings. If criminal judgment lien entries are visible and back-up case documents are inaccessible due to sealing, title searches would become incomplete. Retail and non-retail creditors, title insurance companies and other entities rely on information contained in the judgment lien docket for credit history, including outstanding judgments. These entities also routinely rely on back-up case records to ensure accuracy and thoroughness of their findings. Prohibiting access to this information will create disorder in that marketplace.

Criminal court orders are housed in the public Record Room within the Circuit Court Clerks' Offices. Such orders include both felony and misdemeanor charges. In order to prohibit access to any sealed criminal records, public access to all criminal records within the Record Room would likely need to be prohibited and the records may well need to be moved off-site due to existing storage limitations or moved elsewhere within their Offices. The costs associated with expansion of current storage and filing systems, off-site storage and staff to manage off-site records storage and retrieval will be significant.

Redaction of conviction information on original court orders is not lawful. Such orders may contain both felony and misdemeanor conviction/sentencing information for a single defendant. Because court orders are traditionally prepared in paper form for judicial signature, then scanned and microfilmed for archival purposes, Circuit Court Clerks would be required to make a copy of every court order containing a conviction to be sealed, and then redact the relevant misdemeanor conviction. Given the number of older manual, non-automated records that would need to be located/researched, touched by a human being and reviewed for sealing/redaction is daunting. The labor time and costs associated with this effort will be significant and that would require full funding by the General Assembly in order to implement the Sealing Legislation. Because the Code of Virginia requires all court orders to be treated as permanent records and therefore scanned and/microfilmed, they are also archived in both Circuit Court Clerks' Offices and at the Library of Virginia. The costs for redaction of the identified criminal offenses from the archived records will be substantial and such costs have not yet been determined.

Professional licensing boards and other governmental agencies have differing requirements from state to state as well as within the Commonwealth. This translates to competing requirements for details of criminal history. Such agencies and boards may require criminal history information that has been sealed in Virginia, prohibiting access unless there is an express legislative exemption in the amended Sealing Legislation to permit such access.

In terms of projecting a potential fiscal impact, the VCCA calculated the time necessary to remove **one criminal record from all the records held by a Circuit Court Clerk to be approximately 4 hours, per criminal conviction**. In each Circuit Court Clerk's Office, there are numerous data fields within both electronic records and paper files yet to be automated. In one Circuit Court Clerk's Office, the private vendor identified 64 separate data fields in the automated record wherein case information would need to be redacted to remove references to just one criminal case. Attached, as **Exhibit B**, is a listing of those **64 different data fields** that span criminal and civil records. Where the records of the Circuit Court Clerk are not electronically searchable, the Clerk will need to conduct a manual search of each of these 64 different original paper records in paper files. Since the Code of Virginia does not authorize that the original record cannot be changed, when a criminal conviction needs to be sealed, the Circuit Court Clerk will be required to prevent public access to the original record in one paper file or electronic database, and to create another separate paper file or electronic database to which the public has access. Again, under § 17.1-208 of the Code of Virginia, all records of the circuit court clerk are public records.

The VCCA Is Committed to Working with the Virginia Crime Commission. The VCCA believes that a phased-in approach would enable implementation of the policy objectives of the existing Sealing Legislation while at the same time limiting the upfront fiscal impacts. The VCCA would recommend the following:

- Focus on the Marijuana Legislation first and reconcile the sealing/expungement provisions with the Sealing Legislation.
- Have the Crime Commission convene a stakeholder group and conduct a study of the Sealing Legislation to determine what amendments may be appropriate to the Sealing Legislation and recommend an appropriate level of funding to Circuit Court Clerks to implement that amended Sealing Legislation.
- Note that limiting sealing to Marijuana and a smaller number of misdemeanor offenses in the first bucket of criminal offenses to be sealed pursuant to the amended Sealing Legislation would substantially mitigate the fiscal impact.
- Use a phased-in approach in the amended Sealing Legislation applying sealing to day-forward records that are in a searchable electronic format.
- That phased-in approach would also apply to past records that are in a searchable electronic format. For those Circuit Court Clerks who have back scanned past records in a searchable electronic format, the sealing provisions of the amended Sealing Legislation would apply, back to the point to which the records are in a searchable electronic format.

- For Circuit Court Clerks that have not received the funding to convert records in a searchable electronic format, the amended Sealing Legislation would need to provide funding in the Appropriations Act to back scan records to a certain date, to be set out in the draft legislation. When VCCA worked with the General Assembly to automate land records, that legislation required the Circuit Court Clerks to automate such records back at least 60 years. VCCA believes there should be a date designated in the amended Sealing Legislation so that records older than that date would not be subject to the sealing provisions in the amended Sealing Legislation.
- For all paper records, maintain the current expungement process until such time the records are back scanned into a searchable electronic format.
- Fully fund the personnel and technology costs to the Circuit Court Clerks through the Compensation Board to fully implement the amended Sealing Legislation, or if not amended, the current law. Funding to OES and the State Police, while important for their respective agencies, does not address the personnel and technology costs of the Circuit Court Clerks. The Appropriations Act funds OES through the Judicial Branch, whereas Circuit Court Clerks receive their funding separately through the Appropriations Act, administered by the Compensation Board. So, for example, whenever deputy court clerks that are employees of OES get a pay raise in the Judicial Branch, that pay raise does not apply to deputy court clerks of Circuit Court Clerks, unless there is a separately funded appropriation through the Secretary of Administration, administered through the Compensation Board.
- As an observation, with the limited funding by the General Assembly, it took 12 years to automate the land records of the Circuit Court Clerks in the Commonwealth. Funding of the Legislation (and the scope of criminal convictions included in the amended Sealing Legislation) will directly affect the scope and timing of implementation of the amended Sealing Legislation.
- As an option, pardoning defendants may result in a more uniform and equitable method to achieve the policy objectives of the amended Sealing Legislation and save tens of millions of dollars in the process.

Respectfully submitted,

The Virginia Court Clerks Association
November 15, 2021

**EXHIBIT A
VCCA PROJECTED FISCAL IMPACT
EXISTING SEALING LEGISLATION
ATTACHED**

One FTE can complete approximately 480 records per year.

| | |
|-----------------------------|-----|
| Hours Per Record | 4 |
| Records Per Day | 2 |
| Records Per Week | 10 |
| Records Per Year (48 Weeks) | 480 |

Depending on the number of records and the time frame in which the records must be sealed, the cost may vary.

| Records | Records Per Year | Records Per FTE Per Year | FTEs Needed | Salary | Annual | Years | FTE Cost (Excludes Benefits) |
|---------|------------------|--------------------------|-------------|-----------|------------------|-------|------------------------------|
| 125,000 | 125,000 | 480 | 260 | \$ 32,000 | \$ 8,333,333.33 | 1 | \$ 8,333,333.33 |
| 150,000 | 150,000 | 480 | 313 | \$ 32,000 | \$ 10,000,000.00 | 1 | \$ 10,000,000.00 |
| 200,000 | 200,000 | 480 | 417 | \$ 32,000 | \$ 13,333,333.33 | 1 | \$ 13,333,333.33 |
| 250,000 | 250,000 | 480 | 521 | \$ 32,000 | \$ 16,666,666.67 | 1 | \$ 16,666,666.67 |
| 500,000 | 500,000 | 480 | 1042 | \$ 32,000 | \$ 33,333,333.33 | 1 | \$ 33,333,333.33 |

| Records | Records Per Year | Records Per FTE Per Year | FTEs Needed | Salary | Annual | Years | FTE Cost (Excludes Benefits) |
|---------|------------------|--------------------------|-------------|-----------|------------------|-------|------------------------------|
| 125,000 | 62,500 | 480 | 130 | \$ 32,000 | \$ 4,166,666.67 | 2 | \$ 8,333,333.33 |
| 150,000 | 75,000 | 480 | 156 | \$ 32,000 | \$ 5,000,000.00 | 2 | \$ 10,000,000.00 |
| 200,000 | 100,000 | 480 | 208 | \$ 32,000 | \$ 6,666,666.67 | 2 | \$ 13,333,333.33 |
| 250,000 | 125,000 | 480 | 260 | \$ 32,000 | \$ 8,333,333.33 | 2 | \$ 16,666,666.67 |
| 500,000 | 250,000 | 480 | 521 | \$ 32,000 | \$ 16,666,666.67 | 2 | \$ 33,333,333.33 |

| Records | Records Per Year | Records Per FTE Per Year | FTEs Needed | Salary | Annual | Years | FTE Cost (Excludes Benefits) |
|---------|------------------|--------------------------|-------------|-----------|------------------|-------|------------------------------|
| 125,000 | 41,667 | 480 | 87 | \$ 32,000 | \$ 2,777,777.78 | 3 | \$ 8,333,333.33 |
| 150,000 | 50,000 | 480 | 104 | \$ 32,000 | \$ 3,333,333.33 | 3 | \$ 10,000,000.00 |
| 200,000 | 66,667 | 480 | 139 | \$ 32,000 | \$ 4,444,444.44 | 3 | \$ 13,333,333.33 |
| 250,000 | 83,333 | 480 | 174 | \$ 32,000 | \$ 5,555,555.56 | 3 | \$ 16,666,666.67 |
| 500,000 | 166,667 | 480 | 347 | \$ 32,000 | \$ 11,111,111.11 | 3 | \$ 33,333,333.33 |

EXHIBIT B
64 DIFFERENT DATA FIELDS
FOR REDACTION OF ONE CRIMINAL RECORD

1. Warrant of arrest
2. Indictment
3. Summons
4. Checklist of Bail
5. Commitment Order
6. Transportation Orders
7. Form DC-40 (List of allowance)
8. Request for appointment of Counsel
9. SRP progress reports
10. Certificate of Analysis
11. Plea Forms
12. Court Clerk Notes for each hearing
13. Probation Referrals
14. Jail Cards for each hearing
15. Sentencing guidelines
16. Pre-Sentence Investigation Report
17. Probation Violation Reports (there may be multiple in the file)
18. Rule to Show Causes
19. Bench Warrants for Probation Violation
20. Bench Warrants for Failure to Appear
21. Bench Warrant for Violations of Conditions of Release
22. DNA Forms
23. Continuances orders (there may be multiple in the file)
24. Amended Orders
25. Sentencing Orders
26. Conviction Orders (plea orders)
27. Bond Motion Orders
28. Arraignment Orders
29. Costs Checklists
30. SRP Forms
31. PSP Forms
32. Appointing Counsel Order
33. Bench Trial Order
34. Jury Trials Orders (may be multiple for each day of the jury trial)
35. Order for Motion to Reconsider
36. Order to pay Attorney fees
37. Order for Termination of Probation

38. Order for refund of cash bond
39. Revocation Orders
40. Status hearing orders
41. Jury Verdict forms (may be multiple)
42. Mental Health evaluations
43. Letters from Probation
44. Trial in absence orders
45. Waiver of Indictment Order
46. Term day orders
47. CCRE page
48. Mistrial Orders
49. ROL orders
50. Suppression Motion orders
51. Bench Warrant to Replace PB-15
52. Recognizance Forms
53. Notice/Order Bond forfeiture
54. Youthful Offender Orders
55. Competency/Sanity/NGRI orders
56. Plea rejected order.
57. Sentencing Memorandums
58. Petition in Juvenile files
59. Nolle Prossed Orders
60. Withhold finding of guilt/deferral orders.
61. Cover sheets
62. Bond Motion request from Attorney
63. Disposition Notice of lower Court
64. Waiver of Preliminary hearing