

ARREST RECORD/BIOMETRIC DATA EXPUNCTION

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House Bill 4536 as enacted
Public Act 65 of 2018

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House Bill 4537 as enacted
Public Act 66 of 2018

House Bill 4538 as enacted
Public Act 67 of 2018

Sponsor: Rep. Peter Lucido
House Committee: Law and Justice
Senate Committee: Judiciary
Complete to 4-1-19

BRIEF SUMMARY: House Bills 4536 and 4538 amend different acts to require the expunction or destruction of an individual's arrest record and biometric data if the charge or charges are dismissed before a trial. House Bill 4537 amends a different act to establish policy and rules regarding the expunction or destruction of data in criminal justice information systems. The bills took effect June 6, 2018.

FISCAL IMPACT: House Bills 4536 and 4538 would have an indeterminate fiscal impact on the judiciary and local court funding units and would likely create minor administrative costs for the Department of State Police (MSP) and local law enforcement agencies. (See *Fiscal Information*, below, for a detailed discussion.)

THE APPARENT PROBLEM:

Innocent people are sometimes arrested. It may be a result of another person making a false allegation against someone. Or being misidentified as a suspect. Or being near an incident and swept up with other suspects. Once an investigation begins, and it becomes clear that a person is innocent or that there is no evidence linking him or her to the commission of a crime, charges are typically dropped. However, the person may still have an arrest record on his or her record. Even though the false allegation did not lead to a conviction, the information about the arrest stays on the person's nonpublic record kept by law enforcement, and his or her fingerprints, DNA, and other biometric data may be kept as well. For some people, a criminal history of an arrest can prevent employment in certain fields.

A question of fairness has been raised as to why a record of the arrest would remain on an innocent person's criminal record. To some, the answer lies in amending the law so that, under certain circumstances, even the nonpublic record of an arrest would be erased from a person's criminal record.

THE CONTENT OF THE BILLS:

House Bill 4536 adds a new section to the Code of Criminal Procedure, and **House Bill 4538** amends 1925 PA 289, which requires MSP to establish and maintain a fingerprint identification and criminal history records division. The new provisions specify that *if* an individual is arrested for any crime, *and* the charge or charges are dismissed before trial, *both* of the following apply:

- The arrest record must be removed from the Internet Criminal History Access Tool (ICHAT).
- For cases in which the order of dismissal was entered after June 12, 2018 (the bill's effective date), **and** for which (1) the prosecutor of the case agrees at any time after the case is dismissed **or** (2) the prosecutor or judge of the court in which the case had been filed does not object within 60 days from the date an order of dismissal is entered, all of the following apply:
 - The arrest record, all ***biometric data***, and fingerprints must be expunged, destroyed, or both, as appropriate.
 - Any entry concerning the charge must be removed from the Law Enforcement Information Network (LEIN).
 - Unless a DNA sample or profile, or both, is allowed or required to be retained by MSP under section 6 of the DNA Profiling System Act, the sample and/or profile obtained from the individual must be expunged or destroyed. (This provision applies only under HB 4536.)

Biometric data is defined under 1925 PA 289 to mean all of the following:

- Fingerprint images recorded in a manner prescribed by MSP.
- Palm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by MSP.
- Digital images recorded during the arrest or booking process, including a full-face capture, left and right profile, and scars, marks, and tattoos, if the arresting law enforcement agency has the electronic capability to record the images in a manner prescribed by MSP.
- All descriptive data associated with identifying marks, scars, amputations, and tattoos.

Under the bills, MSP is required to comply with the requirements described above upon receipt of an appropriate order issued by the district or circuit court.

MCL 764.26a (HB 4536)

MCL 28.243 (HB 4538)

House Bill 4537 amends the C.J.I.S. Policy Council Act. Under the bill, the Criminal Justice Information Policy Council must establish policy and promulgate rules concerning the expunction or destruction, or both, of information and data in criminal justice information systems as required under the provisions enacted by House Bill 4536. Information systems included would be LEIN, the Automated Fingerprint Information

System (AFIS), and other information systems related to criminal justice or law enforcement.

MCL 28.214

FISCAL INFORMATION:

House Bills 4536 and 4538 would have an indeterminate fiscal impact on the judiciary and local court funding units. The fiscal impact would depend on how provisions of the bill affected court caseloads and related administrative costs.

House Bills 4536 to 4538 would likely create minor administrative costs for MSP and local law enforcement agencies. The level of the cost increase would depend on the volume of cases in which charges are dismissed before trial. Costs would be incurred for clearing the arrest record from ICHAT, clearing biometric data from databases such as AFIS, clearing entries from LEIN, and destroying applicable DNA samples and profiles. It is not entirely clear how increased costs would be supported; however, MSP could require a fee for the services through the promulgation of administrative rules, though it is unclear whether MSP would pursue this option.

ARGUMENTS:

For:

Cases are dropped and charges dismissed for a variety of reasons, whether a complaining witness recants an allegation or the person is cleared by an ensuing investigation. However, even if the charges are dropped by the prosecutor and the case dismissed by the court, the accused now has a permanent smear on his or her nonpublic criminal history record—an arrest. Having an arrest appear on a criminal history check may block employment in certain professions or have other repercussions. Further, even though the person was never convicted of a crime, his or her fingerprints and biometric data may also remain in law enforcement databases along with those who really did commit crimes. Reportedly, there is no current mechanism in law for the biometric data to be destroyed under these circumstances.

The bill package would provide relief to a person caught in such a scenario. The legislation would only be triggered if the charges were dismissed before a trial began. The provisions simply mean that if all the elements are satisfied, a person whose case was dismissed could have the arrest wiped from his or her record—both public and nonpublic records—and all the biometric data in law enforcement databases destroyed. Moreover, the bills' provisions are *prospective*, meaning that this remedy will apply to arrests that occur after the legislation is enacted into law.

Further, the legislation preserves discretion for the prosecutor or the judge involved in the case to object to the arrest record's being removed from the nonpublic record system and/or the destruction of the biometric data. This is important for certain serious crimes and crimes that tend to be repetitive, such as stalking, domestic violence, and sexual assault, or even

witness intimidation. Witness intimidation is a serious problem in some areas of the state, and getting persons to report crimes and provide evidence in the form of testimony is already a challenge. However, in all cases, a person's arrest information would have to be removed from ICHAT, the public criminal history tool used by many employers to screen job applicants. To supporters, the proposal rights a wrong made against an innocent person and enables the person to have his or her reputation back, unsullied.

Against:

According to information available on the internet from the State Bar of Michigan and other law-related sites, a public criminal record will not show an arrest if the charges were dropped and the case was dismissed. If it does, the State Bar recommends that a person file a Motion for Return of Fingerprints to get the arrest removed from the record. For a copy of the form, a person should contact the court in which he or she was prosecuted or download a form from <http://www.michiganlegalthelp.org>. For cases not subject to the bills' provisions, the arrest will still show up on the nonpublic record kept for law enforcement purposes. Such records can be important in certain circumstances. For example, multiple arrests for similar crimes may show a pattern of behavior even if insufficient evidence prevented a case from going forward.

Further, the bills do not affect the ability of potential employers to ask about felony arrests even if the arrest did not lead to a conviction or the charges were dismissed.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.