

VIRGINIA STATE CRIME COMMISSION



Update: Expungement and Sealing of Criminal Records

2022 ANNUAL REPORT

UPDATE: EXPUNGEMENT AND SEALING OF CRIMINAL RECORDS

SUMMARY OF 2022 STUDY ACTIVITIES

In 2020, the Executive Committee of the Crime Commission directed staff to review expungement in Virginia and criminal record relief in other states, with a focus on the automatic sealing of criminal charges and convictions.¹ As a result of this study, legislation was enacted during the 2021 Special Session I of the General Assembly to create an *automatic* process to seal specific convictions, specific deferred dismissals,² and all non-convictions, as well as a *petition-based* process to seal a wide variety of convictions and deferred dismissals.³ Separate legislation was also enacted during 2021 Special Session I that legalized the recreational possession of marijuana and created automatic and petition-based expungement processes for certain marijuana offenses.⁴ In 2021, staff concluded that the expungement, sealing, and marijuana expungement statutes in the Virginia Code contained significant variations, both technical and substantive, that legislators may want to reconcile in order to ensure that the framework is consistent, individuals have access to the processes, and post-criminal record relief protections are uniform.⁵

During 2022, the Crime Commission formed a subcommittee for members to provide guidance on drafting legislation to reconcile multiple outstanding issues related to expungement, sealing, and marijuana expungement. Based on this guidance, staff consulted with Office of the Executive Secretary of the Supreme Court of Virginia (OES), the Virginia State Police (VSP), and the Virginia Court Clerks Association (VCCA) and drafted legislation to improve the technical components of expungement, sealing, and marijuana expungement without reducing or expanding the availability of these processes. The resulting legislation (SB 1402/HB 2400) was unanimously endorsed by the Crime Commission, introduced during the 2023 Regular Session of the General Assembly, passed both chambers unanimously, and signed into law by the Governor.⁶ Despite this new legislation, several policy matters still remain with the expungement and sealing processes that could be addressed.

PROGRESS ON THE IMPLEMENTATION OF THE NEW SEALING PROCESSES

The 2021 sealing legislation directs OES and VSP to submit an annual report to the Crime Commission regarding their progress in implementing the automated systems needed to exchange information for the sealing of criminal records.⁷ Each of these agencies provided a report and presented on their progress at the December 2022 Crime Commission meeting.

OES provided an overview of the Department of Judicial Information Technology's (DJIT) project for implementing a system which can handle the automated exchange of information. Although OES and DJIT are still determining the project's scope and complexity, the project is on schedule for completion by the statutory deadline of July 1, 2025. OES contends that any substantive changes to the sealing legislation will require additional funding for implementing a new system and may potentially delay the project's completion.⁸

VSP reported that it has made significant progress towards developing and implementing a new system, the Criminal and Rap Back Information System (CRIS). VSP anticipates full implementation of the CRIS by December 31, 2024.⁹

The 2021 sealing legislation also directs VCCA to submit an annual report to the Crime Commission regarding the necessary staffing and technology costs for implementing the provisions of the sealing legislation.¹⁰ VCCA also presented at the December 2022 meeting and stated that while circuit court clerks will need approximately \$33 million for criminal record sealing, such funding has not yet been authorized by the General Assembly.¹¹

2023 CRIME COMMISSION LEGISLATION

The Crime Commission met on January 10, 2023, to finalize its legislative package and unanimously endorsed draft legislation to amend the expungement and sealing statutes in order to better facilitate the implementation and programming of the new sealing processes.

Two identical bills were introduced during the 2023 Regular Session of the General Assembly – HB 2400 (Delegate Charniele L. Herring)¹² and SB 1402 (Senator Scott A. Surovell).¹³ The bills passed both chambers unanimously and were signed into law by the Governor. The bills make the following changes to Virginia's expungement, sealing, and marijuana expungement laws:¹⁴

- Repeals the automatic and petition-based marijuana expungement statutes¹⁵ and moves the same eligible marijuana offenses into the automatic and petition-based sealing statutes in order to clarify that these marijuana offenses will be sealed and not expunged;¹⁶
- Repeals statutes related to the sealing of marijuana offenses solely in the Virginia Central Criminal Records Exchange (CCRE)¹⁷ and the automatic sealing of mistaken or misuse of identity¹⁸ because these provisions are duplicative of existing law and may lead to confusion regarding what is actually sealed;
- Removes the offense of underage possession of alcohol¹⁹ from the automatic sealing process and places it into the petition-based sealing process because this offense is no longer included in the CCRE and therefore cannot be automatically sealed;²⁰
- Requires the use of an electronic, name-based criminal history record search in lieu of the currently used fingerprint-based search when an expungement petition or sealing petition is filed;²¹
- Requires courts to send an “electronic notification” of a sealing order to VSP instead of an “electronic order,” and directs courts to maintain a paper copy of the order under seal;²²
- Permits the courts and Commonwealth’s Attorneys to access sealed records for purposes of determining or challenging whether an offense was properly sealed;²³
- Clarifies that a petition for sealing can only include offenses that stem from the same occurrence so that multiple unrelated offenses cannot be sealed under the same petition;²⁴
- Allows a person to access their own expunged court and police records;²⁵
- Requires pleadings in expungement proceedings to be sealed in the same manner as pleadings in sealing proceedings;²⁶ and,
- Ensures that the Crime Commission and the Joint Legislative Audit and Review Commission (JLARC) can access sealed records for the purpose of conducting research.²⁷

ADDITIONAL EXPUNGEMENT AND SEALING MATTERS TO CONSIDER

While the Crime Commission's 2023 legislation provides significant clarity to expungement and sealing, several issues remain unresolved. Legislators may want to address the following matters before the sealing law takes effect in July 2025.

Establish a clear delineation between expungement and sealing in the Code and regulations:

- Provide a definition for expungement in the Virginia Code;²⁸
- Clarify the effects of expungement;²⁹ and,
- Amend various statutes related to the regulations and the court case management system to recognize the distinction between expunged and sealed records.³⁰

Align the petition-based expungement and petition-based sealing processes:

- Ensure that the information required in an expungement petition and a sealing petition is the same;³¹
- Determine a uniform method of delivering, mailing, or serving expungement and sealing petitions on the Commonwealth's Attorney;³²
- Appoint counsel for indigent expungement petitioners (currently only authorized for indigent sealing petitioners);³³
- Waive filing fees for indigent expungement petitioners (currently only authorized for indigent sealing petitioners);³⁴
- Determine whether court hearings on expungement petitions should be mandatory or discretionary;³⁵
- Align the protections provided to individuals who have their records expunged to match the sealing protections;³⁶
- Provide expungement orders to business screening services (currently only sealing orders are provided to business screening services);³⁷ and,
- Automate the expungement process after an expungement order is entered to match the sealing process.³⁸

Provide additional resources for the expungement and sealing processes:

- Amend the Sealing Fee Fund to provide court-appointed counsel to indigent expungement petitioners (currently only available for indigent sealing petitioners), and provide sufficient funding to pay for court-appointed counsel in both expungement and sealing proceedings;³⁹
- Allocate sufficient resources for stakeholders to comply with the new sealing requirements;⁴⁰ and,
- Clarify how paper records should be handled to comply with the sealing process.

Other issues:

- Increase public awareness of the expungement and sealing processes;⁴¹
- Create a process to pre-screen individuals for expungement or sealing eligibility;
- Establish a process for appointing counsel for indigent expungement and sealing petitioners;⁴²
- Notify an individual when a conviction on their criminal history record has been automatically sealed;
- Determine whether general deferred dispositions (Virginia Code § 19.2-289.02) should be eligible for expungement;⁴³
- Clarify how sealed records affect the Sex Offender and Crimes Against Minors Registry;⁴⁴
- Determine whether to make possession of marijuana offenses under Virginia Code § 4.1-1100 and marijuana-related paraphernalia offenses under Virginia Code § 54.1-3466 eligible for sealing;
- Clarify how possession of marijuana records that were not reported to the CCRE should be addressed since these records will not be automatically sealed;
- Establish a timeframe for the Commonwealth to respond to expungement and sealing petitions, as well as a timeframe for the courts to conduct a hearing on an expungement or sealing petition;
- Determine if access to sealed records is needed beyond the 25 existing purposes; and,
- Consider whether to create a petition-based sealing process for non-convictions.⁴⁵

¹ Virginia State Crime Commission (2021). *2020 annual report: Expungement and sealing of criminal records*. Available at <http://vscc.virginia.gov/2021/VSCC%202020%20Annual%20Report%20Expungement%20and%20Sealing.pdf>.

² A deferred dismissal refers to a circumstance where a charge is dismissed after the defendant completes certain terms or conditions ordered by the court.

³ 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542. These Acts stemmed from House Bill 2113 and Senate Bill 1339. House Bill 2113 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2113>. Senate Bill 1339 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1339>.

⁴ 2021 Va. Acts, Sp. Sess. I, ch. 550 and 551. These Acts stemmed from House Bill 2312 and Senate Bill 1406. House Bill 2312 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2312>. Senate Bill 1406 is available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1406>.

⁵ Virginia State Crime Commission. (2022). *2021 annual report: Update: Expungement and sealing of criminal and court records*. Available at <http://vscc.virginia.gov/2022/VSCC%202021%20Annual%20Report%20-%20Expungement%20and%20Sealing%20Update.pdf>.

⁶ 2023 Va. Acts ch. 554 and 555.

⁷ See 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542. These Acts stemmed from House Bill 2113 and Senate Bill 1339. House Bill 2113 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2113>. Senate Bill 1339 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1339>.

⁸ Office of the Executive Secretary of the Supreme Court. (2022, November 2). *Report to the Virginia State Crime Commission*. Available at <http://vscc.virginia.gov/2022/Dec5mtg/OES%20expungement%20Report%20to%20Virginia%20State%20Crime%20Commission.11.2.22.pdf>.

⁹ Virginia Department of State Police. (2022, October). *Automated systems to exchange information, Progress on system development: A report to the Virginia State Crime Commission*. Available at <http://vscc.virginia.gov/2022/Dec5mtg/VSP%20Automated%20Systems%20to%20Exchange%20Information%20October%202022.pdf>.

¹⁰ See 2021 Va. Acts, Sp. Sess. I, ch. 524 and 542. These Acts stemmed from House Bill 2113 and Senate Bill 1339. House Bill 2113 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=hb2113>. Senate Bill 1339 is available at <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=212&typ=bil&val=sb1339>.

¹¹ Virginia Court Clerks Association. (2022, November 1). *HB 2113 and SB 1339 sealing and expungement legislation*. Available at <http://vscc.virginia.gov/2022/Dec5mtg/Clerks%20-%20Memorandum%20of%20the%20VCCA%20to%20the%20Virginia%20Crime%20Commission.pdf>.

¹² House Bill 2400 (2023). Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?231+sum+HB2400>.

¹³ Senate Bill 1402 (2023). Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?231+sum+SB1402>.

¹⁴ 2023 Va. Acts ch. 554 and 555.

¹⁵ VA. CODE ANN. §§ 19.2-392.2:1 and 19.2-392.2:2 (2022).

¹⁶ VA. CODE ANN. §§ 19.2-392.6 and 19.2-392.12 (2022). This change does not substantively impact marijuana criminal record relief. As previously reported by staff in 2021, the marijuana expungement statutes allowed records to be accessed for the same 25 specified purposes as sealed criminal records. Moving these marijuana offenses into the sealing statutes clarifies how these records will be handled. See Virginia State Crime Commission. (2022). *2021 annual report: Update: Expungement and sealing of criminal and court records*, at pp. 107 and 109. Available at <http://vscc.virginia.gov/2022/VSCC%202021%20Annual%20Report%20-%20Expungement%20and%20Sealing%20Update.pdf>. In addition, the marijuana-related drug paraphernalia offenses that were moved into the petition-based sealing statute will not count towards a person's lifetime limit of two petitions under VA. CODE ANN. § 19.2-392.12(C).

¹⁷ VA. CODE ANN. § 19.2-389.3 (2022).

¹⁸ VA. CODE ANN. § 19.2-392.9 (2022).

¹⁹ VA. CODE ANN. § 4.1-305 (2022).

²⁰ Sealing an underage possession of alcohol offense will not count towards a person's lifetime limit of two petitions under VA. CODE ANN. § 19.2-392.12(C).

²¹ See VA. CODE ANN. §§ 19.2-392.2(C) and 19.2-392.12(E) (2022).

²² See VA. CODE ANN. §§ 19.2-392.7, 19.2-392.10, 19.2-392.11, and 19.2-392.12 (2022). These changes will assist OES with the implementation of the statutorily required automated systems.

²³ See VA. CODE ANN. § 19.2-392.13(C) (2022).

²⁴ See VA. CODE ANN. § 19.2-392.12(C) (2022).

²⁵ See VA. CODE ANN. § 19.2-392.3(C) (2022).

²⁶ See VA. CODE ANN. §§ 19.2-392.2(N) and 19.2-392.12(M) (2022).

²⁷ See VA. CODE ANN. § 19.2-392.13(C) (2022).

²⁸ A definition could be added to VA. CODE ANN. § 19.2-392.2 (2022). Expungement is currently defined in the Virginia Administrative Code as “remov[ing], in accordance with a court order, a criminal history record or a portion of a record from public inspection or normal access.” 6 VA. ADMIN. CODE § 20-120-20 (2016).

²⁹ A Virginia Code section could be enacted using similar language as that in VA. CODE ANN. § 19.2-392.5 (2022), which describes the effects of sealing.

³⁰ See VA. CODE ANN. §§ 9.1-128, 9.1-134, 17.2-293.1, and 17.1-502 (2022).

³¹ See VA. CODE ANN. §§ 19.2-392 and 19.2-392.12 (2022).

³² *Id.*

³³ See VA. CODE ANN. §§ 17.1-205.1 (Sealing Fee Fund) and 19.2-392.12(B) and (L) (provides for the appointment of counsel for indigent sealing petitioners) (2022).

³⁴ The expungement statute only allows for the refund of certain costs to the petitioner if the expungement petition is granted. VA. CODE ANN. § 19.2-392.2(L) (2022). In contrast, sealing petitioners do not have to pay any fees or costs if they demonstrate they are indigent. VA. CODE ANN. § 19.2-392.12(B) (2022). *See also, e.g.,* VA. CODE ANN. § 17.1-606 (2022) (allows indigent individuals to file or defend civil suits without paying fees or costs).

³⁵ Courts *shall* conduct hearings on expungement petitions (VA. CODE ANN. § 19.2-392.2(F)), whereas courts *may* conduct hearings on sealing petitions. VA. CODE ANN. § 19.2-392.12(F) (2022).

³⁶ Sealed records currently have additional protections not granted to expunged records. *See* VA. CODE ANN. §§ 19.2-392.4 (expunged record protections) and 19.2-392.15 (sealed record protections) (2022).

³⁷ *See* VA. CODE ANN. § 19.2-392.16 (2022).

³⁸ For example, the sealing process in VA. CODE ANN. § 19.2-392.12(I) allows for the electronic dissemination of sealing orders to VSP, whereas the expungement process in VA. CODE ANN. § 19.2-392.2(K) requires that expungement orders be mailed to VSP.

³⁹ *See* VA. CODE ANN. § 17.1-205.1 (2022).

⁴⁰ Funding has been provided for VSP and OES to comply with the new sealing processes. However, various other entities may require funding, such as circuit court clerks, the Virginia Department of Motor Vehicles, the Virginia Department of Corrections, the Office of the Attorney General, local law enforcement, Commonwealth’s Attorneys, local and regional jails, local community corrections programs, and other entities that may be in possession of information related to a sealed criminal offense.

⁴¹ *See* Virginia State Crime Commission. (2022). *2021 annual report: Update: Expungement and sealing of criminal and court records*, at pp. 113-114. Available at <http://vsc.virginia.gov/2022/VSCC%202021%20Annual%20Report%20-%20Expungement%20and%20Sealing%20Update.pdf>.

⁴² *Id.*

⁴³ With the repeal of marijuana expungement, the expungement process is generally reserved for non-convictions, while the sealing process can be used for all other case outcomes. The exception to this distinction is that deferred dispositions under VA. CODE ANN. § 19.2-289.02 can be eligible for expungement.

⁴⁴ *See* VA. CODE ANN. § 9.1-900 *et. seq.* (2022).

⁴⁵ Non-convictions can be automatically sealed, but if the Commonwealth objects to the sealing of a misdemeanor non-conviction for a reason specified in the statute, or if the Commonwealth does not concur with the sealing of a felony non-conviction, then the only relief a person can seek is expungement of the non-conviction record. *See* VA. CODE ANN. § 19.2-392.8 (2022).

