# 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:**

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

**§ 160.65 Sealing record of conviction; application for.**

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

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

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

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

**(c) For a person who has been convicted of a misdemeanor, the waiting period shall be one year from the date of conviction of such misdemeanor.**

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

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

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

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

(g) For a person who has been convicted of a violent felony, the waiting period shall be ten years from the date of the conviction of such violent felony.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. A sealed conviction shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling unless so ordered by the court. Except where specifically required or permitted by statute or upon specified authorization of a superior court, no such person shall be required to divulge information pertaining to the sealed record. Such person shall be permitted to respond in the negative to the question "have you ever been convicted of a crime or violation?" or to any question with the same substantive content.

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

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

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

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

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

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

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, or by a conviction for a criminal or non-criminal offense which is sealed pursuant to section 160.65 of the

**criminal procedure law**, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law**, or by a conviction for a criminal or non-criminal offense which is sealed pursuant to section 160.65 of the criminal procedure law**. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law**, or by a conviction for a criminal or non-criminal offense which is sealed pursuant to section 160.65 of the criminal procedure law**.

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