

SENATE BILL REPORT

SB 5019

As Reported by Senate Committee On:
Human Services & Corrections, February 17, 2011

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].

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 10 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 purposes of allowing the subject to have unsupervised access to vulnerable or disabled adults or children.

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 which 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:

- to another criminal justice agency or in connection with employment of the subject by a criminal justice or juvenile justice agency.
- 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.
- 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.
- 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 which has not led to a conviction or other disposition adverse to the subject and for which proceedings are no longer actively pending.

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

Summary of Bill (Recommended Substitute): 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 or judicial agency 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 is a record held by a court or judicial agency that would be 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 the following:

- otherwise qualifying records that are part of court indices and records of public court proceedings;
- 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.

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.

EFFECT OF CHANGES MADE BY HUMAN SERVICES & CORRECTIONS COMMITTEE (Recommended Substitute as Passed Committee): The majority of the provisions that amended RCW 10.97 were moved to a new chapter in Title 10 RCW. Includes a section on the dissemination of order for protection information. Includes the use of a specific court order that outlines the *Ishakawa* factors. Excludes from the definition of exonerating circumstances dismissals for lack of competency and acquittals by reason of insanity.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Proposed Substitute as Heard in Committee:

PRO: This bill will help citizens obtain employment and housing and lead productive lives rather than try to overcome hurdles and obstacles based upon stale information. Half of the cases in district and municipal courts are dismissed and 25 percent of the felonies in superior court are dismissed. Even after a case is dismissed, the permanent record still contains this arrest information. When RCW 10.97 was enacted, courts did not disseminate information like they do now and the Internet didn't exist. Records were much harder to obtain. The bill is not eliminating the record – it will still be available in the system for people who need it – judges, prosecutors, defense attorneys, clients. The bill also does not require new

technologies either and have worked with the clerk's association to find out how they currently keep confidential records confidential and have written the bill in such a way that the system would be used to keep this information confidential. An arrest 19 years ago with no conviction showed up on a credit report when the testifier agreed to co-sign a lease. Although his bank statements and financial information clearly qualified him to sign the lease, the landlord was concerned about the arrest on the record. It was also embarrassing to have to tell a colleague why he could not co-sign the lease. We support Section 5 of the original bill—which would have restricted the Internet publication of information regarding the registration, filing, or issuance of a protection order if publication would be likely to identify the person or location of the person subject to the protection order. Adding that language back in would bring Washington into compliance with the Violence Against Women Act – the state has been out of compliance with VAWA for the last four years.

CON: Concern lies with tying the bill to RCW 10.97 which was enacted in 1977 pursuant to a federal mandate to address rap sheet data, which is the reason that chapter excludes court data. We want to preserve the integrity of RCW 10.97 and rap sheet data. We have no quarrel with the policy of the bill but think it would be best served in a different place other than RCW 10.97. There is no mechanism in this bill to make information that is public nonpublic. Clerks of the court do not have a method short of a court order sealing a record to manually delete information from a public index. Court rules make indices public.

OTHER: The Board of Judicial Administration reviewed the bill and decided not to take a position on it yet and referred it to another committee to review. An internal group on IT issues met during the interim and the issue raised by this bill was one of the issues they considered. There was no consensus by the group on how to handle this issue. The proponents of the bill felt they did not get what they wanted from the IT group so they are here with this bill. From a fiscal perspective, the court system is built around the concept that court records are open records and this bill would close some. There is a probable fiscal impact of \$350,000 to \$400,000 to make the changes in the system required by this bill.

Persons Testifying: PRO: Kim Gordon, Washington Association of Criminal Defense Lawyers, Washington Defender Association; J.S., citizen.

CON: Craig Adams, Pierce County Sheriff, Clerk; Kevin Stock, Washington Association of County Clerks.

OTHER: Senator Don Benton; Mellani McAleenan, Board for Judicial Administration; Molly Lawrence, Legal Voice, Washington Coalition Against Domestic Violence.