



State of Vermont
Department of Public Safety
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To: Vermont House - Committee on Judiciary
From: Department of Public Safety
Re: H. 534 - An act relating to sealing criminal history records (Draft 2.5)
Date: Updated January 27, 2022

The Department of Public Safety appreciates the work that legislators and stakeholders have put into H. 534. As we indicated during the last session, we believe a simplified system that unifies sealing and expungement is preferable to a two-track system. We agree with the underlying premise of this legislation to limit the collateral consequences of public access to criminal history records for employment, housing, and other purposes. We have serious safety concerns regarding the elimination of access to records from criminal justice purposes and offer following detail and suggestions.

H. 534 (Draft 2.5) proposes to eliminate the provision in 13 V.S.A. § 7607(c)(2) that permits criminal justice agencies to use sealed criminal history records for criminal justice purposes. The Vermont Crime Information Center (VCIC) has noted that, under current practice, a sealed offense is indicated in an annotation on an individual's criminal history record of arrests and prosecutions (i.e., a "rap sheet") pursuant to § 7607(c)(2). Eliminating § 7607(c)(2) would end this practice because the sealed record could no longer be used for criminal justice purposes. Instead, the sealed offense would be removed from the criminal history record associated with a particular individual. Criminal history records are currently used by law enforcement for various purposes, including use in the field to assess an individual's involvement with the criminal justice system, as well as for background checks to determine an individual's eligibility to possess a firearm or access a secure facility. These records are not generally publicly available.

Removing a sealed record from a criminal history record will impact these uses. For example, it is VCIC's understanding that removing a felony offense that disqualifies an individual from possessing a firearm from their criminal history record would have the effect of restoring their ability to obtain a firearm. The Department believes this would be an unintended consequence of eliminating § 7607(c)(2) and it recommends maintaining that provision for this and related purposes.

Additionally, law enforcement officers and agencies have access to dispatcher notes, incident narratives, and other information that document an individual's contact with the criminal justice system in computer-aided dispatch and record management systems (CAD/RMS). These case files, notes, narratives, and other information generally fall under the broad definition of a "criminal history record" in 13 V.S.A. § 7601. Once a sealing order is received, current practice is to "partition" this information in the CAD/RMS so only sworn law enforcement personnel can view it pursuant to § 7607(c)(2). Eliminating § 7607(c)(2) would end this practice. Instead, such records would be disidentified from an individual's name in the CAD/RMS and law

enforcement officers would no longer be able to view this information as it relates to a particular individual. This creates a number of serious public and officer safety concerns, and impairs the ability to investigate and solve serious crimes.

Law enforcement officers access CAD/RMS information that documents an individual's contact with the criminal justice system for several reasons, including:

1. **Officer and community safety.** The underlying information in the CAD/RMS relating to a person's prior conduct, law enforcement's response to that conduct, the circumstances of an encounter, the presence of weapons or dangerous animals, and other related information informs officers of the potential risks when responding to incidents and the potential ways to mitigate those risks. Under H. 534, officers would no longer have access to this information if it were connected to a sealed offense, including convictions for offenses like simple assault and assault of a protected professional,¹ or any dismissed offense sealed under § 7603. Dismissed offenses under § 7603, which H. 534 leaves unchanged, are not limited to qualifying offenses and are perhaps the largest pool of cases containing relevant officer and community safety information that can result in sealing. Limiting access to the underlying information described above will hamper officers' situational awareness and evaluation of risk in the field and will jeopardize officer and community safety.
2. **Identifying alternative response options.** Officers have been trained to consider all relevant information, including historical contact with law enforcement in a CAD/RMS, regarding a person's history of mental impairment and other relevant considerations when determining the scope and manner of a law enforcement response to an incident. Removing access to the underlying information in sealed cases will hamper officers' ability to take this information into account in determining the appropriate response to an incident.
3. **Legitimate investigative purposes.** Major crime and cold case investigations rely on historical information regarding a person's pattern of behavior, modus operandi, interpersonal connections, and other relevant information contained in a CAD/RMS to investigate crimes and identify suspects. Indeed, it is often fragments of information that are woven together in major cases to both identify suspects and to aid in prosecution of significant violent and serious crimes. Removing access to the underlying information in sealed cases will hamper these legitimate law enforcement investigations and by extension, impact public safety.

For these reasons, the Department strenuously recommends maintaining law enforcement access to underlying information in a CAD/RMS relating to sealed criminal offenses. There are two primary ways to achieve this goal: (1) exclude underlying information in a CAD/RMS from the

¹ 13 V.S.A. § 1028(a)(1) (Assault of a Protected Professional) is a misdemeanor for the first offense and it is not a listed crime. Similarly, § 1023(a) (Simple Assault) is a non-listed misdemeanor. Accordingly, they are qualifying crimes subject to sealing under H. 534.

definition of criminal history records in § 7601(2), or (2) maintain the existing provision in § 7607(c)(2).

Concerns have been raised regarding the potential for CAD/RMS information to be used in a manner that escalates the potential for violence or other negative outcomes during an interaction, instead of supporting a deescalated or otherwise appropriate response. The Department's view is that more information improves outcomes and reduces errors if officers are trained well on how to appropriately use that information. In other words, these concerns have more to do with training and practice regarding how information is used in the field rather than access to the information itself. The Department welcomes the opportunity to work with the Legislature and stakeholders to invest in achieving the best outcome possible, including identify areas for greater State investment in such training as deemed necessary.

Finally, the Department recommends clarifying the specific legal mechanism to unseal underlying records when records are sealed under Chapter 230 of Title 13. Currently, § 7607(c)(1) only provides for use of sealed records for litigation purposes by entities that have existing possession of them, and § 7607(e)(3) only permits access to the sealing order—not the underlying documents—to the person who is the subject of the case. Access to some sealed records is generally provided in Vermont Rule for Public Access to Court Records 9(c), but it is unclear whether this mechanism applies to court records sealed under Chapter 230 in light of the applicability standard in Rule 9(d).²

It would be appropriate in certain circumstances for the person who is the subject of the case to be able to petition to unseal and gain access to his or her underlying records (to the extent that he or she no longer has possession of them) to demonstrate as needed a more complete picture of the circumstances of the charge and disposition of the case. The same consideration applies to parties who no longer possess sealed records or never accessed such records when they were public but nonetheless have a legitimate need to access and use such records for litigation purposes or a claim arising out of the same incident or occurrence. For this reason, the Department recommends clarifying the legal mechanism to unseal records.

² Chapter 230 of Title 13 arguably does not provide for judicial discretion to *allow* access to sealed criminal history records, in which case Rule 9 may not apply to such records. See Vt. R. Pub. Acc. Ct. Rec. 9(d) (“Applicability. If a statute governs the right of public access and does not provide for judicial discretion to allow or prevent public access to the record, this rule does not apply.”).