

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1224

2007 HOUSE JUDICIARY

HB 1224

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1224

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/16/07

Recorder Job Number: 1211

Committee Clerk Signature

A. Penrose

Minutes:

Chairman DeKrey: We will open the hearing on HB 1224.

Rep. Klemin: I am a sponsor of this bill and explained the bill. I was asked to introduce this bill by Judge Wefald on behalf of the district judges. This is the bill I mentioned this morning in the hearing on HB 1197 that contains a different amendment to the DNA law, section 3, page 2 of this bill. However, this bill amends that section in a different place and different respect. I don't believe there is any conflict between this bill and HB 1197. They both amend this section but they do it in different places.

Judge Bob Wefald: I support this bill (see attached testimony). The fact that HB 1197 is also amending this one section dealing with DNA, I ran that by the AG and if you take a look at it, the first part of subsection 3 of HB 1224 changes that to seal the record. However, if you look at the rest of that in section 12.4, it leaves in place the current language that the laboratory shall expunge all identifiable information in the database pertaining to the person and destroy all samples from the person upon receipt of a certified order. I ran that by AG, and asked if they wanted this cleaned up as well, and I've got a memo back that said absolutely not, this is in compliance with a federal rule, but it's absolutely not a problem for you to amend this bill the way it is. Basically, we're dealing with federal law when they maintain the DNA

database. I want nothing to do with writing any such rule, and I think the rational thing is to simply seal the record and then when the state crime lab gets an order that a record has been sealed, they will then physically get rid of as much as they can; the sample and whatever records they can.

Rep. Koppelman: I understand what you are talking about here, in regard to the practical inability to expunge a record in the digital age. If there a difference legally. In other words, you mentioned that a sealed record could be opened with a court order.

Judge Bob Wefald: Right.

Rep. Koppelman: I assume an expunged record could not, on the assumption that it doesn't exist.

Judge Bob Wefald: That's correct. The idea that expunged records that you take the paper copy and shred it up and everybody forgets that you ever heard about it; erase all entries in the journal, etc. Unfortunately, even in the paper record you're not going to be able to do that. We really have to have a record of the order expunging it. So we have to say so and so's conviction for marijuana is hereby expunged. We have to have a record. If we don't have an order, then someone could say that they'll just expunge this record here and no one will know the difference. I think the idea behind expungement is to help people out, but in fact, I don't think we can physically do it.

Rep. Koppelman: Would it be possible to simply change the definition in law of expungement instead of going this route, and have it state that even though a physical record may exist, it is for all legal purposes non-existent and therefore could not be reopened by a court order, whereas a sealed record could.

Judge Bob Wefald: I suspect that is not nearly as clean a solution as closing and sealing the record. Everybody understands what a sealed record is, the media, etc. If we say it is

expunged and it's not expunged, I think it would be more confusing than to simply seal the record. Because a sealed record is all right there. The other thing about records, and I don't mean to be harsh about it, people go out and commit crimes, there is a real good and sufficient reason why we have a process to take care of that. In the criminal system, most of what we do in the courts is criminal. And everybody wants to give everybody a break. Nobody wants anyone to go to prison. We try to give them a break every time. You have to do something really horrendous the first time out to wind up getting prison time. The fact that somebody got busted for marijuana, and wants a completely clean record, I don't think it's that big a deal anymore.

Rep. Koppelman: I appreciate that. My question to you is whether we are going beyond making just a logistical or clerical change in how this is being presented. Actually it is a policy change, only to the extent that in essence, change is what we are currently or traditionally doing in law with an expungement to the point of sealing it. Correct me if I'm wrong, but what I'm hearing is the only difference between the two legally, and I understand physically the difference between expunged going away and doesn't exist and sealed means it is still on file and can't open it without a court order. But a legal difference, whether that expunged file still physically exists somewhere in cyber space or on paper, the legal difference it seems to me is that if you move it to a sealed record, it still could be opened by court order. That is a different thing. This is really a policy change; when it is expunged we think it is gone forever, and now with a court order you could potentially open the file.

Judge Bob Wefald: I've been in the law business since 1970 and I've never had a successful effort by anyone to ever expunge a record. It's been there. The most times it comes up, when someone is charged with using marijuana and wants the record expunged. I am not aware that any record has been shredded and whited out, etc. I guess you could call it

a policy change. I like to say it's more of a rational way to do this. The problems we have in trying to expunge something, it's literally not possible; to do it the way people would think that it is. If I were arrested for a first time marijuana charge, and I said that time has gone by, and I want my record expunged. I think I would be really disappointed with the result because I think somebody would know about it in the court system. I think the cops could always find it. The cops have their own arrest records.

Chairman DeKrey: We have the same problem on the Pardon Board, when you say you are giving someone a pardon, all you do it enter it on a line in the record that says they were pardoned. There is still a record.

Judge Bob Wefald: In respect to the Pardon and that kind of record, what it does for someone is says I have been pardoned. In the case of the marijuana, you say "I've done my deferred imposition, I followed the rules, this doesn't apply anymore". I regularly tell people in court when we give them that really great break and say that it is a deferred imposition of sentence. You keep your nose clean for 18 months or a year, and what is going to happen is that your guilty plea is going to be changed to not guilty, there's going to be order dismissing it and I say, the cops are still going to know about this. We have people five years later, they come in and say I've had a deferred imposition five years ago, and we may not consider that, but the cops know about it. I guarantee you they do.

Rep. Meyer: I guess my concern is that we are innocent until we are proven guilty.

Judge Bob Wefald: Exactly.

Rep. Meyer: So how does this tie into HB 1197 where we are going to do a DNA sample. I have concerns with that. So you do the DNA sample and that becomes a closed record.

You're found innocent, you haven't done it. There are those cases that are found innocent. They took a DNA sample and it becomes a closed record. It's always going to be there right.

Judge Bob Wefald: The DNA sample part is specifically addressed in subsection 3. The state crime lab said we will continue to expunge the samples and the records that we had, so that the DNA part is completely covered. The second thing is that the results of a criminal case is never an innocent verdict. It's either guilty or not guilty. Innocence is a matter for the Good Lord to judge, I think. The third thing is when a person is charged with a crime, when you are found not guilty, there is still a complete file in the clerk's office, with the criminal complaint and officer's affidavit, the jury verdict, whatever is in there. All the motions, it all stays in the file. Law enforcement will have a record that said you were arrested on such and such a date, for such and such a crime and it would show that you were found not guilty of the charge, and it was dismissed. So there is always going to be a record there. The DNA thing is covered by the state lab under a federal law that they follow in terms of how they expunge or destroy a DNA sample. But as for the rest of the criminal matter, once you get a traffic ticket, or speeding ticket, it goes to the public transportation, they have a record of it. They may not report it to the insurance company after so many years, I would suspect that it's always there.

Rep. Meyer: Will the state crime lab expunge the records on the DNA sample and paperwork.

Judge Bob Wefald: They have a federal law that they follow and as I understand from the memo that was given to me by the AG, that they don't see any conflict between subsection 3 as it is drafted and their existing federal requirement with respect to how they handle the DNA records and samples of people who are found not guilty or against whom the case was dismissed. I don't know what that procedure is. It wasn't in place when I was Attorney General, when we thought a fingerprint was a big deal.

Rep. Boehning: If you get an expunged record, after 10 years, they can't go back and use that record against you, is that correct.

Judge Bob Wefald: A sealed record is not to be considered. The only way a sealed record can be opened is by order of the court. The person with the warrant can't just open the file; they have to petition, give good and sufficient reasons for doing it, then judge will make a decision on whether or not to open the record. I would say that in terms of sentencing for a crime, it would not be considered if it has been sealed.

Rep. Boehning: An expunged record you can't go back and look at it, where you can with a sealed record.

Judge Bob Wefald: The problem is that as optimistic and hopeful as we can be that a record would be expunged, I'm telling you that the evidence today that it cannot be done. You can take the clerk's file and shred it, but the electronic data is going to be there. The cops are going to have it in their database. We have to have some sort of an Order from a judge that says the record of the defendant who was charged with ____ with this case number ____ is hereby expunged. Then the clerk will destroy the record. But still, that would be evidence. The person says I want to walk away forever, and have this behind me; somebody could look at the record and say here it is right here. This comes up with admission to the Bar, taking the State Bar Exam. It asks if you have ever been arrested. Not convicted. I suppose in cases of federal security clearances, you would have to report that you had been arrested; you would have to report it truthfully. We're never going to completely erase a record of a criminal matter.

Rep. Griffin: A sealed record can be petitioned to be open and the court can order that.

Judge Bob Wefald: What happens in court, a person can bring up anything they want, you can ask them if they have ever been convicted of such and such a crime. You can't look at the judge and say, Hey Judge, that record's been expunged. You can't let him answer that question. You could probably make a motion in limine to try to limit what can come in there;

but the fact that they know of the crime, you can't wipe out the person's memory. I think that the notion behind expungement is that the thing is going to disappear completely. I don't think there is anyway that is ever going to happen.

Rep. Griffin: But you could keep it away from the jury, if it were expunged vs. an open, sealed record.

Judge Bob Wefald: What happens, the evidence comes in either through an exhibit or testimony. If your witness is the one whose record you are concerned about, the person is asked the question, weren't you arrested for possession of marijuana in 2008? You think, that has been expunged, what do I do now. The truthful answer is yes, I was. We very seldom admit criminal records into evidence. I can't think of a single reason why we would do that during the course of a trial because in the course of a trial, the issue is not someone's prior record; the issue is the present crime of which the person is charged. It is an error to allow prior bad acts to come in to weigh in on the present case. You can ask people about their criminal history in certain circumstances.

Rep. Onstad: Along the same line of discussion, we are being asked to replace the word expunged with seal the court record.

Judge Bob Wefald: Yes.

Rep. Onstad: Let's go to line 12, what if we put that back and said, it was once expunged, the court may be open.

Judge Bob Wefald: You could not be able to do that. In fact, it would be better to have the sealed record to look at in cases if it ever came up, rather than rely on people's memories of what the record is.

Rep. Onstad: I agree with you, let's replace it. I don't understand once sealed, now to open it up and the court still has a chance to go back and look at it. We're not exchanging one definition for another. Aren't you kind of expanding it a little bit?

Judge Bob Wefald: The problem is that in court, the court records you have to be very careful of how you deal with them, we can't just let anyone decide what's going to be a record and what isn't going to be a record. We have sealed records in this state that are 100 years old. Every once in a while we have to go back and say do we have any legitimate reason for looking at this.

Rep. Onstad: Because of the digital technology and so on, is it a penalty if someone hacked into and got information on a sealed record?

Judge Bob Wefald: The quick answer is I don't know. My only job is to see to it that we have due process and that things get handled properly and if the person is convicted and sentence is imposed within the authorized limits. There are all sorts of penalties for hacking.

Rep. Koppelman: What is the value of a sealed record, of a court record being sealed or expunged?

Judge Bob Wefald: I tried to make it clear. I don't think there's any real utility in the word value in expunging the record, because I don't really believe it happens. When it comes time to access a sealed record that has to be done by court order. If it got to the point where someone was in court and asked about it, the way we handle that is good lawyers anticipate what's coming up, they go to the judge beforehand I think this issue is going to come up in this particular case, I want a motion in limine, I want the court's order right now as to how this issue is going to be treated. It gives everybody a heads up, often times we rule on those issues before the case starts. So we know what's going on. I would say that accessing a record is more difficult and much more infrequent than you might think.

Rep. Koppelman: If that's true, and you also said earlier that you rarely admit a sealed record in a court case, what is the value of having the record sealed.

Judge Bob Wefald: The value for sealing it is for a lot of reasons, such as adoption, etc. The average person can't walk in off the street and see someone's records if they are sealed. With respect to these criminal matters, the information doesn't simply go away. It's more honest to say that we are going to seal the record than to expunge it. If someone needs it, they can get a court order and try to get it unsealed, but it rarely happens. There is a lot of public information out there that you can never remove from all databases floating around out there. I don't think it is a conflict for the Legislature to say, we want to give the people a break in certain cases and help them out. The conflict is that the people committed a crime in the first place. The cops will have a file; the state's attorney has a file, etc.

Rep. Koppelman: The practical, clerical, logistical problem we're dealing with but we also recognize the policy shift that you represent. If the legislature in its wisdom decides that we don't mind changing the word expunged to sealed; it seems to me that we can accomplish this by changing the language on lines 12 and 13, rather than saying once sealed the court record may be open solely by order of the court, upon showing of good cause, to language something like, "once sealed the court record may not be opened in court".

Judge Bob Wefald: That would not bother me. The problem is that we don't know what the future holds. We don't know what the reasons are for asking for information in the future. We don't know if someone's electronic record is been misinterpreted over time. If it were me, I would rather have the record stay there, and I would like to have my record be accurate.

Rep. Koppelman: So what you're asking for is not just for logistical, clerical change, you're asking for the policy change to say, seal them and let the court get at them if they need to.

Judge Bob Wefald: I guess I can say that is a policy change, but the problem is that it isn't a change in reality. We've never gotten rid of them.

Rep. Koppelman: Except that you are able to open them. Can you request an expunged record?

Judge Bob Wefald: If the record is physically there, I can get it. I simply could look at records and get at them now. I'm just telling you that the more honest thing to tell people is that we're going to seal the record, just like in juvenile records, adoption, domestic records. Everybody understands that concept.

Rep. Koppelman: Is there any difference between a juvenile's sealed record and an adult's sealed record.

Judge Bob Wefald: The basic sealing of a record is to keep the media out, to keep the people out that don't belong there, to keep people who are snooping for information. Law enforcement knows this. Juvenile records – let's assume we have a young man, 12 years old and goes on a horrendous crime spree, when the person becomes 19 or 21, and continues the crime spree, we get that all the time. The pre-sentence investigation gives us that information every time. We know exactly what's going on. Now the media is not free to go out and do that. We seal most pre-sentence investigations, media can't get to that. The report contains a lot of private, family information. We have to have that information so that we can make a proper assessment as to what ought to happen with this particular individual. The police have it too. The people who don't get to it are the people that have no business getting to it.

Rep. Delmore: What are the safeguards that we can put in place with sealed records? Do other states expunge or do they seal records.

Judge Bob Wefald: I don't have a clue about what other states do. I didn't do a web search to see. I'm just addressing the situation in North Dakota. The problem, to get back to the

beginning, the judiciary Supreme Court loves to write rules. They already rule on expunging records. We can't tell clerks how to expunge it, because there is no answer, that's the problem.

Rep. Klemin: I understand you're saying that you can have the record expunged in the courthouse, the clerk could tear it up, we might also have it someplace else in electronic format or paper format and so it's still out there in the possession of a third party. If that third party says here it is, there is really nothing a person can do about it.

Judge Bob Wefald: Partially what you said is true. The clerk can take a hard copy record; you can put it in the shredder. We have to have a record of the court order saying, expunge this file. So we're always going to have something in the court record that says, the defendant, court file #, this court record was ordered expunged on this date.

Rep. Klemin: What I'm getting at is there a difference between the real affect of expunging vs. the effect of sealing on the ability of third parties to disclose what they've got.

Judge Bob Wefald: There isn't. Third parties have their information, whether it is the cops or the newspaper, that is the problem. A lot of the information gets into the newspaper right off the bat. We have no authority to tell the newspapers what to do.

Rep. Klemin: Once you seal a record it is completely confidential, under our statute and for a public official to disclose a confidential record can subject themselves to liabilities.

Judge Bob Wefald: That's true, but internally this is a document, these are facts that are relevant to criminal investigations, and background.

Rep. Klemin: An expunged record is not confidential as opposed to a sealed record being confidential and subject to our other statutes on the affect of liability.

Judge Bob Wefald: That is correct. A sealed record has certain protections with certain consequences for the violation of sealed records. I would urge you to give this bill a Do Pass.

I understand this addresses matters differently than we had with expungement, but the problem is that I am convinced that expunged records still exist. I think it's better to have them sealed, because everyone understands what that is, it's a much more honest response to a person who is in that situation.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1224

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/17/07

Recorder Job Number: 1297

Committee Clerk Signature

A. Penrose

Minutes:

Chairman DeKrey: We will take a look at HB 1224.

Rep. Koppelman: Explained the amendment. This basically does what I think the advocates have said what they want to do and that is to make the procedure here that is something workable and realistic. They basically testified that expungement is physically impossible, so therefore let's change it to seal. Their rationale was that they can't physically do it. Then we talk about the other issue that this is a policy shift because of the differences between a sealed record vs. an expunged record. Although they implied that wasn't their intent, I think that is the effect. Clearly this would change the policy as well as the wording. This amendment, for the purposes of this measure, say that it will allow the change from expunged to sealed; but it would say that they can't be reopened even by court order, which is the policy difference between the two. We can either kill the bill or we could amend it this way if we don't want to change the policy. I recommend that we pass the bill with this amendment. I so move the amendment (see attached amendment).

Rep. Boehning: Second.

Chairman DeKrey: We will take a voice vote. Motion carried. We now have the bill before us as amended.

Rep. Delmore: I move a Do Pass as amended.

Rep. Meyer: Second.

Rep. Klemin: Judge Wefald sent us an e-mail this morning, attaching an article from the New York Times and expunging and the problem goes to the electronic databases that are all out there and expunging something from the court records is not expunging it from the world. So it is a problem that they are trying to address. The expunging situation really doesn't have the kind of affect that they would really like to have. I think the amendment does take care of a little loophole in here, that would seem to allow the court to open a sealed record with show of good cause.

Rep. Koppelman: That was my intent to bring the amendment, to say if they want this as a housekeeping measure for the reasons we heard testimony on and you reiterated, let's make, for purposes of this statute, sealing essentially the same, legally as expungement, i.e. the record is gone, we can't get at it, the court can't open it.

Rep. Klemin: I agree with Rep. Koppelman in that there was an unintended consequence in trying to solve one problem and really making another.

Chairman DeKrey: The clerk will call the roll on a Do Pass as amended.

14 YES 0 NO 0 ABSENT DO PASS AS AMEND CARRIER: Rep. Koppelman

House Amendments to HB 1224 (70061.0201) - Judiciary Committee 01/18/2007

Page 1, line 12, after "may" insert "not" and replace "solely" with "even"

Page 1, line 13, remove "upon the showing of good cause"

House Amendments to HB 1224 (70061.0201) - Judiciary Committee 01/18/2007

Page 2, line 2, after "may" insert "not", replace "solely" with "even", and remove "upon a showing of good cause"

Page 2, line 13, after "may" insert "not", replace "solely" with "even", and remove "upon a showing of"

Page 2, line 14, remove "good cause"

Renumber accordingly

Date: 1-17-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1224

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken No Pass as Amended

Motion Made By Rep. Delmore Seconded By Rep. Meyer

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1224: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1224 was placed on the Sixth order on the calendar.

Page 1, line 12, after "may" insert "not" and replace "solely" with "even"

Page 1, line 13, remove "upon the showing of good cause"

Page 2, line 2, after "may" insert "not", replace "solely" with "even", and remove "upon a showing of good cause"

Page 2, line 13, after "may" insert "not", replace "solely" with "even", and remove "upon a showing of"

Page 2, line 14, remove "good cause"

Renumber accordingly

2007 SENATE JUDICIARY

HB 1224

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1224

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: February 13, 2007

Recorder Job Number: 3442

Committee Clerk Signature *Maria A. Solby*

Minutes: Relating to changing expunged records to sealed records.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Testimony in Favor of the Bill:

Sen. Dick Dever, Dist. #32 Introduced the bill for Rep. Klemin – Att. #1 and spoke of his meeting with his judges and the confusion of the word “expunge”. He also introduced the Judge.

Judge Bob Wefald, Burleigh County Judge (meter 2:00) Reviewed the bill – Att. #2a He spoke of New York Times Article and Memo to the Attorney General’s office – Att. #2b They reviewed the house changes (meter 4:07). They went into long discussion in section 3... “Once sealed may never be opened” and how this does not exist. Spoke of a record will always exist even if it has been sealed or expunged. There is always some form of documentation. For example the news paper publishes the original sentence. They reviewed the definition of expunged.

Sen. Nelson asked (meter 4:30) for a review of the changes the house made to the bill.

They spoke of HB 1197 in the DNA Samples reference 31-13-07 and section 3 of this bill. This change should be picked up by the code reviser.

Sen. Nething asked (meter 8:43) if the judge had ever expunged a record. They cited an example of a record being "expunged" during session. A record of the original statement would still be found in the Daily Journal and all who attend would have a copy of it. You could never total erase a record.

Sen. Fiebiger asked what the legal deference of a sealed verses expunged record (meter 10:28) technically it is a "state of mind" issue. Spoke of on an application and the question being asked if one has been convicted of a crime. Spoke of it being "expunged" would you admit to it or not. They had discussion on how a conviction can be dropped if a person meets certain requirements. Gave examples (meter 13:50)

Sen. Olafson asked why this law was specific to Marijuana? Spoke of the history of the drug and all of the juvenile records that were involved at the time.

Testimony Against the bill:

None

Testimony Neutral to the bill:

None

Senator David Nething, Chairman closed the hearing.

Sen. Olafson made the motion to Do Pass HB 1224 and **Sen. Marcellais** seconded the motion. All members were in favor and the motion passes.

Carrier: **Sen. Nething**

Senator David Nething, Chairman closed the hearing.

REPORT OF STANDING COMMITTEE

HB 1224, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1224 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

HB 1224

