

# STATE OF NEW YORK

4027

2017-2018 Regular Sessions

## IN SENATE

February 2, 2017

Introduced by Sen. BAILEY -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law and the executive law, in relation to applications for sealing a record of conviction

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The criminal procedure law is amended by adding a new  
2 section 160.65 to read as follows:

3 § 160.65 Sealing record of conviction; application for.

4 1. A person is eligible to apply to seal a record of conviction,  
5 subject to the provisions contained in this section, by application on a  
6 form specifically designated, sworn to under penalty of perjury and  
7 accompanied by a fee of ninety-five dollars.

8 2. An applicant must be duly terminated and discharged from every  
9 aspect of the sentence, including incarceration, probation, parole,  
10 conditional release, post-release supervision, conditional discharge,  
11 sex offender registration and/or any order of protection on this or any  
12 other matter against the applicant must have expired. The following  
13 waiting periods apply to applications under this section, however, for  
14 good cause shown, the court may shorten a waiting period. Attendance at  
15 a diversion program which delayed the imposition of the sentence may  
16 constitute good cause, in the court's discretion.

17 (a) For a person who has been convicted of one non-criminal offense,  
18 the waiting period shall be six months from the date of conviction of  
19 such offense.

20 (b) For a person who has been convicted of more than one non-criminal  
21 offense arising from separate incidences, the waiting period shall be  
22 one year from the date of conviction of the last such offense.

23 (c) For a person who has been convicted of a misdemeanor, the waiting  
24 period shall be one year from the date of conviction of such misdemea-  
25 nor.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 (d) For a person who has been convicted of more than one misdemeanor  
2 arising from separate incidences, the waiting period shall be three  
3 years from the date of conviction of last such misdemeanor.

4 (e) For a person who has been convicted of one non-violent felony, the  
5 waiting period shall be five years from the date of conviction of such  
6 non-violent felony.

7 (f) For a person who has been convicted of more than one non-violent  
8 felony arising from separate incidences, the waiting period shall be ten  
9 years from the date of conviction of the last non-violent felony.

10 (g) For a person who has been convicted of a violent felony, the wait-  
11 ing period shall be ten years from the date of the conviction of such  
12 violent felony.

13 (h) For a person convicted of more than one violent felony arising  
14 from separate incidences, the waiting period shall be twenty years from  
15 the date of conviction of the last violent felony.

16 3. An application for sealing a record of conviction shall be made to  
17 the judge who originally sentenced the applicant. In the event such  
18 judge is unavailable, the application shall be made to a sitting judge  
19 in the court in which the conviction was ordered, as designated by the  
20 supervising or administrative judge of that court. The judge may refer  
21 an application under this section to a magistrate, who shall have the  
22 authority to grant such an application in the case of a misdemeanor  
23 conviction or a conviction to a non-criminal offense. In the event the  
24 magistrate recommends denial of an application relating to a misdemeanor  
25 or non-criminal offense, such recommendation shall be made to a judge as  
26 designated in this section, who shall, upon reviewing the record and  
27 hearing the applicant, rule on the application. In the case of a felony  
28 matter, the magistrate must make a recommendation to the judge regarding  
29 such application, stating in writing the reasons for the recommendation.  
30 The judge shall review the record and such recommendation and afford the  
31 applicant an opportunity to be heard prior to ruling on the application.

32 4. An application pursuant to this section shall be sworn to under  
33 penalty of perjury and shall include:

34 (a) A list of each of the petitioner's convictions in New York state,  
35 any convictions in any other state or in federal court, the sentence for  
36 each such conviction and the date of the sentence. Non-criminal  
37 convictions outside New York state need not be included.

38 (b) A statement as to the termination of each aspect of the sentence  
39 for each of the above-listed convictions, include the dates of termi-  
40 nation from probation, parole or other supervisory sentences, a state-  
41 ment as to the existence of order or orders of protection and the end  
42 date of such, and a statement as to the completion of any conditional  
43 sentences or any other conditions of sentence imposed by the court or by  
44 law, although this shall not be construed to require a person to have  
45 restored driving or other privileges that have been lost, suspended or  
46 revoked due to the conviction.

47 (c) A description of the nature and circumstances of each crime listed  
48 in paragraph (a) of this subdivision.

49 (d) A description of the nature of the petitioner's personal circum-  
50 stances since the conviction, which shall establish that the petitioner  
51 is entitled to the relief provided in this section.

52 5. The application for sealing a record of conviction shall be served  
53 upon the agency that originally prosecuted the case on twenty-one days  
54 notice. The prosecuting agency may file an answer to the application  
55 seven days prior to the return date of the motion. The court may grant  
56 an application on submissions if the prosecuting agency does not file an

1 opposition. If there is objection, the court must review the issues of  
2 fact and law and determine the merits of the application.

3 6. In the case of non-criminal convictions, misdemeanor convictions  
4 and non-violent felony convictions, the court shall grant the applica-  
5 tion unless sealing the records will harm public safety or would not  
6 serve the interests of justice. In the case of a violent felony  
7 conviction or a conviction for a sex offense, the court shall not grant  
8 the application unless the applicant has established that he or she has  
9 been entirely rehabilitated, that the crime was an aberration in the  
10 applicant's life, that it is not likely to recur and that it is not  
11 against public policy and the interests of justice to grant such appli-  
12 cation.

13 7. If the court deems it necessary, the court may order a report as to  
14 the applicant's background and circumstances from an independent  
15 consultant, expert or agency deemed qualified by the court to prepare  
16 such a report.

17 8. Upon the request of either party or sua sponte, the court shall  
18 conduct a hearing as to any issue of fact or law or in the court's  
19 discretion, may hear testimony or accept written submissions relating  
20 the merits of the application or any matter deemed appropriate by the  
21 court in furtherance of determining the motion. In any such hearing, the  
22 court shall not be bound by the rules of evidence and may admit hearsay  
23 testimony which the court believes will shed light on the applicant's  
24 character and eligibility to receive relief under this section. However,  
25 a decision to grant or deny an application may not be based solely on  
26 hearsay or otherwise traditionally inadmissible evidence.

27 9. A decision granting or denying an application under this section  
28 shall be in writing and shall state the reasons for the court's ruling,  
29 unless the court grants the application without objection or written  
30 response by the prosecutor, in which case the court may issue an order  
31 without a written decision.

32 10. The court's sealing order shall be effective on the thirtieth day  
33 after issuance of the order, except that a court may shorten that period  
34 upon good cause shown.

35 11. Upon the effective date of a sealing order by the court, all  
36 state, county and local government and law enforcement agencies and  
37 their agents and contractors must seal any record relating to the sealed  
38 conviction, including any and all records relating to the arrest and/or  
39 detention of the applicant. Each agency shall designate a method of  
40 safekeeping documents and computer records in a manner which will not  
41 indicate that there ever was a record as to the arrest, detention or  
42 conviction of the individual. Records shall be unsealed only pursuant to  
43 court order except that the following agencies may maintain records in  
44 the following manner:

45 (a) The department of criminal justice services shall maintain a  
46 sealed record in its database in a manner that will not be accessible to  
47 anyone other than law enforcement agents or prosecution agencies in the  
48 course of a criminal investigation or prosecution, or upon a court order  
49 or court-ordered subpoena ordering release of the information. In the  
50 event the applicant is arrested subsequent to the sealing of the  
51 records, the unsealed record shall be included in the department of  
52 criminal justice services "nysid" sheet that is printed out based on the  
53 applicant's fingerprints. A court, upon determining it is in the inter-  
54 ests of justice to unseal such a record, shall order its unsealing,  
55 which shall allow the prosecutor and the court to unseal the records of

1 their agency pertaining to that arrest. Any such unsealed files shall be  
2 made available to the defendant and his or her attorney.

3 (b) The department of corrections and community supervision and all  
4 local jail or prison agencies shall maintain sealed records in a manner  
5 that precludes the public from obtaining information relating to the  
6 arrest, detention or conviction of the individual whose record has been  
7 sealed, including but not limited to removal from all publicly available  
8 databases on the internet and otherwise. However, such agencies shall  
9 maintain a record of individuals who have been in custody which shall be  
10 kept by a custodian of those records within the agency. In the event the  
11 inmate shall be readmitted to the facility, the custodian is authorized  
12 to re-open such files, to be used solely for the agency's official  
13 purposes.

14 12. Nothing in this section shall change the sentencing provisions in  
15 the penal law. A sealed record, unsealed at the time of a re-arrest,  
16 shall continue to qualify as a conviction for sentencing purposes and  
17 may be used to establish an element of a crime as provided in the penal  
18 law.

19 13. It shall be a class A misdemeanor to publish information, other  
20 than as delineated in paragraphs (a) and (b) of subdivision eleven of  
21 this section, regarding the arrest, detention or conviction of an indi-  
22 vidual whose record has been sealed. A person aggrieved by a violation  
23 of this section shall have the right to institute a civil proceeding,  
24 regardless of whether a criminal action was commenced. A plaintiff is  
25 entitled to five hundred dollars for each occurrence along with the  
26 actual damages caused by the disclosure of such sealed record. Law  
27 enforcement, prosecution officials and employees of the office of court  
28 administration shall have a defense to a criminal or civil action under  
29 this section if they believed, in good faith, that they were permitted  
30 or required by law to disclose a sealed conviction. There shall be no  
31 prosecutorial or law enforcement immunity under this section for any  
32 government official who knowingly and intentionally publishes a sealed  
33 record which such official knows to have been sealed under this section.  
34 If a conviction is unsealed pursuant to a new arrest, the provisions of  
35 this subdivision shall not apply.

36 14. An application to unseal a record, which has been sealed pursuant  
37 to this section, may be granted by the court if it is determined that,  
38 in the interests of justice, the information regarding the underlying  
39 conviction should be disclosed. There shall be a presumption in favor of  
40 unsealing a record if the person who is subject to the sealed record is  
41 a witness in a criminal case. An application under this subdivision may  
42 be made either to the court that originally sentenced the defendant in  
43 the sealed case or may be made to the court which has jurisdiction over  
44 any case in New York in which the sealed record may be relevant, includ-  
45 ing the case where the defendant on the sealed case is a witness in a  
46 civil, criminal or other court proceeding.

47 15. A sealed conviction shall not operate as a disqualification of any  
48 person to pursue or engage in any lawful activity, occupation, profes-  
49 sion or calling unless so ordered by the court. Except where specif-  
50 ically required or permitted by statute or upon specified authorization  
51 of a superior court, no such person shall be required to divulge infor-  
52 mation pertaining to the sealed record. Such person shall be permitted  
53 to respond in the negative to the question "have you ever been convicted  
54 of a crime or violation?" or to any question with the same substantive  
55 content.

1 16. Non-governmental employers are hereinafter not permitted to ask  
2 prospective applicants if they have been arrested or if they have been  
3 convicted of a crime or violation. Private citizens and employers are  
4 authorized to search official government records for criminal  
5 convictions in a manner consistent with the law. In the event an employ-  
6 er searches the criminal record of an individual, such individual shall  
7 be put on notice, orally or in writing, that such search will occur.

8 17. Any business, agency or individual who purchases individual crimi-  
9 nal records or databases of criminal records shall not disclose any  
10 information as to a record which has been sealed subsequent to the time  
11 the data was obtained. Any agency providing data to the public or to  
12 private businesses shall develop a system whereby any record which is to  
13 be re-disclosed can be easily and quickly checked by the person, busi-  
14 ness or entity which had obtained the record before it was sealed to  
15 determine if the record has been subsequently sealed. No governmental  
16 agency shall sell any records without developing such a system. Any  
17 record sold or provided to an individual, business or entity shall  
18 contain the following warning:

19 YOU ARE NOT PERMITTED TO DISCLOSE THIS INFORMATION TO ANYONE WITHOUT  
20 FIRST CHECKING TO SEE IF THIS RECORD WAS SEALED AFTER YOU RECEIVED IT.  
21 IT IS UNLAWFUL TO DISCLOSE SEALED RECORDS. TO DETERMINE IF THIS RECORD  
22 HAS BEEN SEALED, CONTACT (INCLUDE AGENCY CONTACT INFORMATION HERE).

23 18. Either party may appeal as of right from the court's order. The  
24 appealing party must serve notice of appeal upon the court and the  
25 opposing party within thirty days of the issuance of the court order. If  
26 the order is appealed by the prosecutor, such notice of appeal shall be  
27 deemed a stay of the order to seal the records. The prosecutor shall  
28 perfect the appeal within sixty days, or the sealing order shall imme-  
29 diately take effect unless the court grants an extension of the time to  
30 perfect the appeal upon good cause shown by the prosecutor. The appeal  
31 shall be taken to the same court to which the appeal of the original  
32 conviction could have been brought. The standard of review at the inter-  
33 mediary appellate court shall be abuse of discretion. The decision of an  
34 intermediary appellate court shall be appealable to the court of appeals  
35 upon leave of the court.

36 19. The right to make an application under this section may not be  
37 waived at the time a guilty plea is entered on any case in New York  
38 state.

39 § 2. Subdivision 16 of section 296 of the executive law, as separately  
40 amended by section 3 of part N and section 14 of part AAA of chapter 56  
41 of the laws of 2009, is amended to read as follows:

42 16. It shall be an unlawful discriminatory practice, unless specif-  
43 ically required or permitted by statute, for any person, agency, bureau,  
44 corporation or association, including the state and any political subdivi-  
45 sion thereof, to make any inquiry about, whether in any form of appli-  
46 cation or otherwise, or to act upon adversely to the individual  
47 involved, any arrest or criminal accusation of such individual not then  
48 pending against that individual which was followed by a termination of  
49 that criminal action or proceeding in favor of such individual, as  
50 defined in subdivision two of section 160.50 of the criminal procedure  
51 law, or by a youthful offender adjudication, as defined in subdivision  
52 one of section 720.35 of the criminal procedure law, or by a conviction  
53 for a violation sealed pursuant to section 160.55 of the criminal proce-  
54 dure law or by a conviction which is sealed pursuant to section 160.58  
55 of the criminal procedure law, or by a conviction for a criminal or  
56 non-criminal offense which is sealed pursuant to section 160.65 of the

1 criminal procedure law, in connection with the licensing, employment or  
2 providing of credit or insurance to such individual; provided, further,  
3 that no person shall be required to divulge information pertaining to  
4 any arrest or criminal accusation of such individual not then pending  
5 against that individual which was followed by a termination of that  
6 criminal action or proceeding in favor of such individual, as defined in  
7 subdivision two of section 160.50 of the criminal procedure law, or by a  
8 youthful offender adjudication, as defined in subdivision one of section  
9 720.35 of the criminal procedure law, or by a conviction for a violation  
10 sealed pursuant to section 160.55 of the criminal procedure law, or by a  
11 conviction which is sealed pursuant to section 160.58 of the criminal  
12 procedure law, or by a conviction for a criminal or non-criminal offense  
13 which is sealed pursuant to section 160.65 of the criminal procedure  
14 law. The provisions of this subdivision shall not apply to the licensing  
15 activities of governmental bodies in relation to the regulation of guns,  
16 firearms and other deadly weapons or in relation to an application for  
17 employment as a police officer or peace officer as those terms are  
18 defined in subdivisions thirty-three and thirty-four of section 1.20 of  
19 the criminal procedure law; provided further that the provisions of this  
20 subdivision shall not apply to an application for employment or member-  
21 ship in any law enforcement agency with respect to any arrest or crimi-  
22 nal accusation which was followed by a youthful offender adjudication,  
23 as defined in subdivision one of section 720.35 of the criminal proce-  
24 dure law, or by a conviction for a violation sealed pursuant to section  
25 160.55 of the criminal procedure law, or by a conviction which is sealed  
26 pursuant to section 160.58 of the criminal procedure law, or by a  
27 conviction for a criminal or non-criminal offense which is sealed pursu-  
28 ant to section 160.65 of the criminal procedure law.

29 § 3. This act shall take effect on the sixtieth day after it shall  
30 have become a law.