

ARREST RECORD/BIOMETRIC DATA

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House Bills 4536-4538 as reported from committee

Sponsor: Rep. Peter Lucido

Committee: Law and Justice

Complete to 10-31-17

Analysis available at
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BRIEF SUMMARY: House Bills 4536 and 4538 would amend various acts to require the expunction or destruction of an individual's arrest card and biometric data if the complaining witness recanted his or her testimony and the charge was dismissed prior to a trial. House Bill 4537 would amend a different act to establish policy and rules regarding the expunction or destruction of data in criminal justice information systems.

The bills are tie-barred to each other, meaning that unless all of the bills were enacted, none will take effect. All of the bills would take effect 90 days after enactment.

FISCAL IMPACT: HBs 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 4536-4538 would create minor administrative costs for the Department of State Police and local law enforcement agencies, which would be dependent upon the extent to which the recantation of official, pre-trial statements to law enforcement occurs. These costs would include the processing of expungement requests and the removal of the records from various state and local law enforcement systems, such as the Law Enforcement Information Network and the Automated Fingerprint Identification System. While these bills do not outline a method of recouping these administrative costs, the Department would have the authority to require a fee for the service through the promulgation of administrative rules, though it is not certain that the Department will choose to do so.

THE APPARENT PROBLEM:

Sometimes, an individual falsely accuses another person of committing a crime against him or her and the person accused is arrested. If the individual later recants the story before a trial begins and the charges against the other person are dropped, often nothing happens to the individual, but the person against whom the false accusations were lodged walks away with an arrest 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. Why should someone's false report be allowed to tarnish the reputation of another, with the potential to negatively impact that person's

future? 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 would add a new section to Chapter IV of the Code of Criminal Procedure (proposed MCL 764.26a) and **House Bill 4538** would amend Public Act 289 of 1925, which requires the Department of State Police to establish and maintain a fingerprint identification and criminal history records division (MCL 28.243). The new provisions would specify that *if* an individual were arrested for any crime, *and* the complaining witness—before a trial is held—recanted his or her statement, affidavit, or testimony alleging that the individual had committed 1 or more offenses against him or her, *and* the charge were dismissed before trial, both of the following would apply:

- The arrest record, all biometric data, fingerprints, and DNA sample or profile, and statements obtained from the individual must be expunged, destroyed, or both, as appropriate. (HB 4538 does not contain a reference to a DNA sample or profile.)
- Any entry concerning the charge and the individual must be removed from the Law Enforcement Information Network (LEIN).

Under **House Bill 4536**, the requirements described above would be satisfied upon the issuance of an appropriate order of the district or circuit court. Under **House Bill 4538**, the Department of State Police would be required to comply with the requirements described above upon receipt of an appropriate order issued by the district or circuit court.

("Biometric data" is defined under Public Act 289 of 1925 to mean all of the following:

- Fingerprint images recorded in a manner prescribed by the department.
- Palm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by the department.
- 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 the department.
- All descriptive data associated with identifying marks, scars, amputations, and tattoos.)

House Bill 4537 would amend the C.J.I.S. Policy Council Act (MCL 28.214). Under the bill, the Criminal Justice Information Policy Council would be required to 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 provision proposed by House Bill 4536. Information systems included would be the Law Enforcement Information Network (LEIN), the Automated Fingerprint Information System (AFIS), and other information systems related to criminal justice or law enforcement.

ARGUMENTS:

For:

As mentioned earlier, sometimes one person falsely accuses another of a crime only to recant the allegation before the trial starts. 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 is narrowly crafted and would only be triggered if the person who made the complaint to the police recanted his or her statement, affidavit, or testimony and the charges were dismissed before a trial began. If there was other evidence to support the case going forward, it is unlikely charges would be dropped just because a witness recanted. Further, the bill package would have no bearing on whether a case was dismissed or not. The provisions simply mean that if all the elements are satisfied, a person whose case was dismissed after the complaining witness recanted could have the arrest wiped from his or her record 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. To supporters, the proposal rights a wrong made against an innocent person and enables the person to have his or her reputation back, unscathed.

Against:

According to information available on the Internet from the State Bar of Michigan and other legal sites, a public criminal record will not show an arrest if the charges were dropped and the case 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.michiganlegalhelp.org>. 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, even if the bill package were enacted, potential employers are allowed to ask about felony arrests even if they did not lead to a conviction or the charges were dismissed. The bills would not change this.

Against:

The bill package wouldn't just clear arrests from a person's public record if the main witness recanted his or her testimony, it would also erase it from the nonpublic law enforcement databases. This could be a dangerous precedent, especially in the case of

domestic violence, which is known to be a crime of repetition. Advocates who provide services to victims of domestic violence voiced a concern that the bill package would have the unintended consequence of acting as an incentive for batterers to threaten and coerce their victims to recant just to clear arrests that do not lead to convictions from their police records—thus creating a misleading picture of the batterer’s character and conduct. Moreover, 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. Perhaps the proposal should undergo more scrutiny to determine potential impacts to public safety.

POSITIONS:

The ACLU of Michigan indicated support for the bills. (10-17-17)

A representative of the Michigan Coalition to End Domestic and Sexual Violence testified in opposition to the bills. (10-17-17)

The Michigan Domestic and Sexual Violence Prevention and Treatment Board indicated opposition to the bills. (10-17-17)

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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.