

To: The Virginia Crime Commission

From: Chip Dicks, Judy Worthington and Carlos Hopkins
On behalf of the Virginia Court Clerks Association

Date: November 1, 2022

Re: HB 2113 and SB 1339
Sealing and Expungement Legislation

Chip Dicks

Background. Ladies and Gentlemen, on behalf of the Virginia Court Clerks Association (the “VCCA”), which represents the elected Circuit Court Clerks as local constitutional officers in the Commonwealth of the Virginia, we submit this report to the Honorable Members of the Virginia Crime Commission. The VCCA was directed in HB 2113 and SB 1339 (the “Sealing Legislation”) in Enactment No. 12 as follows: “That the Virginia Court Clerks’ Association shall determine the necessary staffing and technology costs of implementing the provisions of this act and report to the Virginia State Crime Commission by November 1, 2021, and by November 1 of each year thereafter until such determination has been made.” The General Assembly has not determined or provided any funding for Circuit Court Clerks to implement the provisions of the Sealing Legislation.

Executive Summary. The VCCA estimates, based upon the legislation, as enacted, that there will be a fiscal impact of at least \$33M annually, which is detailed below and in Attachments A and B. The workload of the Circuit Court Clerks is not addressed in the appropriations provided to the Virginia State Police (“VSP”) and the Office of the Executive Secretary of the Virginia Supreme Court (“OES”). Circuit Court Clerks are not funded through OES but instead are funded through the State Compensation Board. This report contains specific policy proposals that we will discuss during the Crime Commission’s meeting on December 5, 2022 that we feel would eliminate or mitigate the cost impacts to Circuit Court Clerks of the Sealing legislation, as enacted.

The VCCA Projected Fiscal Impacts of Sealing Legislation, As Enacted. VCCA projects an annual cost of \$33M for the foreseeable future to implement the Sealing Legislation as enacted. Attached, as **Exhibit A**, is the VCCA projected fiscal impact. The VCCA also evaluated a series of amendments to the existing provisions of the Sealing Legislation to eliminate or mitigate the projected fiscal impact. To give a broad overview of that fiscal impact statement, the Circuit Court Clerks maintain a broad range of criminal and civil records, in accordance with statutory mandates set out in Title 17.1 of the Code of Virginia. In fact, each Circuit Court Clerk has more than 850 statutory duties and the status of criminal convictions extends to many different divisions within Circuit Court Clerks’ Offices.

Pursuant to Section 17.1-208 of the Code of Virginia, all records of the Circuit Court Clerk are public records, available for public inspection and production to a requestor in a document production process similar to that applicable to public records subject to the Freedom of Information Act. There is a policy balance to be struck by the General Assembly between the

public's right to access public records and the privacy rights of citizens whose criminal records are being sealed or expunged by the Sealing Legislation.

For example, real estate records contain every judgment docketed by a Circuit Court Clerk for criminal fines, costs and restitution pursuant to Section 8.01-446 of the Code of Virginia. Every judgment lien docket in the Circuit Court Clerks' Offices where such matters are recorded is required to be open for public inspection and no redactions are permitted, even if the judgment against a criminal defendant has been satisfied and the case sealed.

Sealing criminal judgments for unpaid fines, costs and restitution prohibits complete title searches which are necessary for real estate closings. If criminal judgment lien entries are visible and back-up case documents are inaccessible due to sealing, title searches would become incomplete. Retail and non-retail creditors, title insurance companies and other entities rely on information contained in the judgment lien docket for credit history, including outstanding judgments. These entities also routinely rely on back-up case records to ensure accuracy and thoroughness of their findings. Prohibiting access to this information will create disorder in that marketplace.

Criminal court orders are housed in the public Record Room within the Circuit Court Clerks' Offices. Such orders include both felony and misdemeanor charges. In order to prohibit access to any sealed criminal records, public access to all criminal records within the Record Room would likely need to be prohibited and the records may well need to be moved off-site due to existing storage limitations or moved elsewhere within their Offices. The costs associated with expansion of current storage and filing systems, off-site storage and staff to manage off-site records storage and retrieval will be significant.

Redaction of conviction information on original court orders is not lawful. Such orders may contain both felony and misdemeanor conviction/sentencing information for a single defendant. Because court orders are traditionally prepared in paper form for judicial signature, then scanned and microfilmed for archival purposes, Circuit Court Clerks would be required to make a copy of every court order containing a conviction to be sealed, and then redact the relevant misdemeanor conviction. Given the number of older manual, non-automated records that would need to be located/researched, touched by a human being and reviewed for sealing/redaction is daunting.

The labor time and costs associated with this effort will be significant and that will require full funding by the General Assembly in order to implement the Sealing Legislation. Because the Code of Virginia requires all court orders to be treated as permanent records and therefore scanned and/microfilmed, they are also archived in both Circuit Court Clerks' Offices and at the Library of Virginia. The costs for redaction of the identified criminal offenses from the archived records will be substantial and such costs have not yet been determined.

Professional licensing boards and other governmental agencies have differing requirements from state to state as well as within the Commonwealth. This translates to competing requirements for details of criminal history. Such agencies and boards may require criminal history information that has been sealed in Virginia, prohibiting access unless there is an express legislative

exemption in the amended Sealing Legislation to permit such access to local, state and federal agencies, as well as government agencies from other states.

In terms of projecting a potential fiscal impact, the VCCA calculated the time necessary to remove **one criminal record from all the records held by a Circuit Court Clerk to be approximately 4 hours, per criminal conviction**. In each Circuit Court Clerk's Office, there are numerous data fields within both electronic records and paper files yet to be automated. In one Circuit Court Clerk's Office, as a beta test, the private vendor identified 64 separate data fields in the automated record wherein case information would need to be redacted to remove references to just one criminal case.

Attached, as **Exhibit B**, is a listing of those **64 different data fields** that span criminal and civil records. Where the records of the Circuit Court Clerk are not electronically searchable, the Clerk will need to conduct a manual search of each of these 64 different original paper records in paper files. Since the Code of Virginia does not authorize that the original record cannot be changed, when a criminal conviction needs to be sealed, the Circuit Court Clerk will be required to prevent public access to the original record in one paper file or electronic database, and to create another separate paper file or electronic database to which the public has access. Again, under § 17.1-208 of the Code of Virginia, all records of the circuit court clerk are public records.

The VCCA Is Committed to Working with the Virginia Crime Commission. The VCCA would recommend consideration of the following:

- Amend the Sealing Legislation to exempt Circuit Court Clerks from the sealing provisions so that any redaction of criminal convictions in the Circuit Courts would occur pursuant to the current provisions for expungement.
- Delay the implementation of the Sealing Legislation until the later of: (i) July 1, 2027 or (ii) a date that is July 1 in the year that is two years after when Circuit Court Clerks receive full funding for such implementation.
- The Sealing Legislation shall not apply to any court records in a paper or non-searchable electronic format.
- Use a phased-in approach in the Sealing Legislation applying sealing only to day-forward records that are in a searchable electronic format.
- That phased-in approach could also apply to past records that are in a searchable electronic format. For those Circuit Court Clerks who have back scanned past records in a searchable electronic format, the sealing provisions of the Sealing Legislation would apply, back to the point to which the records are in a searchable electronic format.
- For Circuit Court Clerks that have not received the funding to convert records in a searchable electronic format, the Sealing Legislation would need to provide funding in the Appropriations Act to back scan records to a certain date. When VCCA worked with the General Assembly to automate land records, that legislation required the Circuit

Court Clerks to automate such records back at least 60 years. With the limited funding by the General Assembly, it took 12 years to automate the land records of the Circuit Court Clerks back 60 years. VCCA believes there should be a date designated in the Sealing Legislation so that records older than that date would not be subject to the sealing provisions in the amended Sealing Legislation. The district courts have a record retention period of 10 years, whereas Circuit Court Clerks are required to maintain original records back to the founding of this country.

- For all paper records, maintain the current expungement process until such time the records are back scanned into a searchable electronic format.
- Fully fund the personnel and technology costs to the Circuit Court Clerks through the Compensation Board to fully implement the Sealing Legislation. Funding to OES and the State Police, while important for their respective agencies, does not address the personnel and technology costs of the Circuit Court Clerks. The Appropriations Act funds OES through the Judicial Branch, whereas Circuit Court Clerks receive their funding separately through the Appropriations Act, administered by the Compensation Board. So, for example, whenever deputy court clerks that are employees of OES get a pay raise in the Judicial Branch, that pay raise does not apply to deputy court clerks of Circuit Court Clerks, unless there is a separately funded appropriation through the Secretary of Administration, administered through the Compensation Board.
- The Marijuana Legislation needs to be reconciled with the sealing/expungement provisions with the Sealing Legislation.
- Limiting sealing to Marijuana and a smaller number of misdemeanor offenses in the first bucket of criminal offenses to be sealed in the Sealing Legislation would substantially mitigate the fiscal impact.
- The Crime Commission should continue to have the authority to study the Sealing Legislation to determine what amendments should be made to implement the policy objectives of the General Assembly.
- An option considered by VCCA would be to pardon defendants as a way that may result in a more uniform and equitable method to achieve the policy objectives of the Sealing Legislation and save tens of millions of dollars in the process.

Respectfully submitted,

The Virginia Court Clerks Association
November 1, 2022

**EXHIBIT A
VCCA PROJECTED FISCAL IMPACT
EXISTING SEALING LEGISLATION
ATTACHED**

One FTE can complete approximately 480 records per year.

Hours Per Record	4
Records Per Day	2
Records Per Week	10
Records Per Year (48 Weeks)	480

Depending on the number of records and the time frame in which the records must be sealed, the cost may vary.

Records	Records Per Year	Records Per FTE Per Year	FTEs Needed	Salary	Annual	Years	FTE Cost (Excludes Benefits)
125,000	125,000	480	260	\$ 32,000	\$ 8,333,333.33	1	\$ 8,333,333.33
150,000	150,000	480	313	\$ 32,000	\$ 10,000,000.00	1	\$ 10,000,000.00
200,000	200,000	480	417	\$ 32,000	\$ 13,333,333.33	1	\$ 13,333,333.33
250,000	250,000	480	521	\$ 32,000	\$ 16,666,666.67	1	\$ 16,666,666.67
500,000	500,000	480	1042	\$ 32,000	\$ 33,333,333.33	1	\$ 33,333,333.33

Records	Records Per Year	Records Per FTE Per Year	FTEs Needed	Salary	Annual	Years	FTE Cost (Excludes Benefits)
125,000	62,500	480	130	\$ 32,000	\$ 4,166,666.67	2	\$ 8,333,333.33
150,000	75,000	480	156	\$ 32,000	\$ 5,000,000.00	2	\$ 10,000,000.00
200,000	100,000	480	208	\$ 32,000	\$ 6,666,666.67	2	\$ 13,333,333.33
250,000	125,000	480	260	\$ 32,000	\$ 8,333,333.33	2	\$ 16,666,666.67
500,000	250,000	480	521	\$ 32,000	\$ 16,666,666.67	2	\$ 33,333,333.33

Records	Records Per Year	Records Per FTE Per Year	FTEs Needed	Salary	Annual	Years	FTE Cost (Excludes Benefits)
125,000	41,667	480	87	\$ 32,000	\$ 2,777,777.78	3	\$ 8,333,333.33
150,000	50,000	480	104	\$ 32,000	\$ 3,333,333.33	3	\$ 10,000,000.00
200,000	66,667	480	139	\$ 32,000	\$ 4,444,444.44	3	\$ 13,333,333.33
250,000	83,333	480	174	\$ 32,000	\$ 5,555,555.56	3	\$ 16,666,666.67
500,000	166,667	480	347	\$ 32,000	\$ 11,111,111.11	3	\$ 33,333,333.33

EXHIBIT B
64 DIFFERENT DATA FIELDS
FOR REDACTION OF ONE CRIMINAL RECORD

1. Warrant of arrest
2. Indictment
3. Summons
4. Checklist of Bail
5. Commitment Order
6. Transportation Orders
7. Form DC-40 (List of allowance)
8. Request for appointment of Counsel
9. SRP progress reports
10. Certificate of Analysis
11. Plea Forms
12. Court Clerk Notes for each hearing
13. Probation Referrals
14. Jail Cards for each hearing
15. Sentencing guidelines
16. Pre-Sentence Investigation Report
17. Probation Violation Reports (there may be multiple in the file)
18. Rule to Show Causes
19. Bench Warrants for Probation Violation
20. Bench Warrants for Failure to Appear
21. Bench Warrant for Violations of Conditions of Release
22. DNA Forms
23. Continuances orders (there may be multiple in the file)
24. Amended Orders
25. Sentencing Orders
26. Conviction Orders (plea orders)
27. Bond Motion Orders
28. Arraignment Orders
29. Costs Checklists
30. SRP Forms
31. PSP Forms
32. Appointing Counsel Order
33. Bench Trial Order
34. Jury Trials Orders (may be multiple for each day of the jury trial)
35. Order for Motion to Reconsider
36. Order to pay Attorney fees
37. Order for Termination of Probation

38. Order for refund of cash bond
39. Revocation Orders
40. Status hearing orders
41. Jury Verdict forms (may be multiple)
42. Mental Health evaluations
43. Letters from Probation
44. Trial in absence orders
45. Waiver of Indictment Order
46. Term day orders
47. CCRE page
48. Mistrial Orders
49. ROL orders
50. Suppression Motion orders
51. Bench Warrant to Replace PB-15
52. Recognizance Forms
53. Notice/Order Bond forfeiture
54. Youthful Offender Orders
55. Competency/Sanity/NGRI orders
56. Plea rejected order.
57. Sentencing Memorandums
58. Petition in Juvenile files
59. Nolle Prossed Orders
60. Withhold finding of guilt/deferral orders.
61. Cover sheets
62. Bond Motion request from Attorney
63. Disposition Notice of lower Court
64. Waiver of Preliminary hearing