Department of Planning and Budget
2021 Special Session I Fiscal Impact Statement

1. **Bill Number:** HB2113S1

House of Origin	☐	Introduced	☐	Substitute	☐	Engrossed
Second House	☐	In Committee	☒	Substitute	☐	Enrolled

2. **Patron:** Herring

3. **Committee:** Senate Finance and Appropriations

4. **Title:** Automatic expungement of criminal records.

5. **Summary:** Provides for a process of record sealing, defined in the bill as (i) the restriction of the dissemination of criminal history record information contained in the Central Criminal Records Exchange (CCRE), including any records relating to an arrest, charge, or conviction, to the purposes set forth in the bill, and (ii) the prohibition of the dissemination of court records, unless such dissemination is authorized by a court order for a purpose set forth in the bill. It describes the process by which the Department of State Police (VSP) and the Office of the Executive Secretary of the Supreme Court (OES) must share information on a regular basis to ensure records are sealed at the appropriate time. It also provides a process by which the Department of Motor Vehicles (DMV) must seal eligible records in its possession. It requires the Board of Criminal Justice Services (the Board) to adopt regulations and procedures for the dissemination of sealed criminal history record information. The bill also creates the Sealing Fee Fund, which will be administered by the OES, which must use the funds solely to fund the costs for the compensation of court-appointed counsel under the provisions of the bill.

   The bill provides for the record sealing of various Code sections, lays out the criteria that must be met before such records may be sealed, and lists exceptions for instances in which individuals or parties (including perspective employers, firearms dealers, etc.) may access records that have otherwise been ordered sealed. The bill prohibits agencies and other parties from requiring the disclosure of such records on applications for employment, for services, including insurance, or for the rental of a dwelling, and creates criminal penalties for violations of those sections. It creates a criminal penalty for the unauthorized release of sealed records. The bill also provides that a person who fails to disclose a record that has been sealed in circumstances that require disclosure is guilty of perjury under § 18.2-434.

   The bill also includes regulations for the release of such records by business screening services. It requires them to register with VSP, and allows VSP to charge an annual licensing fee to allow business screening services to access such information. A portion of this fee is to be used to cover the cost of providing such records and the remainder must be deposited into the Sealing Fee Fund. It also provides a process by which an individual may dispute the completeness or accuracy of a criminal or traffic history record that is maintained by a business screening service, and provides for civil penalties for business screening services

that violate this section. It allows the Office of the Attorney General (OAG) to file civil actions to enforce this section.

The bill contains an enactment clause.

6. **Budget Amendment Necessary**: Yes, Items 39, 402, and 425.

7. **Fiscal Impact Estimates:** Preliminary. See Item 8 below.

8. **Fiscal Implications:** According to the Department of State Police (VSP), the proposed legislation would require the agency to replace several of its core systems that collect and store criminal record information, including the agency's Criminal History System, the Applicant Tracking System, the Expungement System, the Master Name Index (an index of names and search algorithm to connect a record to an individual in the event of misspellings or aliases), the Civil Commitment System, and the Rap Back System (which allows agencies to be notified of any employees who are charged with a crime), and to unify all of these systems onto one platform. The estimated cost to make these replacements and upgrades is $12.5 million. The Department estimates it will also need $66,520 to modify its existing systems that disseminate marijuana records in order to comply with this proposed legislation. Additionally, it will cost approximately $15,000 to develop and implement the functionality for the agency to delete all records from the CCRE that are not reportable under the proposed legislation. The total estimated information technology one-time cost to VSP is $12,581,520.

   Additionally, VSP estimates it will need four analyst positions, and one lead analyst position, to comply with the provisions of this bill. These positions would complete several functions as provided in the proposed legislation, including the completion of out-of-state criminal history reviews to find convictions that qualify for record sealing. Current technology does not allow for this search function to be automated, so these positions would need to manually examine the qualifying records, confirm the requirements of the originating state or territory, and conduct research on incomplete records.

   There are 304,799 records in the Central Criminal Records Exchange (CCRE) that would meet criteria for automatic expungement according to the bill, and VSP received an average of 30,100 such records between calendar years 2017-2019. VSP estimates that each analyst position would be able to review, research, and process 6,000 of these record examinations, and the corresponding expungements per year. The total ongoing cost for these positions, including salary and benefits, is $438,464 annually. Other costs associated with these positions include $17,722 per year in office space costs, $24,301 in one-time furniture expenses, and $9,957 the first year and $7,700 annually thereafter for information technology costs.

   According to the Office of the Executive Secretary (OES), the agency would need to make the following technological changes in order to implement the proposed legislation:

   - modify 17 public/external-facing and 20 internal systems/interfaces to prohibit access to automatically expunged cases;

- develop and implement incoming and outgoing interfaces with VSP to receive and process cases for automatic expungement and orders voiding expungements;
- develop an Expungement Management System (EXMS), which includes project setup, infrastructure configuration, and development of capabilities to fully implement the bill's requirements;
- modify multiple systems to allow receipt of expungement and expungement void ordered entered through the EXMS;
- conduct performance and load testing of all affected systems;
- address database security and roles to ensure that only authorized users see the automatically expunged data; and
- assign additional processing units to systems to handle the increased load during expungement list processing, including additional data storage capabilities and software licensing costs.

OES estimates the total fiscal impact of this bill to be $6,156,130. According to OES, this appropriation may be spread out over the four years it will take to be developed based on the bill's July 1, 2025, effective date.

Under the substitute bill, DMV would expunge an estimated 5,100 records annually at a cost of $38 per expungement, with the agency requiring three additional positions. In addition, the agency would incur one-time costs of $9 per record expungement for the automated portion of its expungement process and related activities, with that cost rate applied to an estimated 25,400 records. DMV cannot absorb these costs and staff positions without a budget amendment, but will not require funding until July 1, 2025 when the portions of the bill impacting DMV become effective.

The proposed legislation provides for conviction of perjury under § 18.2-434, a Class 5 felony, for individuals who deny or fail to disclose an offense to (i) an employer who is permitted to request information about sealed records (§ 19.2-392.5(E)); (ii) a court amidst proceedings related to the care and custody of a child (§ 19.2-392.5(G)); or (iii) a court in the jury selection process (§ 19.2-392.5(J)). A Class 5 felony is punishable by a term of imprisonment of between one and ten years, or confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both. The bill also establishes a new Class 1 misdemeanor for the unauthorized disclosure of a sealed record under § 19.2-392.14, and a Class 6 felony for any person who makes an unauthorized disclosure maliciously and intentionally. Section 19.2-392.15 makes it a Class 1 misdemeanor for employers, landlords, educational institutions, and state and local agencies to require an individual to disclose an automatically expunged record, unless they are an exempted organization specifically listed in the Code. Under current law, a Class 1 misdemeanor is punishable by up to 12 months in prison or a fine of not more than $2,500, or both. A Class 6 felony is punishable by a term of imprisonment of between one and five years, or confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both.

According to the Virginia Criminal Sentencing Commission, existing data do not contain sufficient detail to estimate the number of additional individuals who may be convicted of perjury if the proposal were enacted. However, affected offenders may be sentenced similarly

to those who are currently convicted of perjury under § 18.2-434. Based upon FY 2019 and FY 2020 Sentencing Guideline data obtained by the Virginia Criminal Sentencing Commission, 85 offenders were convicted of a Class 5 felony under § 18.2-434. The perjury offense was the primary, or most serious offense in 59 cases. Another 50.8% of the offenders were given a local-responsible (jail) term for which the median sentence was three months. The remaining 20.3% received a state-responsible (prison) term with a median sentence of 1.8 years.

Existing data do not contain sufficient detail to estimate the number of additional individuals who may be convicted under the proposed Class 1 misdemeanors for unauthorized disclosure and requiring the disclosure of sealed records, or for the proposed Class 6 felonies for intentional and malicious disclosure of sealed records, according to the Virginia Criminal Sentencing Commission. According to General District Court Case Management System (CMS) data for FY2015 to FY2020, one individual was convicted of a Class 1 misdemeanor under § 19.2-392.3 for illegal disclosure of expunged criminal records. This was the only offense at sentencing, and the offender did not receive an active term of incarceration to serve after sentencing. It is not possible to determine if this case involved malicious and intentional disclosure. General District Court CMS data for the same six-year period indicate there were no Class 1 misdemeanor convictions under § 19.2-392.4 for requiring disclosure of expunged criminal records.

Because the bill expands the applicability of the existing Class 5 felony under § 18.2-434 and creates a new Class 6 felony, it may increase future state prison bed needs in the Commonwealth. However, available data is not sufficient to estimate the number of cases under the proposed legislation or estimate the overall impact. Accordingly, the magnitude of the impact on prison bed space cannot be determined at this time.

Due to the lack of data, the Virginia Criminal Sentencing Commission has concluded, pursuant to § 30-19.1:4 of the Code of Virginia, that the impact of the proposed legislation on state-responsible (prison) bed space cannot be determined. In such cases, Chapter 56, 2020 Acts of Assembly, Special Session I, requires that a minimum impact of $50,000 be assigned to the bill.

Any potential fiscal impact on local and regional jails or the Department of Juvenile Justice (DJJ) is indeterminate at this time.

The proposed legislation may also increase the local-responsible jail bed space needs, however the extent of the impact cannot be determined at this time using existing data. However, any increase in jail population will increase costs to the state. The Commonwealth currently pays the localities $4.00 a day for each misdemeanant or otherwise local-responsible prisoner held in a jail. It also funds a large portion of the jails' operating costs, e.g. correctional officers. The state's share of these costs varies from locality to locality. However, according to the Compensation Board's most recent Jail Cost Report (November 2020), the estimated total state support for local jails averaged $34.59 per inmate, per day in FY 2019.

According to the Office of the Attorney General (OAG), there is no anticipated fiscal impact on agency operations as a result of the provisions of this bill. The Department of Criminal Justice Services (DCJS) indicates that any fiscal impact generated as a result of the provisions of this bill can be absorbed within existing resources.

9. **Specific Agency or Political Subdivisions Affected:** Department of State Police, Office of Executive Secretary, Commonwealth's Attorneys, Office of the Attorney General, Department of Motor Vehicles, Department of Forensic Science, Department of Social Services, Department of Criminal Justice Services, Department of Corrections, Local law enforcement agencies.

10. **Technical Amendment Necessary:** No.

11. **Other Comments:** None.