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# LAW ENFORCEMENT OFFICERS AND AGENCIES Georgia Bureau of Investigation: Provide Records Related to the Prosecution of Certain Offenses to Potential Employers Involved in Caring for Minor Children, the Elderly, or the Mentally Afflicted

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## LAW ENFORCEMENT OFFICERS AND AGENCIES

### ***Georgia Bureau of Investigation: Provide Records Related to the Prosecution of Certain Offenses to Potential Employers Involved in Caring for Minor Children, the Elderly, or the Mentally Afflicted***

CODE SECTIONS:	O.C.G.A. §§ 35-3-34 to -36 (amended), -34.1 (new), 42-8-62 (amended), -63.1 (new)
BILL NUMBER:	SB 22
ACT NUMBER:	375
GEORGIA LAWS:	2003 Ga. Laws 840
SUMMARY:	The Act authorizes the Georgia Crime Information Center to release a first offender's record of arrests, charges, or sentences for certain sexual offenses to public schools, private schools, child welfare agencies, nursing homes, personal care homes, or any person or entity providing healthcare, day care, or services to children, the elderly, the mentally ill or the mentally handicapped when the first offender has applied for employment therein.
EFFECTIVE DATE:	July 1, 2004; O.C.G.A. § 35-3-36, July 1, 2003

### ***History***

Previously, Georgia law allowed offenders to take “first offender status” unless their first offense was “murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, [or] aggravated sexual battery.”<sup>1</sup> “First offender status is granted at

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1. See Audio Recording of Senate Proceedings, Mar. 4, 2003 (remarks by Sen. Gloria Butler), at <http://www.ganet.org/services/leg/audio/archive.html> [hereinafter Senate Audio]; Editorial, *Exempt Sex Offenders*, AUGUSTA CHRON., Apr. 30, 2003, at A04, available in Westlaw, GANP [hereinafter *Exempt Sex Offenders*].

the discretion of the court”<sup>2</sup> and is “designed to give a break to those with no criminal past who may have simply made a one-time mistake.”<sup>3</sup> Unfortunately, the law left a “loophole” open for a person convicted of a crime like child molestation and who was granted first offender status.<sup>4</sup> When prospective employers performed a criminal background check on this person, the check would not show the child molestation conviction, because many conviction records are removed from public records under the First Offender Act after the offender serves his sentence.<sup>5</sup> Consequently, establishments that care for children, the elderly, or the mentally challenged ran the risk of hiring dangerous employees.<sup>6</sup>

For example, on June 2, 2003, Elvin Whiten, a teacher at Crim High School in east Atlanta, was charged with raping a student.<sup>7</sup> The teacher had been charged in 1992 with sexual battery involving another student while he was teaching at a different school.<sup>8</sup> Crim High School had performed a background check when it hired Mr. Whiten in 1993, but the teacher’s record appeared clear because of his first offender status.<sup>9</sup> Similar legislation could have prevented this incident if it had been law when the teacher was first charged in 1992.<sup>10</sup>

A study revealed that “at least 3740 people in Georgia have been granted first offender status for sex crimes,” and some of the crimes have been so serious as to warrant a prison sentence.<sup>11</sup> Nearly 2000 of those have been sentenced “since [Georgia] created a registry of sex offenders in 1996.”<sup>12</sup> The offenders “include 527 child molesters,

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2. See Senate Audio, *supra* note 1.

3. Jane O. Hansen, *State Law Shields Child Sex Offenders*, ATLANTA J. CONST., Mar. 30, 2003, at A1.

4. See Audio Recording of House Proceedings, Apr. 17, 2003 (remarks by Rep. Greg Morris), at <http://www.ganet.org/services/leg/audio/archive.html> [hereinafter House Audio]; Senate Audio, *supra* note 1 (remarks by Sen. Gloria Butler); see *Lawmakers 2003* (GPTV broadcast, Mar. 4, 2003) (on file with the Georgia State University Law Review).

5. See Senate Audio, *supra* note 1 (remarks by Sen. Gloria Butler); *Legislature 2003: Briefs*, ATLANTA J. CONST., Mar. 5, 2003, at B6.

6. See Senate Audio, *supra* note 1.

7. See Paul Donsky, *Background Checks OK'd in School Hiring*, ATLANTA J. CONST., June 5, 2003, at B4.

8. See *id.*

9. See *id.*

10. See *id.*

11. See Hansen, *supra* note 3, at A1.

12. See *id.*

28 rapists, 33 aggravated child molesters and 14 aggravated sexual batterers.”<sup>13</sup>

Also, the bill acknowledged that sex crime perpetrators are often repeat offenders.<sup>14</sup> Experts declare hiding first offenses of this nature from the public is especially dangerous because “certain types of sex offenders are at a high risk of re-offending, particularly those who are sexually attracted to children and prey on boys.”<sup>15</sup> In a 2000 study, polygraph examinations of imprisoned sex offenders revealed that the offenders actually averaged 108 more victims than the person or people for whom they were caught victimizing.<sup>16</sup>

## SB 22

### *Introduction*

Senators Gloria Butler, Mary H. Squires, Kasim Reed, David Adelman, and Robert Brown of the 55th, 5th, 35th, 2nd, and 26th districts, respectively, sponsored SB 22.<sup>17</sup> Senator Butler introduced the bill in the Senate on January 27, 2003.<sup>18</sup>

### *Consideration by the Senate*

After introduction, the bill was assigned to the Senate Public Safety and Homeland Security Committee.<sup>19</sup> The Senate Committee favorably reported a substitute on February 26, 2003.<sup>20</sup> The Senate Committee made several changes, including adding language throughout the bill to (1) provide for an effective date, (2) include

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13. *Id.*

14. See Electronic Mail Interview with Sen. David Adelman, Senate District No. 42 (June 9, 2003) [hereinafter Adelman Interview].

15. See *Exempt Sex Offenders*, *supra* note 1.

16. *Id.* Victor Vieth, Director of the National Center for Prosecution of Child Abuse in Alexandria, Virginia, notes that “[i]t's extremely rare that the first time you're caught is the first time you've acted out sexually inappropriately.” *Id.*

17. See SB 22, as introduced, 2003 Ga. Gen. Assem.

18. See *id.*

19. See *id.*

20. See *id.*

child welfare agencies as affected parties, and (3) add an additional subsection to proposed Code sections 33-3-34.1 and 42-8-63.1.<sup>21</sup>

The Senate Committee first added the word “certain” in order “to provide records related to prosecution of certain first offenders.”<sup>22</sup> This “housekeeping” addition ensured the bill was not so overly broad as to include every first offender.<sup>23</sup> Some attorneys use first offender status as a bargaining tool, so the Senate Committee added this language to limit the bill’s scope.<sup>24</sup>

The second addition provided that the bill “shall become effective upon funds being appropriated by the General Assembly or upon the Georgia Bureau of Investigation obtaining funding or grant monies for implementation of this Act.”<sup>25</sup>

The third addition added a subsection to proposed Code sections 33-3-34.1 and 42-8-63.1.<sup>26</sup> The Senate Committee limited the bill’s scope to offenders “discharged under this article on or after July 1, 2004.”<sup>27</sup> The language ensures that a court could not apply the Act retroactively.<sup>28</sup>

The Senate passed the substitute unanimously by vote of 47 to 0 on March 4, 2003.<sup>29</sup>

### *Consideration by the House*

The House Committee on Special Judiciary favorably reported a substitute on April 10, 2003.<sup>30</sup> First, the House Committee added

21. Compare SB 22, as introduced, 2003 Ga. Gen. Assem., with SB 22 (SCS), 2003 Ga. Gen. Assem.

22. Compare SB 22, as introduced, 2003 Ga. Gen. Assem., with SB 22 (SCS), 2003 Ga. Gen. Assem.

23. See Adelman Interview, *supra* note 14; Telephone Interview with Sen. Gloria Butler, Senate District No. 55 (June 26, 2003) [hereinafter Butler Interview].

24. See Butler Interview, *supra* note 23.

25. See SB 22 (SCS), 2003 Ga. Gen. Assem. The Georgia Crime Information Center’s requirement of new computer software to implement the Act necessitates the additional funding. See Butler Interview, *supra* note 23.

26. Compare SB 22, as introduced, 2003 Ga. Gen. Assem., with SB 22 (SCS), 2003 Ga. Gen. Assem.

27. Compare SB 22, as introduced, 2003 Ga. Gen. Assem., with SB 22 (SCS), 2003 Ga. Gen. Assem.

28. See Telephone Interview with Sen. David Adelman, Senate District No. 42 (June 26, 2003) [hereinafter Adelman Interview Two].

29. See Georgia Senate Voting Record, SB 22 (Mar. 4, 2003); State of Georgia Final Composite Status Sheet, SB 22, Apr. 25, 2003.

30. See State of Georgia Final Composite Status Sheet, SB 22, Apr. 25, 2003.

language to the bill's description to include mentally ill and mentally retarded persons into the class of citizens protected by the Act.<sup>31</sup> The House Committee included mentally ill and mentally retarded persons because they, like children and the elderly, are vulnerable to sexual offenders.<sup>32</sup> Second, the House Committee added subsection (4) to proposed Code sections 33-3-34.1 and 42-8-63.1.<sup>33</sup> The subsection codifies the addition of mentally ill and mentally handicapped persons.<sup>34</sup>

The House amended the Committee substitute and passed SB 22, as substituted and amended, on April 17, 2003.<sup>35</sup> A House floor amendment added section 3A to the bill, which would have amended Code section 35-3-36.<sup>36</sup> The House added this section at the Georgia Bureau of Investigation's request to change provisions relating to the records submitted to the Georgia Crime Information Center.<sup>37</sup>

The Senate agreed to the House substitute on April 17, 2003.<sup>38</sup> Governor Sonny Perdue signed SB 22 into law on June 4, 2003.<sup>39</sup>

### *The Act*

The Act amends Chapter 3 of Title 35 and Chapter 8 of Title 42 of the Code.<sup>40</sup> Sections 1 and 2 of the Act amend Code sections 35-3-34 and 35-3-35, respectively, by incorporating new Code section 35-3-34.1.<sup>41</sup>

Section 3 of the Act inserts a new Code section authorizing the Georgia Crime Information Center to release a first offender's record of arrests, charges, or sentences for certain sexual offenses when the offender applies "for employment with a public school, private

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31. Compare SB 22 (SCS), 2003 Ga. Gen. Assem., with SB 22 (HCS), 2003 Ga. Gen. Assem.

32. See Butler Interview, *supra* note 23.

33. Compare SB 22 (SCS), 2003 Ga. Gen. Assem., with SB 22 (HCS), 2003 Ga. Gen. Assem.

34. See Butler Interview, *supra* note 23.

35. See Georgia House of Representatives Voting Record, SB 22 (Apr. 17, 2003); State of Georgia Final Composite Status Sheet, SB 22, Apr. 25, 2003.

36. Compare SB 22 (HCS), 2003 Ga. Gen. Assem., with SB 22 (HCSFA), 2003 Ga. Gen. Assem.

37. See Adelman Interview Two, *supra* note 28. Compare SB 22 (HCS), 2003 Ga. Gen. Assem., with SB 22 (HCSFA), 2003 Ga. Gen. Assem.

38. See State of Georgia Final Composite Status Sheet, SB 22, Apr. 25, 2003.

39. See 2003 Ga. Laws 843.

40. See 2003 Ga. Laws 840.

41. Compare 2000 Ga. Laws 1206, § 1, at 1206 (formerly found at O.C.G.A. § 35-3-34 (2001)), with O.C.G.A. § 35-4-34 (Supp. 2003); compare 2000 Ga. Laws 1206, § 2, at 1207 (formerly found at O.C.G.A. § 35-3-35 (2001)), with O.C.G.A. § 35-3-35 (Supp. 2003).

school, child welfare agency,” nursing home, personal care home, or applies for a position with any “person or entity that provides” healthcare, day care, or services to children, the elderly, the mentally ill or the mentally handicapped.<sup>42</sup>

Section 3A amends Code section 35-3-36 by adding language incorporating into the section the felonies, the misdemeanors, and the violations enumerated in Code subparagraph 35-3-33(a)(1)(A).<sup>43</sup>

Section 4 of the Act amends Code section 42-8-62 by adding female pronouns where appropriate.<sup>44</sup> It also adds language that excludes the registration requirements under the state sexual offender registry and any other exclusions required pursuant to Code section 42-8-63.1 from the exoneration of the defendant’s criminal conviction.<sup>45</sup>

Section 5 of the Act inserts a new Code section to disqualify for employment a person who has been discharged under article 3 of Chapter 8 in Title 42 if the person is applying for a position in a public school, private school, child welfare agency, nursing home, personal care home, or applies for a position with any person or entity providing healthcare, day care, or services to children, the elderly, the mentally ill or the mentally handicapped.<sup>46</sup>

The Act protects the most vulnerable people in society by providing relevant information to their care providers while preserving the utility of first offender status.<sup>47</sup> While the Act takes away anonymity of certain offenders, it leaves unaffected other benefits, such as “pleas to society and [to] the defendant.”<sup>48</sup>

42. See O.C.G.A. § 35-3-34.1 (Supp. 2003).

43. Compare 1973 Ga. Laws 1301, § 4, at 1304 (formerly found at O.C.G.A. § 35-4-36 (2001)), with O.C.G.A. § 35-3-36 (Supp. 2003).

44. Compare 1990 Ga. Laws 735, § 1, at 735-36 (formerly found at O.C.G.A. § 42-8-63 (2001)), with O.C.G.A. § 42-8-63 (Supp. 2003).

45. Compare 1990 Ga. Laws 735, § 1, at 735-36 (formerly found at O.C.G.A. § 42-8-63 (2001)), with O.C.G.A. § 42-8-63 (Supp. 2003).

46. See O.C.G.A. § 42-8-63.1 (Supp. 2003).

47. See Senate Audio, *supra* note 1 (remarks by Sen. Gloria Butler). First offender status provides a “second chance” to first time offenders. *Id.* One of the Act’s main concerns was with the victim. See Butler Interview, *supra* note 23. Being raped or molested can have lifelong repercussions. See *id.*; *Exempt Sex Offenders*, *supra* note 1, at A4.

48. See Adelman Interview, *supra* note 14.

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Moreover, the Act's scope is limited to information sought in connection with employment.<sup>49</sup>

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49. *See Senate Audio, supra* note 1.