

Senate Bill 288 - Prefile

By: Senator Anderson of the 43rd

A BILL TO BE ENTITLED
AN ACT

1 To amend Code Section 35-3-37 of the Official Code of Georgia Annotated, relating to
2 review of individual's criminal history record information, definitions, privacy
3 considerations, written application requesting review, and inspection, so as to provide for the
4 automatic restriction of certain criminal history record information of arrests when there has
5 been a final disposition other than a conviction or a certain time period and conditions are
6 met since a conviction; to provide for related matters; to repeal conflicting laws; and for
7 other purposes.

8 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

9 **SECTION 1.**

10 Code Section 35-3-37 of the Official Code of Georgia Annotated, relating to review of
11 individual's criminal history record information, definitions, privacy considerations, written
12 application requesting review, and inspection, is amended by revising subsections (h)
13 through (j) and (m) through (r) as follows:

14 "(h) Access to an individual's criminal history record information, including any
15 fingerprints or photographs of the individual taken in conjunction with the arrest, shall be
16 restricted by the center for the following types of dispositions:

17 (1) The charge was dismissed or nolle prossed or there was a disposition other than a
18 conviction for the charge ~~Prior to indictment, accusation, or other charging instrument:~~

19 ~~(A) The case was never referred for further prosecution to the proper prosecuting~~
20 ~~attorney by the arresting law enforcement agency and:~~

21 ~~(i) The offense against such individual is closed by the arresting law enforcement~~
22 ~~agency. It shall be the duty of the head of the arresting law enforcement agency to~~
23 ~~notify the center whenever a record is to be restricted pursuant to this division within~~
24 ~~30 days of such decision. A copy of the notice shall be sent to the accused and the~~
25 ~~accused's attorney, if any, by mailing the same by first-class mail within seven days~~
26 ~~of notifying the center; or~~

27 ~~(ii) The center does not receive notice from the arresting law enforcement agency that~~
 28 ~~the offense has been referred to the prosecuting attorney or transferred to another law~~
 29 ~~enforcement or prosecutorial agency of this state, any other state or a foreign nation,~~
 30 ~~or any political subdivision thereof for prosecution and the following period of time~~
 31 ~~has elapsed from the date of the arrest of such individual:~~

32 ~~(I) If the offense is a misdemeanor or a misdemeanor of a high and aggravated~~
 33 ~~nature, two years;~~

34 ~~(II) If the offense is a felony, other than a serious violent felony or a felony sexual~~
 35 ~~offense specified in Code Section 17-3-2.1 involving a victim under 16 years of age,~~
 36 ~~four years; or~~

37 ~~(III) If the offense is a serious violent felony or a felony sexual offense specified~~
 38 ~~in Code Section 17-3-2.1 involving a victim under 16 years of age, seven years.~~

39 ~~If the center receives notice of the filing of an indictment subsequent to the restriction~~
 40 ~~of a record pursuant to this division, the center shall make such record available in~~
 41 ~~accordance with Code Section 35-3-34 or 35-3-35. If the center does not receive~~
 42 ~~notice of a charging instrument within 30 days of the applicable time periods set forth~~
 43 ~~in this division, such record shall be restricted by the center for noncriminal justice~~
 44 ~~purposes and shall be considered sealed.~~

45 ~~(B) The case was referred to the prosecuting attorney but was later dismissed;~~

46 ~~(C) The grand jury returned two no bills; or~~

47 ~~(D) The grand jury returned one no bill and the applicable time period set forth in~~
 48 ~~division (ii) of subparagraph (A) of this paragraph has expired; and~~

49 ~~(2) After indictment or accusation:~~

50 ~~(A) Except as provided in subsection (i) of this Code section, all charges were~~
 51 ~~dismissed or nolle prossed;~~

52 ~~(B)(2) The individual was sentenced in accordance with the provisions of subsection (a)~~
 53 ~~or (c) of Code Section 16-13-2, and the individual successfully completed the terms and~~
 54 ~~conditions of his or her probation;~~

55 ~~(C)(3) The individual pleaded guilty to or was found guilty of a violation of~~
 56 ~~paragraph (2) or (3) of subsection (a) of Code Section 3-3-23 and was sentenced in~~
 57 ~~accordance with the provisions of subsection (c) of Code Section 3-3-23.1, and the~~
 58 ~~individual successfully completed the terms and conditions of his or her probation;~~

59 ~~(D)(4) The individual was convicted, but successfully completed a drug court treatment~~
 60 ~~program, mental health treatment program, or veterans treatment program pursuant to a~~
 61 ~~court order, the individual's case has been dismissed or nolle prossed; and he or she has~~
 62 ~~not been arrested during such program, excluding any arrest for a nonserious traffic~~
 63 ~~offense; or~~

64 ~~(E)(5) Ten years have elapsed since entry of the judgment of conviction and in such time~~
 65 ~~the individual has been free from conviction of any felony and completion of any court~~
 66 ~~ordered financial obligations of the sentence has occurred; or The individual was~~
 67 ~~acquitted of all of the charges by a judge or jury unless, within ten days of the verdict, the~~
 68 ~~prosecuting attorney demonstrates to the trial court through clear and convincing~~
 69 ~~evidence that the harm otherwise resulting to the individual is clearly outweighed by the~~
 70 ~~public interest in the criminal history record information being publicly available because~~
 71 ~~either:~~

72 ~~(i) The prosecuting attorney was barred from introducing material evidence against~~
 73 ~~the individual on legal grounds, including, without limitation, the granting of a motion~~
 74 ~~to suppress or motion in limine; or~~
 75 ~~(ii) The individual has been formally charged with the same or similar offense within~~
 76 ~~the previous five years.~~

77 ~~(6) When an individual was convicted of an offense and was sentenced to punishment~~
 78 ~~other than the death penalty, but such conviction was vacated by the trial court or~~
 79 ~~reversed by an appellate court or other postconviction court, the decision of which has~~
 80 ~~become final by the completion of the appellate process.~~

81 ~~(i) Reserved. After the filing of an indictment or accusation, an individual's criminal~~
 82 ~~history record information shall not be restricted if:~~

83 ~~(1) The charges were nolle prossed or otherwise dismissed because:~~

84 ~~(A) Of a plea agreement resulting in a conviction of the individual for an offense~~
 85 ~~arising out of the same underlying transaction or occurrence as the conviction;~~

86 ~~(B) The prosecuting attorney was barred from introducing material evidence against~~
 87 ~~the individual on legal grounds, including, without limitation, the granting of a motion~~
 88 ~~to suppress or motion in limine;~~

89 ~~(C) The conduct which resulted in the arrest of the individual was part of a pattern of~~
 90 ~~criminal activity which was prosecuted in another court of the state or a foreign nation;~~
 91 ~~or~~

92 ~~(D) The individual had diplomatic, consular, or similar immunity or inviolability from~~
 93 ~~arrest or prosecution;~~

94 ~~(2) The charges were tried and some but not all of the charges resulted in an acquittal;~~
 95 ~~or~~

96 ~~(3) The individual was acquitted of all charges but it is later determined that the acquittal~~
 97 ~~was the result of jury tampering or judicial misconduct.~~

98 ~~(j)(1) When an individual had a felony charge dismissed or nolle prossed or was found~~
 99 ~~not guilty of such charge but was convicted of a misdemeanor offense that was not a~~
 100 ~~lesser included offense of the felony charge, such individual may petition the court in~~

101 ~~which he or she was accused or convicted, as applicable, or, if such charge was~~
102 ~~dismissed, the superior court in the county where the arrest occurred to restrict access to~~
103 ~~criminal history record information for the felony charge within four years of the arrest.~~
104 ~~Such court shall maintain jurisdiction over the case for this limited purpose and duration.~~
105 ~~Such petition shall be served on the arresting law enforcement agency and the~~
106 ~~prosecuting attorney. If a hearing is requested, such hearing shall be held within 90 days~~
107 ~~of the filing of the petition. The court shall hear evidence and shall grant an order~~
108 ~~restricting such criminal history record information if the court determines that the~~
109 ~~misdemeanor conviction was not a lesser included offense of the felony charge and that~~
110 ~~the harm otherwise resulting to the individual clearly outweighs the public interest in the~~
111 ~~criminal history record information being publicly available.~~

112 ~~(2) When an individual was convicted of an offense and was sentenced to punishment~~
113 ~~other than the death penalty, but such conviction was vacated by the trial court or~~
114 ~~reversed by an appellate court or other post-conviction court, the decision of which has~~
115 ~~become final by the completion of the appellate process, and the prosecuting attorney has~~
116 ~~not retried the case within two years of the date the order vacating or reversing the~~
117 ~~conviction became final, such individual may petition the court in which he or she was~~
118 ~~convicted to restrict access to criminal history record information for such offense. Such~~
119 ~~court shall maintain jurisdiction over the case for this limited purpose and duration. Such~~
120 ~~petition shall be served on the prosecuting attorney. If a hearing is requested, such~~
121 ~~hearing shall be held within 90 days of the filing of the petition. The court shall hear~~
122 ~~evidence and shall determine whether granting an order restricting such criminal history~~
123 ~~record information is appropriate, giving due consideration to the reason the judgment~~
124 ~~was reversed or vacated, the reason the prosecuting attorney has not retried the case, and~~
125 ~~the public's interest in the criminal history record information being publicly available.~~

126 ~~(3) When an individual's case has remained on the dead docket for more than 12 months,~~
127 ~~such individual may petition the court in which the case is pending to restrict access to~~
128 ~~criminal history record information for such offense. Such petition shall be served on the~~
129 ~~prosecuting attorney. If a hearing is requested, such hearing shall be held within 90 days~~
130 ~~of the filing of the petition. The court shall hear evidence and shall determine whether~~
131 ~~granting an order restricting such criminal history record information is appropriate,~~
132 ~~giving due consideration to the reason the case was placed on the dead docket; provided,~~
133 ~~however, that the court shall not grant such motion if an active warrant is pending for~~
134 ~~such individual.~~

135 ~~(4)(j)(1)(A)~~ When an individual was convicted in this state of a misdemeanor or a
136 series of misdemeanors arising from a single incident, and at the time of such
137 conviction such individual was a youthful offender, provided that such individual

138 successfully completed the terms of his or her sentence and, since completing the terms
 139 of his or her sentence, has not been arrested for at least five years, excluding any arrest
 140 for a nonserious traffic offense, and provided, further, that he or she was not convicted
 141 in this state of a misdemeanor violation or under any other state's law with similar
 142 provisions of one or more of the offenses listed in subparagraph (B) of this paragraph,
 143 he or she may petition the court in which the conviction occurred to restrict access to
 144 criminal history record information. Such court shall maintain jurisdiction over the
 145 case for this limited purpose and duration. Such petition shall be served on the
 146 prosecuting attorney. If a hearing is requested, such hearing shall be held within 90
 147 days of the filing of the petition. The court shall hear evidence and shall determine
 148 whether granting an order restricting such criminal history record information is
 149 appropriate, giving due consideration to the individual's conduct and the public's
 150 interest in the criminal history record information being publicly available.

151 (B) Record restriction shall not be appropriate if the individual was convicted of:

- 152 (i) Child molestation in violation of Code Section 16-6-4;
- 153 (ii) Enticing a child for indecent purposes in violation of Code Section 16-6-5;
- 154 (iii) Improper sexual contact by employee or agent in violation of Code
 155 Section 16-6-5.1;
- 156 (iv) Keeping a place of prostitution in violation of Code Section 16-6-10;
- 157 (v) Pimping in violation of Code Section 16-6-11;
- 158 ~~(vi) Pandering by compulsion in violation of Code Section 16-6-14;~~
- 159 ~~(vii)~~(vi) Masturbation for hire in violation of Code Section 16-6-16;
- 160 ~~(viii)~~(vii) Giving massages in a place used for lewdness, prostitution, assignation, or
 161 masturbation for hire in violation of Code Section 16-6-17;
- 162 ~~(ix)~~(viii) Sexual battery in violation of Code Section 16-6-22.1;
- 163 ~~(x)~~(ix) Any offense related to minors generally in violation of Part 2 of Article 3 of
 164 Chapter 12 of Title 16;
- 165 ~~(xi)~~(x) Theft in violation of Chapter 8 of Title 16; provided, however, that such
 166 prohibition shall not apply to a misdemeanor conviction of shoplifting or refund fraud
 167 in violation of Code Section 16-8-14 or 16-8-14.1, as applicable; or
- 168 ~~(xii)~~(xi) Any serious traffic offense in violation of Article 15 of Chapter 6 of
 169 Title 40; and

170 ~~(5)~~(2) When an individual was arrested on a fugitive from justice warrant as provided
 171 in Code Section 17-13-4, such individual may petition the superior court in the county
 172 where the arrest occurred to restrict access to criminal history record information for such
 173 warrant. Such court shall maintain jurisdiction over the case for this limited purpose and
 174 duration. Such petition shall be served on the arresting law enforcement agency and the

175 prosecuting attorney. If a hearing is requested, such hearing shall be held within 90 days
 176 of the filing of the petition. The court shall hear evidence and shall grant an order
 177 restricting such criminal history record information if the court determines that
 178 circumstances warrant restriction and that the harm otherwise resulting to the individual
 179 clearly outweighs the public interest in the criminal history record information being
 180 publicly available."

181 "(m)(1) For criminal history record information maintained by the clerk of court, an
 182 individual who has a record restricted pursuant to this Code section may petition the court
 183 with original jurisdiction over the charges in the county where the clerk of court is
 184 located for an order to seal all criminal history record information maintained by the clerk
 185 of court for such individual's charge. Notice of such petition shall be sent to the clerk of
 186 court and the prosecuting attorney. A notice sent by registered or certified mail or
 187 statutory overnight delivery shall be sufficient notice.

188 (2) The court shall order all criminal history record information in the custody of the
 189 clerk of court, including within any index, to be restricted and unavailable to the public
 190 if the court finds by a preponderance of the evidence that:

191 ~~(A) The the criminal history record information has been restricted pursuant to this~~
 192 ~~Code section; and~~

193 ~~(B) The harm otherwise resulting to the privacy of the individual clearly outweighs the~~
 194 ~~public interest in the criminal history record information being publicly available.~~

195 (3) Within 60 days of the court's order, the clerk of court shall cause every document,
 196 physical or electronic, in its custody, possession, or control to be restricted.

197 (4) The person who is the subject of such sealed criminal history record information may
 198 petition the court for inspection of the criminal history record information included in the
 199 court order. Such information shall always be available for inspection, copying, and use
 200 by criminal justice agencies and the Judicial Qualifications Commission.

201 ~~(n)(1) Except as provided in subsection (j) of this Code section, as to arrests occurring~~
 202 ~~before July 1, 2013, an individual may, in writing, request the arresting law enforcement~~
 203 ~~agency to restrict the criminal history record information of an arrest, including any~~
 204 ~~fingerprints or photographs taken in conjunction with such arrest. Reasonable fees shall~~
 205 ~~be charged by the arresting law enforcement agency and the center for the actual costs~~
 206 ~~of restricting such records, provided that such fee shall not exceed \$50.00.~~

207 ~~(2) Within 30 days of receipt of such written request, the arresting law enforcement~~
 208 ~~agency shall provide a copy of the request to the prosecuting attorney. Within 90 days~~
 209 ~~of receiving the request, the prosecuting attorney shall review the request to determine~~
 210 ~~if the request meets the criteria set forth in subsection (h) of this Code section for record~~
 211 ~~restriction, and the prosecuting attorney shall notify the arresting law enforcement agency~~

212 of his or her decision within such 90 day period. If the prosecuting attorney denies such
 213 request, he or she shall cite with specificity the reason for such denial in writing and
 214 attach to such denial any relevant documentation in his or her possession used to make
 215 such denial. There shall be a presumption that the prosecuting attorney does not object
 216 to the request to restrict the criminal history record information if he or she fails to
 217 respond to the request for a determination within the 90 day period set forth in this
 218 paragraph. The arresting law enforcement agency shall inform the individual of the
 219 prosecuting attorney's decision, and, if record restriction is approved by the prosecuting
 220 attorney, the arresting law enforcement agency shall restrict the criminal history record
 221 information within 30 days of receipt of the prosecuting attorney's decision.

222 (3) If a prosecuting attorney declines an individual's request to restrict access to criminal
 223 history record information, such individual may file a civil action in the superior court
 224 where the entity is located. A copy of the civil action shall be served on the entity and
 225 prosecuting attorney for the jurisdiction where the civil action is filed, and they may
 226 become parties to the action. A decision of the prosecuting attorney to decline a request
 227 to restrict access to criminal history record information shall be upheld unless the
 228 individual demonstrates by clear and convincing evidence that the arrest is eligible for
 229 record restriction pursuant to subsection (h) of this Code section and the harm otherwise
 230 resulting to the privacy of the individual clearly outweighs the public interest in the
 231 criminal history record information being publicly available.

232 (4) To restrict criminal history record information at the center, an individual shall
 233 submit a prosecuting attorney's approved record restriction request or a court order issued
 234 pursuant to paragraph (3) of this subsection to the center. The center shall restrict access
 235 to such criminal history record information within 30 days of receiving such information.

236 ~~(p)~~(n) Nothing in this Code section shall give rise to any right which may be asserted as
 237 a defense to a criminal prosecution or serve as the basis for any motion that may be filed
 238 in any criminal proceeding. The modification, correction, supplementation, amendment,
 239 or restriction of criminal history record information shall not abate or serve as the basis for
 240 the reversal of any criminal conviction.

241 ~~(p)~~(o) Any application to the center for access to or restriction of criminal history record
 242 information made pursuant to this Code section shall be made in writing on a form
 243 approved by the center. The center shall be authorized to develop and publish such
 244 procedures as may be necessary to carry out the provisions of this Code section. In
 245 adopting such procedures and forms, the provisions of Chapter 13 of Title 50, the 'Georgia
 246 Administrative Procedure Act,' shall not apply.

247 ~~(q)~~(p) It shall be the duty of the entity to take such action as may be reasonable to prevent
248 disclosure of information to the public which would identify any individual whose criminal
249 history record information is restricted pursuant to this Code section.

250 ~~(r)~~(q) If the center has notified a firearms dealer that an individual is prohibited from
251 purchasing or possessing a handgun pursuant to Part 5 of Article 4 of Chapter 11 of
252 Title 16 and if the prohibition is the result of such individual being involuntarily
253 hospitalized within the immediately preceding five years, upon such individual or his or
254 her attorney making an application to inspect his or her records, the center shall provide the
255 record of involuntary hospitalization and also inform the individual or attorney of his or her
256 right to a hearing before the judge of the probate court or superior court relative to such
257 individual's eligibility to possess or transport a handgun."

258

SECTION 2.

259 All laws and parts of laws in conflict with this Act are repealed.