

SENATE BILL NO. 702

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Rehabilitation and Social Services

on February 4, 2022)

(Patron Prior to Substitute--Senator Kiggans)

A BILL to amend and reenact § 19.2-389.3, as it is currently effective and as it may become effective, of the Code of Virginia, relating to marijuana criminal history information; disclosure to state and local governments by certain applicants.

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-389.3, as it is currently effective and as it may become effective, of the Code of Virginia is amended and reenacted as follows:

§ 19.2-389.3. (For contingent expiration date, see Acts 2021, Sp. Sess. I, cc. 524, 542, 550, and 551) Marijuana possession; limits on dissemination of criminal history record information; prohibited practices by employers, educational institutions, and state and local governments; penalty.

A. Records relating to the arrest, criminal charge, or conviction of a person for a misdemeanor violation of § 18.2-248.1 or a violation of § 18.2-250.1, including any violation charged under §§ 18.2-248.1 or 18.2-250.1 that was deferred and dismissed pursuant to § 18.2-251, maintained in the Central Criminal Records Exchange shall not be open for public inspection or otherwise disclosed, provided that such records may be disseminated (i) to make the determination as provided in § 18.2-308.2:2 of eligibility to possess or purchase a firearm; (ii) to aid in the preparation of a pretrial investigation report prepared by a local pretrial services agency established pursuant to Article 5 (§ 19.2-152.2 et seq.) of Chapter 9, a pre-sentence or post-sentence investigation report pursuant to § 19.2-299 or in the preparation of the discretionary sentencing guidelines worksheets pursuant to subsection C of § 19.2-298.01; (iii) to aid local community-based probation services agencies established pursuant to the Comprehensive Community Corrections Act for Local-Responsible Offenders (§ 9.1-173 et seq.) with investigating or serving adult

27 local-responsible offenders and all court service units serving juvenile delinquent offenders; (iv) for
28 fingerprint comparison utilizing the fingerprints maintained in the Automated Fingerprint Information
29 System computer; (v) to attorneys for the Commonwealth to secure information incidental to sentencing
30 and to attorneys for the Commonwealth and probation officers to prepare the discretionary sentencing
31 guidelines worksheets pursuant to subsection C of § 19.2-298.01; (vi) to any full-time or part-time
32 employee of the State Police, a police department, or sheriff's office that is a part of or administered by
33 the Commonwealth or any political subdivision thereof, and who is responsible for the prevention and
34 detection of crime and the enforcement of the penal, traffic, or highway laws of the Commonwealth, for
35 purposes of the administration of criminal justice as defined in § 9.1-101; (vii) to the Virginia Criminal
36 Sentencing Commission for research purposes; (viii) to any full-time or part-time employee of the State
37 Police or a police department or sheriff's office that is a part of or administered by the Commonwealth or
38 any political subdivision thereof for the purpose of screening any person for full-time or part-time
39 employment with the State Police or a police department or sheriff's office that is a part of or administered
40 by the Commonwealth or any political subdivision thereof; (ix) to the State Health Commissioner or his
41 designee for the purpose of screening any person who applies to be a volunteer with or an employee of an
42 emergency medical services agency as provided in § 32.1-111.5; (x) to any full-time or part-time employee
43 of the Department of Forensic Science for the purpose of screening any person for full-time or part-time
44 employment with the Department of Forensic Science; (xi) to the chief law-enforcement officer of a
45 locality, or his designee who shall be an individual employed as a public safety official of the locality, that
46 has adopted an ordinance in accordance with §§ 15.2-1503.1 and 19.2-389 for the purpose of screening
47 any person who applies to be a volunteer with or an employee of an emergency medical services agency
48 as provided in § 32.1-111.5; and (xii) to any full-time or part-time employee of the Department of Motor
49 Vehicles, any employer as defined in § 46.2-341.4, or any medical examiner as defined in 49 C.F.R. §
50 390.5 for the purpose of complying with the regulations of the Federal Motor Carrier Safety
51 Administration.

52 B. An employer or educational institution shall not, in any application, interview, or otherwise,
53 require an applicant for employment or admission to disclose information concerning any arrest, criminal

54 charge, or conviction against him when the record relating to such arrest, criminal charge, or conviction
55 is not open for public inspection pursuant to subsection A. An applicant need not, in answer to any question
56 concerning any arrest, criminal charge, or conviction, include a reference to or information concerning
57 any arrest, criminal charge, or conviction when the record relating to such arrest, criminal charge, or
58 conviction is not open for public inspection pursuant to subsection A.

59 C. Agencies, officials, and employees of the state and local governments shall not, in any
60 application, interview, or otherwise, require an applicant for a license, permit, registration, or
61 governmental service to disclose information concerning any arrest, criminal charge, or conviction against
62 him ~~when~~ if (i) the record relating to such arrest, criminal charge, or conviction is not open for public
63 inspection pursuant to subsection A and (ii) no law or regulation prohibits the applicant, if granted the
64 license, permit, registration, or governmental service, from consuming marijuana. An applicant need not,
65 in answer to any question concerning any arrest, criminal charge, or conviction, include a reference to or
66 information concerning any arrest, criminal charge, or conviction ~~when~~ if (a) the record relating to such
67 arrest, criminal charge, or conviction is not open for public inspection pursuant to subsection A and (b)
68 no law or regulation prohibits the applicant, if granted the license, permit, registration, or governmental
69 service, from consuming marijuana. Such an application may not be denied solely because of the
70 applicant's refusal to disclose information concerning any such arrest, criminal charge, or conviction
71 unless the agency, official, or employee is authorized to require the disclosure of such information
72 pursuant to the provisions of this subsection.

73 D. A person who willfully violates subsection B or C is guilty of a Class 1 misdemeanor for each
74 violation.

75 **§ 19.2-389.3. (For contingent effective date, see Acts 2021, Sp. Sess. I, cc. 524, 542, 550, and**
76 **551) Marijuana possession; limits on dissemination of criminal history record information;**
77 **prohibited practices by employers, educational institutions, and state and local governments;**
78 **penalty.**

79 A. Criminal history record information contained in the Central Criminal Records Exchange,
80 including any records relating to an arrest, criminal charge, or conviction, for a misdemeanor violation of

81 § 18.2-248.1 or a violation of § 18.2-250.1, including any violation charged under §§ 18.2-248.1 or 18.2-
82 250.1 that was deferred and dismissed pursuant to § 18.2-251, shall not be open for public inspection or
83 otherwise disclosed, provided that such records may be disseminated and used for the following purposes:
84 (i) to make the determination as provided in § 18.2-308.2:2 of eligibility to possess or purchase a firearm;
85 (ii) for fingerprint comparison utilizing the fingerprints maintained in the Automated Fingerprint
86 Information System; (iii) to the Virginia Criminal Sentencing Commission for its research purposes; (iv)
87 to any full-time or part-time employee of the State Police or a police department or sheriff's office that is
88 a part of or administered by the Commonwealth or any political subdivision thereof for the purpose of
89 screening any person for full-time or part-time employment with, or to be a volunteer with, the State Police
90 or a police department or sheriff's office that is a part of or administered by the Commonwealth or any
91 political subdivision thereof; (v) to the State Health Commissioner or his designee for the purpose of
92 screening any person who applies to be a volunteer with or an employee of an emergency medical services
93 agency as provided in § 32.1-111.5; (vi) to any full-time or part-time employee of the Department of
94 Forensic Science for the purpose of screening any person for full-time or part-time employment with the
95 Department of Forensic Science; (vii) to the chief law-enforcement officer of a locality, or his designee
96 who shall be an individual employed as a public safety official of the locality, that has adopted an
97 ordinance in accordance with §§ 15.2-1503.1 and 19.2-389 for the purpose of screening any person who
98 applies to be a volunteer with or an employee of an emergency medical services agency as provided in §
99 32.1-111.5; (viii) to any full-time or part-time employee of the Department of Motor Vehicles, any
100 employer as defined in § 46.2-341.4, or any medical examiner as defined in 49 C.F.R. § 390.5 for the
101 purpose of complying with the regulations of the Federal Motor Carrier Safety Administration; (ix) to any
102 employer or prospective employer or its designee where federal law requires the employer to inquire about
103 prior criminal charges or convictions; (x) to any employer or prospective employer or its designee where
104 the position that a person is applying for, or where access to the premises in or upon which any part of the
105 duties of such position is performed or is to be performed, is subject to any requirement imposed in the
106 interest of the national security of the United States under any security program in effect pursuant to or
107 administered under any contract with, or statute or regulation of, the United States or any Executive Order

108 of the President; (xi) to any person authorized to engage in the collection of court costs, fines, or restitution
109 under subsection C of § 19.2-349 for purposes of collecting such court costs, fines, or restitution; (xii) to
110 administer and utilize the DNA Analysis and Data Bank set forth in Article 1.1 (§ 19.2-310.2 et seq.) of
111 Chapter 18; (xiii) to publish decisions of the Supreme Court, Court of Appeals, or any circuit court; (xiv)
112 to any full-time or part-time employee of a court, the Office of the Executive Secretary, the Division of
113 Legislative Services, or the Chairs of the House Committee for Courts of Justice and the Senate Committee
114 on the Judiciary for the purpose of screening any person for full-time or part-time employment as a clerk,
115 magistrate, or judge with a court or the Office of the Executive Secretary; (xv) to any employer or
116 prospective employer or its designee where this Code or a local ordinance requires the employer to inquire
117 about prior criminal charges or convictions; (xvi) to any employer or prospective employer or its designee
118 that is allowed access to such sealed records in accordance with the rules and regulations adopted pursuant
119 to § 9.1-128 and procedures adopted pursuant to § 9.1-134; (xvii) to any business screening service for
120 purposes of complying with § 19.2-392.16; (xviii) to any attorney for the Commonwealth and any person
121 accused of a violation of law, or counsel for the accused, in order to comply with any constitutional and
122 statutory duties to provide exculpatory, mitigating, and impeachment evidence to an accused; (xix) to any
123 party in a criminal or civil proceeding for use as authorized by law in such proceeding; (xx) to any party
124 for use in a protective order hearing as authorized by law; (xxi) to the Department of Social Services or
125 any local department of social services for purposes of performing any statutory duties as required under
126 Title 63.2; (xxii) to any party in a proceeding relating to the care and custody of a child for use as
127 authorized by law in such proceeding; (xxiii) to the attorney for the Commonwealth and the court for
128 purposes of determining eligibility for sealing pursuant to the provisions of § 19.2-392.12; (xxiv) to
129 determine a person's eligibility to be empaneled as a juror; and (xxv) to the person arrested, charged, or
130 convicted of the offense that was sealed.

131 B. Except as provided in subsection C, agencies, officials, and employees of state and local
132 governments, private employers that are not subject to federal laws or regulations in the hiring process,
133 and educational institutions shall not, in any application, interview, or otherwise, require an applicant for
134 employment or admission to disclose information concerning any arrest, criminal charge, or conviction

135 against him when the record relating to such arrest, criminal charge, or conviction is not open for public
136 inspection pursuant to subsection A. An applicant need not, in answer to any question concerning any
137 arrest, criminal charge, or conviction, include a reference to or information concerning any arrest, criminal
138 charge, or conviction when the record relating to such arrest, criminal charge, or conviction is not open
139 for public inspection pursuant to subsection A.

140 C. The provisions of subsection B shall not apply if:

141 1. The person is applying for full-time employment or part-time employment with, or to be a
142 volunteer with, the State Police or a police department or sheriff's office that is a part of or administered
143 by the Commonwealth or any political subdivision thereof;

144 2. This Code requires the employer to make such an inquiry;

145 3. Federal law requires the employer to make such an inquiry;

146 4. The position, or access to the premises in or upon which any part of the duties of such position
147 is performed or is to be performed, is subject to any requirement imposed in the interest of the national
148 security of the United States under any security program in effect pursuant to or administered under any
149 contract with, or statute or regulation of, the United States or any Executive Order of the President; or

150 5. The rules and regulations adopted pursuant to § 9.1-128 and procedures adopted pursuant to §
151 9.1-134 allow the employer to access such sealed records.

152 D. Agencies, officials, and employees of the state and local governments shall not, in any
153 application, interview, or otherwise, require an applicant for a license, permit, registration, or
154 governmental service to disclose information concerning any arrest, criminal charge, or conviction against
155 him ~~when~~ if (i) the record relating to such arrest, criminal charge, or conviction is not open for public
156 inspection pursuant to subsection A and (ii) no law or regulation prohibits the applicant, if granted the
157 license, permit, registration, or governmental service, from consuming marijuana. An applicant need not,
158 in answer to any question concerning any arrest, criminal charge, or conviction, include a reference to or
159 information concerning any arrest, criminal charge, or conviction ~~when~~ if (a) the record relating to such
160 arrest, criminal charge, or conviction is not open for public inspection pursuant to subsection A and (b)
161 no law or regulation prohibits the applicant, if granted the license, permit, registration, or governmental

162 service, from consuming marijuana. Such an application may not be denied solely because of the
163 applicant's refusal to disclose information concerning any such arrest, criminal charge, or conviction
164 unless the agency, official, or employee is authorized to require the disclosure of such information
165 pursuant to the provisions of this subsection.

166 E. No person, as defined in § 36-96.1:1, shall, in any application for the sale or rental of a dwelling,
167 as defined in § 36-96.1:1, require an applicant to disclose information concerning any arrest, criminal
168 charge, or conviction against him when the record relating to such arrest, criminal charge, or conviction
169 is not open for public inspection pursuant to subsection A. An applicant need not, in answer to any question
170 concerning any arrest, criminal charge, or conviction, include a reference to or information concerning
171 arrests, criminal charges, or convictions when the record relating to such arrest, criminal charge, or
172 conviction is not open for public inspection pursuant to subsection A. Such an application may not be
173 denied solely because of the applicant's refusal to disclose information concerning any such arrest,
174 criminal charge, or conviction.

175 F. No insurance company, as defined in § 38.2-100, shall, in any application for insurance, as
176 defined in § 38.2-100, require an applicant to disclose information concerning any arrest, criminal charge,
177 or conviction against him when the record relating to such arrest, criminal charge, or conviction is not
178 open for public inspection pursuant to subsection A. An applicant need not, in answer to any question
179 concerning any arrest, criminal charge, or conviction, include a reference to or information concerning
180 arrests, criminal charges, or convictions when the record relating to such arrest, criminal charge, or
181 conviction is not open for public inspection pursuant to subsection A. Such an application may not be
182 denied solely because of the applicant's refusal to disclose information concerning any such arrest,
183 criminal charge, or conviction.

184 G. If any entity or person listed under subsection B, D, E, or F includes a question about a prior
185 arrest, criminal charge, or conviction in an application for one or more of the purposes set forth in such
186 subsections, such application shall include, or such entity or person shall provide, a notice to the applicant
187 that an arrest, criminal charge, or conviction that is not open for public inspection pursuant to subsection
188 A does not have to be disclosed in the application. Such notice need not be included on any application

189 for one or more of the purposes set forth in subsection C or on an application for a license, permit,
190 registration, or governmental service for which disclosure of a record protected from public inspection
191 may be required pursuant to subsection D.

192 H. The provisions of this section shall not prohibit the disclosure of any arrest, criminal charge, or
193 conviction that is not open for public inspection pursuant to subsection A or any information from such
194 records among law-enforcement officers and attorneys when such disclosures are made by such officers
195 or attorneys while engaged in the performance of their duties for purposes solely relating to the disclosure
196 or use of exculpatory, mitigating, and impeachment evidence or between attorneys for the Commonwealth
197 when related to the prosecution of a separate crime.

198 I. A person who willfully violates subsection B, D, E, or F is guilty of a Class 1 misdemeanor for
199 each violation.

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