

# SENATE BILL REPORT

## SB 5019

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As of January 18, 2012

**Title:** An act relating to privacy of nonconviction records.

**Brief Description:** Concerning the privacy of nonconviction records.

**Sponsors:** Senators Regala, Kline, Harper and Kohl-Welles.

**Brief History:**

**Committee Activity:** Human Services & Corrections: 1/13/11, 2/17/11 [DPS, w/oRec]; 1/12/12.

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### SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

**Majority Report:** That Substitute Senate Bill No. 5019 be substituted therefor, and the substitute bill do pass.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Harper and McAuliffe.

**Minority Report:** That it be referred without recommendation.

Signed by Senators Stevens, Ranking Minority Member; Baxter and Carrell.

**Staff:** Jennifer Strus (786-7316)

**Background:** When a criminal justice agency disseminates criminal history record information pertaining to an arrest, detention, indictment, information, or other formal criminal charges made after December 31, 1977, it must also include the disposition of the charge or charges. If the disposition of the charge or charges occurs within the ten days immediately preceding the dissemination of the information and has not yet been reported to the agency, or if the agency receives the dispositional information within a 72 hour period before it disseminates the information, the agency is not required to include the dispositional information.

Generally, conviction records may be disseminated without restriction. Criminal history record information pertaining to an incident that occurred within the last 12 months for which the person is still being processed may be disseminated unless it is in response to a background check request for the purposes of allowing the subject to have unsupervised access to vulnerable or disabled adults or children.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

A conviction record is defined as criminal history record information relating to an incident that has led to a conviction or other disposition adverse to the subject of the record.

Nonconviction data may be disseminated by a criminal justice agency in the following instances:

- when it is to another criminal justice agency or in connection with employment of the subject by a criminal justice or juvenile justice agency.
- in order to implement a statute, ordinance, executive order, or court rule decision or order that expressly refers to records of arrest, charges, or allegations of criminal conduct or other nonconviction data; and the statute ordinance, executive order, or court rule that authorizes or directs that the record be available or accessible for specific purposes.
- when it is to individuals and agencies under a contract with a criminal justice agency to provide services related to the administration of criminal justice. The contract must limit the use of the information to the purpose stated in the contract and ensure that the information will remain confidential consistent with state and federal law.
- when it is to individuals and agencies for the express purpose of research, evaluation, or statistical activities pursuant to a contract with the criminal justice agency. The contract must authorize access to nonconviction data; limit the use of that information which identifies a specific individual to research, evaluation, or stated purposes; and provide notice to the individual or agency receiving the information that the information cannot be further disseminated.

Nonconviction data consists of all criminal history record information relating to an incident that has not led to a conviction or other disposition adverse to the subject and for which proceedings are no longer actively pending.

The Public Disclosure Act (PDA) allows public access to all records related to the conduct of government subject to a list of narrow exemptions. One of these exemptions addresses law enforcement records. Officials may refuse to disclose investigative records if withholding the records is essential to effective law enforcement or the protection of any person's right to privacy.

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Substitute):** Nonconviction Data in Court Records. Except in the situations permitted under current law, a criminal justice agency may not disseminate nonconviction data unless the individual identified in the data has provided express written permission for the dissemination.

Nonconviction data also includes all criminal history record information relating to a conviction that has been vacated.

Conviction data does not include criminal history record information for a conviction that has been vacated.

Upon the request of the person who is the subject of the record, a record of exonerating disposition held by a court, judicial agency, or the Judicial Information System (JIS) must be

kept confidential by that court or agency. However, the record is to be available to court personnel, judicial officers, law enforcement, prosecuting attorneys, the individual identified in the records, and the attorney for that individual.

A record of exonerating disposition held by a court, other judicial agency, or JIS is considered nonconviction data if collected by a criminal justice agency other than a court. It does not include acquittals by reason of insanity or dismissals based upon the lack of competency. This record includes otherwise qualifying records that are part of court indices, records of public court proceedings, JIS, and including:

- a probable cause hearing in which the court found no probable cause;
- a charge that was resolved by the prosecutor's acceptance of a bail forfeiture; or
- a charge that was dismissed pursuant to a stipulated order of continuance.

Upon the motion of the person who is the subject of the record, a record of exonerating disposition held by a court, JIS, or other judicial agency must be kept confidential if it is proved that the record consists of an exonerating disposition, and continued public access to the record poses a risk of harm to the privacy, employment, housing, professional, safety and other essential or significant interests of the subject of the record. If the motion is granted, the proceedings in the case are to be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the event. A reasonable processing fee, not to exceed \$50 may be charged by the clerk of the court at the time the motion is filed unless the person is indigent. Courts and judicial agencies are immune from civil liability for negligent dissemination of records.

Courts and other criminal justice agencies cannot make information relating to the registration, filing of a petition for, or the issuance of an order for protection available on a website accessible by the public if:

- the publication would be likely to publicly reveal the identity or location of the party protected under the order;
- the request to issue an order of protection has been withdrawn; or
- after a hearing, the court has declined to issue an order for protection.

Courts and other criminal justice agencies may share court and law enforcement generated data contained in secure governmental registries on the Internet for protection order enforcement purposes or for oversight and accountability purposes.

A specific court order that incorporates the *Ishakawa* factors must be used by the court when entering an order to keep records confidential.

Nonconviction Data in Law Enforcement Investigative Records. Law enforcement investigative reports containing only nonconviction data may be made confidential when two years or more have elapsed since the report became nonconviction data as a result of the entry of a disposition favorable to the defendant or upon the passage of three years from the date of arrest or issuance of a citation or warrant, whichever is less, for an offense for which a conviction was not obtained. These provisions are not applicable if the defendant is a fugitive or the case is under active prosecution.

A law enforcement agency may deny a request to make law enforcement records containing only nonconviction data confidential if:

- the disposition was a deferred prosecution or similar diversion of the alleged offender;
- the individual who is subject of the record to be made confidential has been previously convicted of a felony or gross misdemeanor; or
- the individual who is the subject of the record to be made confidential has been arrested for or charged with another crime during the intervening period.

A denial by a law enforcement agency of the application to make records confidential is appealable to the superior court in the court in which the law enforcement agency is located. A law enforcement agency is not liable for failure to make a record confidential unless the agency is found to have acted in bad faith.

**Appropriation:** None.

**Fiscal Note:** Requested on January 11, 2012.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: There is quite a bit of nonconviction data that finds its way into court records and then is disseminated to the public. The folks whose records are disseminated are people who qualify for record deletion from the Washington State Police. Arrest data is as damaging as conviction data. There is no remedy for people to have the information removed from court records. An attorney has received lots of call from people who think their arrest data is private and then find out it has been disseminated and they are denied housing and employment. This bill is about people who are innocent and have not been found guilty. The language in the bill dealing with law enforcement records seems an attempt to nullify a recent Supreme Court decision. The bill prohibits protective order information from being posted on the internet. The federal Violence Against Women Act requires this statutory protection Washington is out of compliance, and this bill would bring Washington into compliance.

CON: The system does not work as the bill assumes it does. The court clerks are concerned about the cost of implementing the bill – assumes the fiscal impact of the bill will be about \$500,000. Also need to remember that nonconviction data is in the public domain through other states whose laws are different than Washington's laws.

**Persons Testifying:** PRO: Grace Huang, WA State Coalition Against Domestic Violence; Jennifer Smith, Aimee Sutton, Bob Cooper, WA Assn. of Criminal Defense Attorneys.

CON: James McMahan, WA Assn. of County Officials; Chester Baldwin, WA Apartment Assn.; Tony Branson, Manufactured Housing Communities of WA.