

Department of Legislative Services  
Maryland General Assembly  
2016 Session

**FISCAL AND POLICY NOTE**  
**Third Reader - Revised**

Senate Bill 215

(Senator Norman, *et al.*)

Judicial Proceedings

Judiciary

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**Criminal Procedure - Expungement - Nolle Prosequi**

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This bill establishes that a petition for expungement based on a *nolle prosequi* may be filed at any time after the disposition. However, unless a petitioner files with the petition for expungement a written general waiver and release of all the petitioner's tort claims arising from the charge, the expungement may only occur by removing the court or police record to a separate secure area to which persons are denied access unless they have a legitimate reason for access.

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**Fiscal Summary**

**State Effect:** Depending on judicial discretion, potential increase in special fund expenditures if the bill results in higher payments from the State Insurance Trust Fund (SITF) for claims filed under the Maryland Tort Claims Act (MTCA), as discussed below. General fund expenditures increase for State agencies subject to higher SITF assessments if SITF incurs losses from MTCA payments as a result of the bill's provisions. The magnitude of the increase depends on the number of MTCA cases affected by the bill and the amount of the claims in those cases, which cannot be reliably estimated at this time.

**Local Effect:** Depending on judicial discretion, expenditures for local governments increase if the bill results in higher payments for claims under the Local Government Tort Claims Act (LGTCA) and/or if local governments have to pay increased insurance premiums for liability coverage against LGTCA claims.

**Small Business Effect:** None.

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## Analysis

**Current Law:** A *nolle prosequi* is a formal motion by a State's Attorney indicating that a charge or charges will not be prosecuted.

Petitions for expungements are subject to various waiting periods, based on the type of disposition involved. Generally, a petition for expungement for a *nolle prosequi* may not be filed within three years after the disposition, unless the petitioner files with the petition a written general waiver and release of all the petitioner's tort claims arising from the charge. However, a petition for expungement based on a *nolle prosequi* with the requirement of drug or alcohol treatment may not be filed until the completion of the required treatment.

In general, a person must file a civil cause of action within three years after the cause of action accrues. In *Davis v. Magee*, 140 Md.App. 635 (2001), the Maryland Court of Special Appeals noted that the reason behind the general waiver and release requirement for the filing of an expungement in less than three years was to prevent a situation in which a defendant being sued for a tort action arising out of the expunged charge would have to defend against a claim when the relevant records have been destroyed or made inaccessible. *Davis* at 652, citing *Pantazes v. Pantazes*, 77 Md.App. 712 at 719 (1989).

Under the Criminal Procedure Article, a person who has been charged with the commission of a crime may file a petition for expungement listing the relevant facts of a police record, court record, or other record maintained by the State or a political subdivision of the State, under various circumstances listed in the statute. These grounds include acquittal, dismissal of charges, entry of probation before judgment, entry of *nolle prosequi*, stet of charge, and gubernatorial pardon. Individuals convicted of a crime that is no longer a crime or convicted or found not criminally responsible of specified public nuisance crimes are also eligible for expungement of the associated criminal records under certain circumstances.

If two or more charges, other than one for a minor traffic violation, arise from the same incident, transaction, or set of facts, they are considered to be a unit. If a person is not entitled to expungement of one charge or conviction in a unit, the person is not entitled to expungement of any other charge in the unit.

A person is not entitled to expungement if (1) the petition is based on the entry of probation before judgment, except a probation before judgment for a crime where the act on which the conviction is based is no longer a crime, and the person within three years of the entry of the probation before judgment has been convicted of a crime other than a minor traffic violation or a crime where the act on which the conviction is based is no longer a crime or (2) the person is a defendant in a pending criminal proceeding.

Expungement of a court record means removal from public inspection:

- by obliteration;
- by removal to a separate secure area to which persons who do not have a legitimate reason for access are denied access; and
- if access to a court record or police record can be obtained only by reference to another such record, by the expungement of that record, or the part of it that provides access.

**Background:** The Judiciary advises that, during fiscal 2015, there were 32,726 petitions for expungement filed in the District Court and 2,448 petitions filed in the circuit courts. During fiscal 2014, there were 35,737 petitions for expungement filed in the District Court and 1,646 in the circuit courts.

In general, the number of expungements received by the Maryland Criminal Justice Information System (CJIS) within the Department of Public Safety and Correctional Services has steadily increased over the years. CJIS advises that this increase is due to legislation expanding eligibility for expungements (including expungements for individuals arrested and released without being charged) and an increase in the number of occupations and employers requiring background checks. The numbers shown below in **Exhibit 1** do not include expungements for individuals released without being charged with a crime. Those expungements are handled through a fairly automated process and involve significantly less work than other types of expungements.

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**Exhibit 1**  
**CJIS Expungements**  
**2004-2015**

<u>Calendar Year</u>	<u>CJIS Expungements<sup>1</sup></u>
2004	15,769
2005	16,760
2006	20,612
2007	21,772
2008	24,200
2009	25,146
2010	27,199
2011	20,492
2012	30,654
2013	34,207
2014	33,801
2015	36,412

<sup>1</sup>Does not include expungements for individuals released without being charged.

Source: Maryland Criminal Justice Information System – Department of Public Safety and Correctional Services

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**State Expenditures:**

*State Insurance Trust Fund:* Depending on judicial discretion, special fund expenditures for SITF increase if the bill results in higher payments for MTCA claims. General fund expenditures increase for agencies subject to higher premium assessments only if the increase in MTCA claims payments under the bill results in a significant increase in claims paid.

The three-year waiting period for expungements for *nolle prosequi* dispositions is related to the three-year statute of limitations for civil causes of action. If a police and/or court record is expunged prior to receipt or notification of a claim under MTCA by the Treasurer's Office, then the Treasurer's Office may encounter difficulties in investigating claims or may have to pay higher amounts for these claims as a result of hindered investigations if it is not permitted to access the expunged records. The extent of this increase cannot be reliably estimated at this time. False imprisonment by law enforcement is an example of the type of MTCA claim that may be related to an expunged record under the bill.

Section 10-101(e) of the Criminal Procedure Article specifies the ways in which an expunged police or court record may be removed from public inspection, including removing the records to a separate secure area to which persons are denied access unless they have a legitimate reason for access. The only other reference to “legitimate reason” under the expungement statute (Title 10, Subtitle 1 of the Criminal Procedure Article) is with respect to expunged police records for individuals arrested and released without being charged with a crime under § 10-103.1 of the Criminal Procedure Article. That statutory provision specifies that a legitimate reason for accessing those expunged records includes using the records for purposes of proceedings relating to the arrest.

The expungement statute does not define “legitimate reason.” The Judiciary (1) advises that a judge, not a clerk, has to determine whether a person has a legitimate reason to access an expunged record and (2) assumes that the only legitimate reasons are those in § 10-108 of the Criminal Procedure Article or those persons given access at the discretion of the judge.

In general, under § 10-108, a person is prohibited from opening or reviewing an expunged record or disclosing information from that record to another person without a court order from the court that ordered the record expunged. A court may order the opening or review of an expunged record or the disclosure of information from that record (1) after notice to the person whom the record concerns, a hearing, and the showing of good cause or (2) if an *ex parte* order involving a specified petition from a State’s Attorney that a law enforcement agency unit needs the record for a pending criminal investigation and the investigation will be jeopardized or life or property will be endangered without access to the record. Individuals who violate § 10-108 are guilty of a misdemeanor, punishable by imprisonment for up to one year and/or a \$1,000 maximum fine. An official or employee of the State or a political subdivision of the State who is convicted of violating § 10-108 may be removed or dismissed from public service.

Thus, should the State face a tort claim or civil lawsuit based on the expunged charge, the ability of the State to access the expunged records depends on whether a judge determines that the State’s reason for access to the expunged records (defense of a civil lawsuit) is a “legitimate reason” or meets the good cause requirement under § 10-108.

Claims under MTCA are paid out of SITF, which is administered by the Treasurer’s Office. The Treasurer’s Insurance Division handles approximately 5,000 MTCA claims each year. SITF paid the following amounts in tort claims under MTCA: \$5.8 million in fiscal 2014; \$7.3 million in fiscal 2015; \$8.5 million in fiscal 2016 (estimated); and \$9.0 million in fiscal 2017 (projected). The Governor’s proposed fiscal 2017 budget includes a \$10.5 million appropriation for tort claims (including motor vehicle torts) under MTCA. The funds are to be transferred to SITF.

Agencies pay premiums to SITF that are comprised of an assessment for each employee covered and SITF payments for torts committed by the agency's employees. The portion of the assessment attributable to losses is allocated over five years. The Treasurer is charged with setting premiums "so as to produce funds that approximate the payments from the fund." (*See* Md. State Fin. & Proc. Code Ann. § 9-106(b).) The actuary assesses SITF's reserves and each agency's loss experience for the various risk categories, which include tort claims and constitutional claims. An agency's loss history, consisting of settlements and judgments incurred since the last budget cycle, comprises part of the agency's annual premium. That amount is electronically transferred to SITF from the appropriations in an agency's budget.

*Judiciary:* The Judiciary can implement the bill's requirements with existing resources. The Judiciary advises that although the bill may result in an initial increase in filings for petitions for expungement and results in additional hearings for access to records expunged without the filing of a general waiver and release of tort claims, it does not anticipate a significant long-term fiscal or operational impact from the bill.

The Judiciary further advises that it reprints brochures and forms on an as-needed basis and is likely to incur increased expenditures of \$9,571 to revise the Petition for Expungement form and the Expungement Brochure to reflect the bill's provisions. However, the Department of Legislative Services advises that revising printed materials to reflect changes to statute is a routine function of the Judiciary and can be incorporated into annual revisions of forms and brochures.

**Local Expenditures:** Local expenditures increase if the bill results in higher payments for claims under LGTCA and insurance premiums. The magnitude of this increase cannot be reliably estimated at this time.

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## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts), Office of the Public Defender, Department of Public Safety and Correctional Services, Department of State Police, Maryland Department of Transportation, Department of Legislative Services

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