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LAW ENFORCEMENT AND OTHER AGENCIES Georgia Bureau of Investigation: Expunge Criminal Records When Arrested But Not Charged or Charges Dismissed; Allow Prosecutor Discretion in Expungement; Provide for Judicial Review of Prosecutor or Agency Decision Against Expunging Record; Provide for Fees for Expungement

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LAW ENFORCEMENT AND OTHER AGENCIES

Georgia Bureau of Investigation: Expunge Criminal Records When Arrested But Not Charged or Charges Dismissed; Allow Prosecutor Discretion in Expungement; Provide for Judicial Review of Prosecutor or Agency Decision Against Expunging Record; Provide for Fees for Expungement

CODE SECTION:	O.C.G.A. § 35-3-37 (amended)
BILL NUMBER:	HB 183
ACT NUMBER:	417
GEORGIA LAWS:	1997 Ga Laws 1345
SUMMARY:	The Act allows individuals arrested but not charged, or who have had charges brought against them but dismissed by the prosecuting attorney, to have their criminal records relating to the incident expunged. The Act requires the individual to submit a written request to have his or her record expunged from the arresting agency's files. The Act allows the individual to appeal a refusal to expunge the record. The Act also allows the prosecuting attorney to appeal a decision by the agency to expunge the record. The Act provides criteria which must be met for the record to be expunged. The Act allows the prosecuting attorney discretion in deciding whether to allow expungement. The Act further provides for a fee to cover the costs of expungement. The Act provides that it shall not apply to destruction or expungement of incident reports or jail records.
EFFECTIVE DATE:	July 1, 1997

History

In 1973, the Georgia General Assembly provided for the Georgia Crime Information Center (GCIC) to store, among other things, the criminal records and police reports of all of the state law enforcement agencies.[1] Under the same 1973 law, the GCIC was required to return the records, including fingerprints and photographs of "any person arrested or taken into custody and subsequently released without charge, or cleared of the offense through court proceedings [to that

1. *See* 1973 Ga. Laws 1301 (codified at O.C.G.A. §§ 35-3-30 to -39 (1993)).

person] . . . if required by statute or upon court order."[2] The law allowed an individual to view his or her own records and contest their accuracy.[3] The accuracy of the record was to be decided by the arresting agency, which the individual could appeal to the superior court.[4]

The timing of the court's order for expungement of records, however, was a matter of some controversy. Agencies and the GCIC repeatedly turned to the courts or the Attorney General for clarification.[5] Even if charges were subsequently dropped by prosecutors, the Attorney General opined that no "legal basis" existed for purging the records of the arrest.[6] Pleas of nolo contendere,[7] completion of First Offender status,[8] orders to nolle prosequi[9] and acquittal by operation of law[10] did not warrant expungement. The record, however, needed to accurately reflect the disposition of the case.[11] The superior court, after a mandatory hearing,[12] could order "expungement, modification or supplementation"[13] of criminal records contested and appealed by an individual only when such records were "inaccurate, incomplete or misleading."[14] The statute, as interpreted by subsequent case law, was designed to "correct mistakes" in criminal records, but not to provide expungement of arrest records for which the underlying charges were found to be baseless.[15]

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2. 1973 Ga. Laws 1301, § 4, at 1308 (codified at O.C.G.A. § 35-3-37 (1993)).

3. *Id.*

4. *See id.*

5. *See* Meinken v. Burgess, 262 Ga. 863, 426 S.E.2d 876 (1993) (providing expungement is warranted only when state interest in maintaining records is outweighed by individual's interest in freedom from harm from the records); Stroehecker v. Gwinnettt, 182 Ga. App. 853, 297 S.E.2d 260 (1987) (holding that superior court must hold a hearing to determine if records should be expunged); State v. C.S.B., 250 Ga. 261, 297 S.E.2d 260 (1982) (holding First Offender Act does not provide for expungement of record after successful completion of probation under the program); 1975 Op. Att'y Gen. 75-110 (Ga.); 1982 Op. Att'y Gen. 82-8 (Ga.); 1985 Op. Att'y Gen. U85-37 (Ga.); 1989 Op. Att'y Gen. 89-60 (Ga.).

6. *See* 1975 Op. Att'y Gen. 75-110 (Ga.).

7. *See C.S.B.*, 250 Ga. at 262, 297 S.E.2d at 260; 1975 Op. Att'y Gen. 75-110 (Ga.).

8. *See C.S.B.*, 250 Ga. at 263, 297 S.E.2d at 262.

9. *See* Drake v. State, 170 Ga. App. 846, 847, 318 S.E.2d 721, 722 (1984).

10. *See* Meinken v. Burgess, 262 Ga. 863, 426 S.E.2d 876 (1993).

11. *See* 1975 Op. Att'y Gen. 75-110 (Ga.).

12. *See* Stroehecker v. Gwinnett County Police Dep't, 182 Ga. App. 853, 357 S.E.2d 305 (1987).

13. 1973 Ga. Laws 1301 (formerly found at O.C.G.A. § 35-3-37 1993)).

14. *Id.; see also* Drake v. State, 170 Ga. App. 846, 318 S.E.2d 721 (1984); 1989 Op. Att'y Gen. 89-60 (Ga.).

15. *See* Telephone Interview with Rep. William C. Randall, House District No. 127 (July 7, 1997) [hereinafter Randall Interview].

In its most recent decision on the subject, the Georgia Supreme Court broadened the grounds for expungement of criminal records in *Meinken v. Burgess*.[16] Although the court acknowledged that expungement was an extreme measure that should only be taken in an exceptional circumstance when modification or supplementation of the record would be inadequate to the interests of the individual, it refused to limit the remedy to circumstances in which the records are inaccurate.[17] The Georgia Supreme Court proffered a balancing test to determine whether the interests of the state in keeping the records are outweighed by the interests of the individual.[18] The "balancing test," however, essentially lacked clear standards, and rested on "a slippery legal foundation."[19]

Today, criminal record checks are conducted by various entities including credit bureaus, banks, and employers before a business decision is made.[20] Arrests or charges that never amounted to anything, were never pursued by the Grand Jury,[21] or that were found to be mistakes,[22] remain on the records of the accused and hamper their efforts to get credit, find jobs, and live in certain areas, and limit other situations.[23] The complicated nature of the expungement process necessitated that anyone requesting expungement obtain counsel, which resulted in large expenses that prevented poorer people from obtaining expungement of their records when it was warranted.[24] Several legislators who supported the proposed expungement plan even had arrest records for crimes they had not committed, but could not have expunged.[25]

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16. 262 Ga. 863, 426 S.E.2d 876 (1993).

17. *Id.* at 864-65, 426 S.E.2d at 878.

18. *Id.* at 866, 426 S.E.2d at 879-80.

19. Telephone Interview with Jack Martin, Chairman, Legislative Committee of Georgia Association of Criminal Defense Lawyers (July 9, 1997) [hereinafter Martin Interview].

20. *See* Telephone Interview with Teresa Nelson, ACLU (June 12, 1997) [hereinafter Nelson Interview].

21. *See* Martin Interview, *supra* note 19 (noting that records were retained for man who was charged with very serious crime of rape, which was obviously consensual upon investigation, and Grand Jury refused to indict him).

22. *See* Randall Interview, *supra* note 15 (recalling a man who still had record for arrest after he was exonerated at preliminary hearing because witness immediately claimed that he could not be the person).

23. *See* Nelson Interview, *supra* note 20. Protest groups feared that record checks deterred civil disobedience demonstrators from exercising their First Amendment right to free speech out of fear of losing their jobs. *See id.*; Martin Interview, *supra* note 19.

24. *See* Nelson Interview, *supra* note 20.

25. *See* Randall Interview, *supra* note 15.

HB 183

Introduction

Senator Edward Boshears proposed a bill in the 1996 legislative session (SB 533)[26] to allow anyone arrested or indicted for a crime and subsequently not charged, not prosecuted, or cleared through a court proceeding to have his or her records of the incident purged.[27] The bill did not pass.[28] The House introduced its own version in 1997 with better results.[29]

House Version

The original version of HB 183 affected only Code section 35-3-37(c).[30] It provided that any person arrested but not charged or prosecuted for a crime could have all criminal records relating to that incident purged.[31] It required the individual to request the expungement, and if it was not granted, he or she had thirty days from the denial of the requested expungement to file an appeal to the superior court.[32] It clarified that the superior court could order the record expunged if the arrest and/or indictment was not prosecuted, as provided above, and the agency would have to alter or delete its records in compliance with the order.[33] The bill did not change the procedures of the Code section in any other substantive way.[34]

The House Special Judiciary substitute expanded the concept by requiring the original arresting agency to send written notice to the individual against whom charges were dismissed or withdrawn to inform him that those records could be purged if the individual requested.[35] Further, if action is taken, the agency must then inform the GCIC that the records had been purged by request, and the GCIC must also purge its copies of the offending records.[36] The substitute provided for fees to be charged to the individual requesting the

26. *See* Judy Bailey, *Bills Stack Up in State Legislature; Subjects Include New Judges, Juvenile Law, Drunken Driving*, FULTON COUNTY DAILY REP., Feb. 19, 1996, at 3; *see also* 1973 Ga. Laws 1301.

27. *See* Bailey, *supra* note 26.

28. The bill never reached the House. "In my twenty-three years in the [Georgia House of Representatives], I have not seen this type of legislation before." Randall Interview, *supra* note 15.

29. *See* Final Composite Status Sheet, Mar. 28, 1997.

30. HB 183, as introduced, 1997 Ga. Gen. Assem.

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

35. HB 183 (HCS), 1997 Ga. Gen. Assem.

36. *See id.*

expungement, to cover the costs, provided the costs do not exceed $50.[37] If the expungement was not carried out, the substitute provided that the individual could appeal to the superior court.[38] The court would be required to order expungement if the records referenced the charges that were not subsequently prosecuted.[39]

Senate Version

In the Senate Judiciary Committee, a member of the Georgia Association of District Attorneys and a representative of the Sheriff's Association offered an amendment that would restrict the expungement to cases in which the person had no prior convictions, no pending charges, and no indictments.[40] This amendment was incorporated into the bill by the Senate Judiciary Committee.[41]

The Senate version, eventually approved as the final version of the bill, left Code section 35-3-37 intact including subsection (c), which provided for expungement when records were "inaccurate or incomplete,"[42] but it added an entirely new Code section explicitly

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37. *Id.* The $50 fee was intended to only impose a maximum, and not a required cost. *See id.* No provision was made for waiver of the $50 fee for indigent applicants. Interview with Paul Heppner, Deputy Director, Georgia Crime Information Center of Georgia Bureau of Investigation (July 7, 1997) [hereinafter Heppner Interview]. "The thinking was that $50 is not a lot of money. Most everyone can come up with $50." Martin Interview, *supra* note 19. The $50 was an administrative cost to cover the man-hours spent expunging the records. *See id.* If a justifiable and legitimate basis existed for someone who could not afford it, the district attorney may be able to have the fee waived, but such waiver would depend on each circuit's approach to indigency and the fee. *See id.*; Telephone Interview with Robert Keller, District Attorney of Clayton County (July 10, 1997) [hereinafter Keller Interview].

38. *See* HB 183 (HCS), 1997 Ga. Gen. Assem.

39. *See id.*

40. Record of Proceedings in the Senate Judiciary Committee (Mar. 18, 1997) (remarks by Mr. Keller on behalf of the Georgia Association of District Attorneys, Sheriffs' Association, GBI, and Police Chiefs' Association) (available at Georgia State University College of Law Library). The prosecutors and law enforcement officers were legitimately concerned that people do not get away with a crime on a legal technicality and have it taken off of their record. Heppner Interview, *supra* note 37; Martin Interview, *supra* note 19; Nelson Interview, *supra* note 20; Randall Interview, *supra* note 15. The classic example is a spousal abuse situation in which the wife is intimidated into not pressing charges against her husband. Heppner Interview, *supra* note 37; Martin Interview, *supra* note 19; Nelson Interview, *supra* note 20; Randall Interview, *supra* note 15. Without the safeguards, the police would not know about any prior altercations involving the husband and wife if future problems arose, because the unindicted arrests would be subject to expungement. Heppner Interview, *supra* note 37; Martin Interview, *supra* note 19; Nelson Interview, *supra* note 20; Randall Interview, *supra* note 15.

41. HB 183 (SCS), 1997 Ga. Gen. Assem.

42. *Compare* O.C.G.A. § 35-3-37(c) (1993) *with* HB 183 (SCS), 1997 Ga. Gen. Assem.

stating stricter criteria for criminal record expungement when the records accurately reflected an arrest that did not result in a conviction.[43] Under this version, an individual could have his or her records expunged only if the arrest incident was never referred to the prosecuting attorney, or the prosecuting attorney dismissed the charges without first seeking an indictment or filing an accusation.[44] The GCIC was given the authority to prescribe the form for record expungement requests.[45] Once the request is made, the agency must forward the request to the "proper prosecuting attorney."[46] The prosecuting attorney then reviews the request to ascertain whether it meets the criteria for expungement.[47]

The criteria that the prosecuting attorney uses in reviewing the requests to expunge for charges not indicted includes the following: the charges are dismissed without indictment or accusation; no other charges are pending against the individual; and the individual has no other convictions for the same or similar offenses within five years.[48] Prison time is not to be counted in the five-year requirement.[49] If the prosecuting attorney finds that the criteria are met, then the records relating to the arrest must be purged.[50] Any items that cannot be destroyed must not be subject to disclosure, except as directed by the prosecuting attorney or a court order.[51] When the agency must expunge its records, it must also send notice to the GCIC.[52] The GCIC, however, is not required to destroy its copies of the records, but only to restrict public access.[53] These restricted records can only be made available to "criminal justice officials" for "official judicial law enforcement" or "criminal investigative purposes."[54]

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43. HB 183 (SCS), 1997 Ga. Gen. Assem.

44. *Id.*

45. *See id.* The criteria also lends guidance to the GCIC for when they can expunge records. *See* Keller Interview, *supra* note 37.

46. HB 183 (SCS), 1997 Ga. Gen. Assem.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.* Cost was a factor in the decision to not completely expunge the records. *See* Keller Interview, *supra* note 37. If the records were completely expunged, rather than restricted, the cost to retrieve previously expunged records needed for legitimate law enforcement purposes, or a *Brady v. Maryland* situation, would approach $400 per record, rather than the projected $50 administrative cost provided for in the statute. *See id.*

54. HB 183 (SCS), 1997 Ga. Gen. Assem. The records would be restricted from employers, but not from prosecuting attorneys. Martin Interview, *supra* note 19. If an employer, for example, asked for a record check of an individual with expunged records, then the report would state that the individual had no prior arrests. Keller

If the agency refuses to expunge the records, after the prosecutor has decided that the criteria are met, then the individual can appeal the refusal to the superior court.[55] The agency's decision can be upheld only if, under a clear and convincing standard, the criteria were not met, and the individual can be reimbursed for attorney's fees if he prevails on appeal.[56] The prosecuting attorney or Attorney General likewise may appeal an agency's decision to expunge documents when the state attorney recommends against purging the records.[57]

Indicted charges cannot be expunged if the prosecuting attorney shows that the charges were "nolle prossed, dead docketed, or otherwise dismissed" when one or more of the following exists: a plea agreement, a bar on government from introducing material evidence "including but not limited to . . . a motion to suppress or motion in limine," a decision by the prosecutor not to pursue the charges because the individual was already incarcerated on other charges, completion of a pretrial diversion program that does not specifically grant expungement, conduct prosecuted in another jurisdiction, or immunity from arrest or prosecution.[58] All of these requirements can be averted, however, if the individual whose pending charges were either dead-docketed, nolle-prossed, or otherwise dismissed requests expungement of the records, and the prosecutors do not object to the request within sixty days.[59]

The Senate version of the bill also provided that records of prisons, incident reports, or "custodial records maintained by the county" not be subject to expungement.[60] Such information would not be open to the public, and the agencies would have the burden of taking actions "reasonable" to prevent disclosure of the identities of individuals who had records expunged.[61] Further requirements prohibit any records from being expunged that would otherwise break the constitutional due process rights of a defendant under *Brady v. Maryland*.[62]

Interview, *supra* note 37. The ACLU supported the final version of the bill despite its misgivings because of the protection afforded to the citizens from private use of the records once expungement was obtained. Nelson Interview, *supra* note 20. Others fear that the confidential records are not currently securely maintained by the GCIC, and that the already frequent illegal record searches could frustrate the purpose of the legislation. Martin Interview, *supra* note 19.

55. *See* HB 183 (SCS), 1997 Ga. Gen. Assem.

56. *See id.*

57. *See id.* The district attorney can only appeal based on a reasonable belief that the criteria to allow expungement have not been met. *See* Keller Interview, *supra* note 37.

58. HB 183 (SCS), 1997 Ga. Gen. Assem. The statute provides separate expungement criteria for pre-indictment and post-indictment records. *See* Keller Interview, *supra* note 37.

59. *See* HB 183 (SCS), 1997 Ga. Gen. Assem.

60. *Id.*

61. *See id.*

62. 373 U.S. 83 (1963) (holding that suppression of evidence of another suspect in

In Committee, the American Civil Liberties Union (ACLU) objected to the amendment because it would drastically reduce the number of records that could be expunged, and would thus "gut" the bill.[63] The ACLU disliked the increased decisionmaking authority afforded to the prosecuting attorneys in this version,[64] and the Georgia Association of Criminal Defense Lawyers (GACDL), also active in the bill's debate and evolution, preferred that judges have more independent authority to expunge on appeals of prosecutorial denials of expungement.[65] Mr. Robert Keller, author of the changes and District Attorney for Clayton County, claimed that the bill did not provide district attorneys with any discretion; it merely provided a process to determine whether the specific statutory criteria had been met.[66] If the criteria for expungement are met, then the statute is self-executing.[67] Senator Oliver noted in further support for the Senate version that a verdict of not guilty "just means that the prosecution has not overcome the burden of proof enough to convince the jury. It does not mean that the defendant was innocent."[68]

As Passed

The Conference Committee version of the bill was passed into law.[69] This version tempered the changes and criteria of the Senate version of the bill by allowing the prosecutor to refuse to expunge a charge that was nolle prossed, dead docketed, or otherwise dismissed only if an indictment or accusation was filed.[70] The plea agreement exception to expungement was restricted to those resulting in a conviction "arising out of the same underlying transaction," and expungement could not be

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same occurrence by prosecutors violated defendant's Fourteenth Amendment due process rights). *Brady* may also apply to cancel an expungement when, for example, a defendant presents self-defense against a homicide charge and the victim has an expunged assault charge. Martin Interview, *supra* note 19. The district attorney may have a duty to disclose the prior charge because it is relevant to the defendant's claim that he was not the aggressor in the incident, but rather defended himself. *See id.*

63. *See Lawmakers '97* (GPTV broadcast, Mar. 27, 1997) (remarks by Mr. Keller of Sheriff's Association, GBI, and Police Chief's Association).

64. *See* Nelson Interview, *supra* note 20.

65. *See* Martin Interview, *supra* note 19.

66. Keller Interview, *supra* note 37.

67. *See id.*

68. Record of Proceedings in the Senate Judiciary Committee (Mar. 18, 1997) (remarks by Sen. Mary-Margaret Oliver) (available at Georgia State University of College of Law Library). The bill was designed to protect those who were truly innocent, not those who were legally not guilty. Martin Interview, *supra* note 19.

69. *See* HB 183 (CCS), 1997 Ga. Gen. Assem.; *cf.* O.C.G.A. § 35-3-37 (Supp. 1997).

70. HB 183 (CCS), 1997 Ga. Gen. Assem.

denied because a material witness refused to testify pursuant to a statutory right.[71]

Representative Randall, the original author of the bill, agreed with the Senate changes.[72] He noted that the exception for jail files was included in order to protect the jails so that a record would exist if charges were brought against the jail.[73] Randall stated that the revised bill was a foot in the door, but that change may be needed after the bill is enacted and problems are discovered.[74] Representative Glenn Richardson noted that he could not imagine anyone getting his or her record expunged with the Senate changes.[75] Nonetheless, the bill passed the House,[76] and was signed by the Governor.[77]

Raymond L. Peeler

71. *Id.*

72. *See Lawmakers '97* (GPTV broadcast, Mar. 27, 1997) (remarks by Rep. Randall) (videotape available in Georgia State University College of Law Library).

73. *Id.*

74. *Id.; see* Randall Interview, *supra* note 15 ("[T]he bill may need tweaking."); Nelson Interview, *supra* note 20 ("[T]his law will be tweaked in the next few years."); Martin Interview, *supra* note 19 ("[T]he bill will need some fine tuning.").

75. *Lawmakers '97* (GPTV broadcast, Mar. 27, 1997) (remarks by Rep. Glenn Richardson).

76. *See* O.C.G.A. § 35-3-37 (Supp. 1997); Final Composite Status Sheet, Mar. 28, 1997.

77. *See* Final Composite Status Sheet, Mar. 28, 1997.