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HOUSE BILL NO. 2541

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Militia, Police and Public Safety
on February 6, 2009)

(Patron Prior to Substitute—Delegate Amundson)

*A BILL to amend and reenact §§ 19.2-389 and 54.1-204 of the Code of Virginia, relating criminal records checks of applicants for licensure.***Be it enacted by the General Assembly of Virginia:****1. That §§ 19.2-389 and 54.1-204 of the Code of Virginia are amended and reenacted as follows:**

§ 19.2-389. Dissemination of criminal history record information.

A. Criminal history record information shall be disseminated, whether directly or through an intermediary, only to:

1. Authorized officers or employees of criminal justice agencies, as defined by § 9.1-101, for purposes of the administration of criminal justice and the screening of an employment application or review of employment by a criminal justice agency with respect to its own employees or applicants, and dissemination to the Virginia Parole Board, pursuant to this subdivision, of such information on all state-responsible inmates for the purpose of making parole determinations pursuant to subdivisions 1, 2, 3, and 5 of § 53.1-136 shall include collective dissemination by electronic means every 30 days;

2. Such other individuals and agencies that require criminal history record information to implement a state or federal statute or executive order of the President of the United States or Governor that expressly refers to criminal conduct and contains requirements or exclusions expressly based upon such conduct, except that information concerning the arrest of an individual may not be disseminated to a noncriminal justice agency or individual if an interval of one year has elapsed from the date of the arrest and no disposition of the charge has been recorded and no active prosecution of the charge is pending;

3. Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement which shall specifically authorize access to data, limit the use of data to purposes for which given, and ensure the security and confidentiality of the data;

4. Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice agency that shall specifically authorize access to data, limit the use of data to research, evaluative, or statistical purposes, and ensure the confidentiality and security of the data;

5. Agencies of state or federal government that are authorized by state or federal statute or executive order of the President of the United States or Governor to conduct investigations determining employment suitability or eligibility for security clearances allowing access to classified information;

6. Individuals and agencies where authorized by court order or court rule;

7. Agencies of any political subdivision of the Commonwealth for the conduct of investigations of applicants for public employment, permit, or license whenever, in the interest of public welfare or safety, it is necessary to determine under a duly enacted ordinance if the past criminal conduct of a person with a conviction record would be compatible with the nature of the employment, permit, or license under consideration;

8. Public or private agencies when authorized or required by federal or state law or interstate compact to investigate (i) applicants for foster or adoptive parenthood or (ii) any individual, and the adult members of that individual's household, with whom the agency is considering placing a child or from whom the agency is considering removing a child due to abuse or neglect, on an emergency, temporary, or permanent basis pursuant to §§ 63.2-901.1 and 63.2-1505, subject to the restriction that the data shall not be further disseminated to any party other than a federal or state authority or court as may be required to comply with an express requirement of law;

9. To the extent permitted by federal law or regulation, public service companies as defined in § 56-1, for the conduct of investigations of applicants for employment when such employment involves personal contact with the public or when past criminal conduct of an applicant would be incompatible with the nature of the employment under consideration;

10. The appropriate authority for purposes of granting citizenship and for purposes of international travel, including but not limited to, issuing visas and passports;

11. A person requesting a copy of his own criminal history record information as defined in § 9.1-101 at his cost, except that criminal history record information shall be supplied at no charge to a person who has applied to be a volunteer with (i) a Virginia affiliate of Big Brothers/Big Sisters of America; (ii) a volunteer fire company or volunteer rescue squad; (iii) the Volunteer Emergency

60 Families for Children; (iv) any affiliate of Prevent Child Abuse, Virginia; (v) any Virginia affiliate of
61 Compeer; or (vi) any board member or any individual who has been offered membership on the board
62 of a Crime Stoppers, Crime Solvers or Crime Line program as defined in § 15.2-1713.1;

63 12. Administrators and board presidents of and applicants for licensure or registration as a child
64 welfare agency as defined in § 63.2-100 for dissemination to the Commissioner of Social Services'
65 representative pursuant to § 63.2-1702 for the conduct of investigations with respect to employees of and
66 volunteers at such facilities, caretakers, and other adults living in family day-care homes or homes
67 approved by family day-care systems, and foster and adoptive parent applicants of private child-placing
68 agencies, pursuant to §§ 63.2-1719 through 63.2-1721, subject to the restriction that the data shall not be
69 further disseminated by the facility or agency to any party other than the data subject, the Commissioner
70 of Social Services' representative or a federal or state authority or court as may be required to comply
71 with an express requirement of law for such further dissemination;

72 13. The school boards of the Commonwealth for the purpose of screening individuals who are
73 offered or who accept public school employment and those current school board employees for whom a
74 report of arrest has been made pursuant to § 19.2-83.1;

75 14. The State Lottery Department for the conduct of investigations as set forth in the State Lottery
76 Law (§ 58.1-4000 et seq.), and the Department of Agriculture and Consumer Services for the conduct of
77 investigations as set forth in Article 1.1:1 (§ 18.2-340.15 et seq.) of Chapter 8 of Title 18.2;

78 15. Licensed nursing homes, hospitals and home care organizations for the conduct of investigations
79 of applicants for compensated employment in licensed nursing homes pursuant to § 32.1-126.01, hospital
80 pharmacies pursuant to § 32.1-126.02, and home care organizations pursuant to § 32.1-162.9:1, subject to
81 the limitations set out in subsection E;

82 16. Licensed homes for adults, licensed district homes for adults, and licensed adult day-care centers
83 for the conduct of investigations of applicants for compensated employment in licensed homes for adults
84 pursuant to § 63.2-1720, in licensed district homes for adults pursuant to § 63.1-189.1, and in licensed
85 adult day-care centers pursuant to § 63.2-1720, subject to the limitations set out in subsection F;

86 17. The Alcoholic Beverage Control Board for the conduct of investigations as set forth in
87 § 4.1-103.1;

88 18. The State Board of Elections and authorized officers and employees thereof in the course of
89 conducting necessary investigations with respect to registered voters, limited to any record of felony
90 convictions;

91 19. The Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse
92 Services for those individuals who are committed to the custody of the Commissioner pursuant to
93 §§ 19.2-169.2, 19.2-169.6, 19.2-176, 19.2-177.1, 19.2-182.2, 19.2-182.3, 19.2-182.8, and 19.2-182.9 for
94 the purpose of placement, evaluation, and treatment planning;

95 20. Any alcohol safety action program certified by the Commission on the Virginia Alcohol Safety
96 Action Program for (i) assessments of habitual offenders under § 46.2-360, (ii) interventions with first
97 offenders under § 18.2-251, or (iii) services to offenders under § 18.2-51.4, 18.2-266, or 18.2-266.1;

98 21. Residential facilities for juveniles regulated or operated by the Department of Social Services, the
99 Department of Education, or the Department of Mental Health, Mental Retardation and Substance Abuse
100 Services for the purpose of determining applicants' fitness for employment or for providing volunteer or
101 contractual services;

102 22. The Department of Mental Health, Mental Retardation and Substance Abuse Services and
103 facilities operated by the Department for the purpose of determining an individual's fitness for
104 employment pursuant to departmental instructions;

105 23. Pursuant to § 22.1-296.3, the governing boards or administrators of private or religious
106 elementary or secondary schools which are accredited by a statewide accrediting organization
107 recognized, prior to January 1, 1996, by the State Board of Education or a private organization
108 coordinating such records information on behalf of such governing boards or administrators pursuant to
109 a written agreement with the Department of State Police;

110 24. Public and nonprofit private colleges and universities for the purpose of screening individuals
111 who are offered or accept employment;

112 25. Executive directors of community services boards or the personnel director serving the
113 community services board for the purpose of determining an individual's fitness for employment
114 pursuant to §§ 37.2-506 and 37.2-607;

115 26. Executive directors of behavioral health authorities as defined in § 37.2-600 for the purpose of
116 determining an individual's fitness for employment pursuant to §§ 37.2-506 and 37.2-607;

117 27. The Commissioner of the Department of Social Services for the purpose of locating persons who
118 owe child support or who are alleged in a pending paternity proceeding to be a putative father, provided
119 that only the name, address, demographics and social security number of the data subject shall be
120 released;

121 28. Authorized officers or directors of agencies licensed pursuant to Article 2 (§ 37.2-403 et seq.) of

Chapter 4 of Title 37.2 by the Department of Mental Health, Mental Retardation and Substance Abuse Services for the purpose of determining if any applicant who accepts employment in any direct consumer care position has been convicted of a crime that affects their fitness to have responsibility for the safety and well-being of persons with mental illness, mental retardation and substance abuse pursuant to §§ 37.2-416, 37.2-506, and 37.2-607;

29. The Commissioner of the Department of Motor Vehicles, for the purpose of evaluating applicants for a motor carrier certificate or license subject to the provisions of Chapters 20 (§ 46.2-2000 et seq.) and 21 (§ 46.2-2100 et seq.) of Title 46.2;

30. The chairmen of the Committees for Courts of Justice of the Senate or the House of Delegates for the purpose of determining if any person being considered for election to any judgeship has been convicted of a crime;

31. Heads of state agencies in which positions have been identified as sensitive for the purpose of determining an individual's fitness for employment in positions designated as sensitive under Department of Human Resource Management policies developed pursuant to § 2.2-1201.1. Dissemination of criminal history record information to the agencies shall be limited to those positions generally described as directly responsible for the health, safety and welfare of the general populace or protection of critical infrastructures;

32. The Office of the Attorney General, for all criminal justice activities otherwise permitted under subdivision A 1 and for purposes of performing duties required by the Civil Commitment of Sexually Violent Predators Act (§ 37.2-900 et seq.);

33. Shipyards, to the extent permitted by federal law or regulation, engaged in the design, construction, overhaul, or repair of nuclear vessels for the United States Navy, including their subsidiary companies, for the conduct of investigations of applications for employment or for access to facilities, by contractors, leased laborers, and other visitors;

34. Any employer of individuals whose employment requires that they enter the homes of others, for the purpose of screening individuals who apply for, are offered, or have accepted such employment;

35. Public agencies when and as required by federal or state law to investigate (i) applicants as providers of adult foster care and home-based services or (ii) any individual with whom the agency is considering placing an adult on an emergency, temporary, or permanent basis pursuant to § 63.2-1601.1, subject to the restriction that the data shall not be further disseminated by the agency to any party other than a federal or state authority or court as may be required to comply with an express requirement of law for such further dissemination, subject to limitations set out in subsection G;

36. The Department of Medical Assistance Services, or its designee, for the purpose of screening individuals who, through contracts, subcontracts, or direct employment, volunteer, apply for, are offered, or have accepted a position related to the provision of transportation services to enrollees in the Medicaid Program or the Family Access to Medical Insurance Security (FAMIS) Program, or any other program administered by the Department of Medical Assistance Services;

37. The State Corporation Commission for the purpose of investigating individuals who are members, senior officers, directors, and principals of an applicant for licensure as a mortgage lender or mortgage broker, or a licensed mortgage lender or mortgage broker for the purpose of investigating individuals applying for a position of employment in which the individual may have access to or process personal identifying or financial information from a member of the public, pursuant to Chapter 16 (§ 6.1-408 et seq.) of Title 6.1. Notwithstanding any other provision of law, if an application for a mortgage lender or mortgage broker license is denied based in whole or in part on information obtained from the Central Criminal Records Exchange pursuant to § 6.1-414, the Commissioner of Financial Institutions or his designee may disclose such information to the applicant or its designee; ~~and~~

38. The Department of Professional and Occupational Regulation for the purpose of investigating individuals for initial licensure pursuant to § 54.1-2106.1; and

39. Other entities as otherwise provided by law.

Upon an ex parte motion of a defendant in a felony case and upon the showing that the records requested may be relevant to such case, the court shall enter an order requiring the Central Criminal Records Exchange to furnish the defendant, as soon as practicable, copies of any records of persons designated in the order on whom a report has been made under the provisions of this chapter.

Notwithstanding any other provision of this chapter to the contrary, upon a written request sworn to before an officer authorized to take acknowledgments, the Central Criminal Records Exchange, or the criminal justice agency in cases of offenses not required to be reported to the Exchange, shall furnish a copy of conviction data covering the person named in the request to the person making the request; however, such person on whom the data is being obtained shall consent in writing, under oath, to the making of such request. A person receiving a copy of his own conviction data may utilize or further disseminate that data as he deems appropriate. In the event no conviction data is maintained on the data subject, the person making the request shall be furnished at his cost a certification to that effect.

183 B. Use of criminal history record information disseminated to noncriminal justice agencies under this
184 section shall be limited to the purposes for which it was given and may not be disseminated further.

185 C. No criminal justice agency or person shall confirm the existence or nonexistence of criminal
186 history record information for employment or licensing inquiries except as provided by law.

187 D. Criminal justice agencies shall establish procedures to query the Central Criminal Records
188 Exchange prior to dissemination of any criminal history record information on offenses required to be
189 reported to the Central Criminal Records Exchange to ensure that the most up-to-date disposition data is
190 being used. Inquiries of the Exchange shall be made prior to any dissemination except in those cases
191 where time is of the essence and the normal response time of the Exchange would exceed the necessary
192 time period. A criminal justice agency to whom a request has been made for the dissemination of
193 criminal history record information that is required to be reported to the Central Criminal Records
194 Exchange may direct the inquirer to the Central Criminal Records Exchange for such dissemination.
195 Dissemination of information regarding offenses not required to be reported to the Exchange shall be
196 made by the criminal justice agency maintaining the record as required by § 15.2-1722.

197 E. Criminal history information provided to licensed nursing homes, hospitals and to home care
198 organizations pursuant to subdivision 15 of subsection A shall be limited to the convictions on file with
199 the Exchange for any offense specified in §§ 32.1-126.01, 32.1-126.02, and 32.1-162.9:1.

200 F. Criminal history information provided to licensed assisted living facilities, licensed district homes
201 for adults, and licensed adult day-care centers pursuant to subdivision 16 of subsection A shall be
202 limited to the convictions on file with the Exchange for any offense specified in § 63.1-189.1 or
203 63.2-1720.

204 G. Criminal history information provided to public agencies pursuant to subdivision 35 of subsection
205 A shall be limited to the convictions on file with the Exchange for any offense specified in § 63.2-1719.

206 H. Upon receipt of a written request from an employer or prospective employer, the Central Criminal
207 Records Exchange, or the criminal justice agency in cases of offenses not required to be reported to the
208 Exchange, shall furnish at the employer's cost a copy of conviction data covering the person named in
209 the request to the employer or prospective employer making the request; provided that the person on
210 whom the data is being obtained has consented in writing to the making of such request and has
211 presented a photo-identification to the employer or prospective employer. In the event no conviction data
212 is maintained on the person named in the request, the requesting employer or prospective employer shall
213 be furnished at his cost a certification to that effect. The criminal history record search shall be
214 conducted on forms provided by the Exchange.

215 § 54.1-204. Prior convictions not to abridge rights.

216 A. A person shall not be refused a license, certificate or registration to practice, pursue, or engage in
217 any regulated occupation or profession solely because of a prior criminal conviction, unless the criminal
218 conviction directly relates to the occupation or profession for which the license, certificate or registration
219 is sought. However, the regulatory board shall have the authority to refuse a license, certificate or
220 registration if, based upon all the information available, including the applicant's record of prior
221 convictions, it finds that the applicant is unfit or unsuited to engage in such occupation or profession.

222 B. In determining whether a criminal conviction directly relates to an occupation or profession, the
223 regulatory board shall consider the following criteria:

- 224 1. The nature and seriousness of the crime;
225 2. The relationship of the crime to the purpose for requiring a license to engage in the occupation;
226 3. The extent to which the occupation or profession might offer an opportunity to engage in further
227 criminal activity of the same type as that in which the person had been involved;
228 4. The relationship of the crime to the ability, capacity or fitness required to perform the duties and
229 discharge the responsibilities of the occupation or profession;
230 5. The extent and nature of the person's past criminal activity;
231 6. The age of the person at the time of the commission of the crime;
232 7. The amount of time that has elapsed since the person's last involvement in the commission of a
233 crime;
234 8. The conduct and work activity of the person prior to and following the criminal activity; and
235 9. Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or following
236 release.

237 C. A regulatory board or department may require any applicant for registration, licensure or
238 certification to submit to fingerprinting and to provide personal descriptive information to be forwarded
239 along with the applicant's fingerprints through the Central Criminal Records Exchange to the Federal
240 Bureau of Investigation for the purpose of obtaining criminal history record information regarding such
241 applicant. Such applicant shall pay the cost of the fingerprinting or a criminal records check or both.

242 *The regulatory board or department may, at its discretion, enter into contracts with*
243 *non-governmental entities to effectuate the provisions of the preceding paragraph, but any criminal*
244 *record check response shall be returned to a governmental entity.*

The Central Criminal Records Exchange, upon receipt of an applicant's record or notification that no record exists, shall make a report to the regulatory board or department or their designee, who must belong to a governmental entity. If an applicant is denied a registration, license or certificate because of the information appearing in his criminal history record, the regulatory board or department shall notify the applicant that information obtained from the Central Criminal Records Exchange contributed to such denial. The information shall not be disseminated except as provided for in this section.

D. A regulatory board or department shall consider the criminal information as contained in the applicant's state or national criminal history in lieu of the applicant providing certified copies of such court records in determining whether a criminal conviction directly relates to an occupation or profession or if an applicant is unfit or unsuited to engage in an occupation or profession. The regulatory board or department may request additional information from the applicant in making such determination.

2. That the Department of Professional and Occupational Regulation shall obtain criminal history record information regarding individuals for initial licensure as a real estate licensee pursuant to § 54.1-2106.1.

3. That the State Police shall invoice the Department of Professional and Occupational Regulation for any costs and expenses of implementing the provisions of this act.