



Pete Ricketts, Governor

MEMORANDUM

To: Juvenile Pretrial Diversion Programs
From: Amy Hoffman, Director of Juvenile Diversion Programs
Date: April 16, 2019
Re: Diversion and Sealed Records Statutes – LB 354

Legislative Bill 354, introduced by Senator Pansing Brooks, will amend the statutes related to the sealing of juvenile records. The Legislature passed this bill and it was signed by Governor Pete Ricketts on March 27, 2019. Since there is no emergency clause, these changes will become effective September 7, 2019. This memorandum includes the statutes amended by each section of the legislative bill and provides notes to assist diversion programs to understand how these changes will impact their programs and participants.

Section 1: Nebraska Revised Statute §43-260.04: Adds an additional subsection to the diversion statutes to clarify how programs should respond to a public inquiry and who can have access to information or records pertaining to the juvenile's participation in diversion.

A juvenile pretrial diversion program shall:

(9)(a) Respond to a public inquiry in the same manner as if there were no information or records concerning participation in the diversion program. Information or records pertaining to participation in the diversion program shall not be disseminated to any person other than:

- (i) A criminal justice agency as defined in section 29-3509;*
- (ii) The individual who is the subject of the record or any persons authorized by such individual; or*
- (iii) Other persons or agencies authorized by law.*

(b) An individual, a person, or an agency requesting information subject to subdivision (9)(a) of this section shall provide the diversion program with satisfactory verification of his, her, or its identity.

Don Arp, Jr., Executive Director

Nebraska Commission on Law Enforcement and Criminal Justice

P.O. Box 94946
301 Centennial Mall South
Lincoln, Nebraska 68509

OFFICE 402-471-2194 FAX 402-471-2837
NCC.Webmaster@Nebraska.gov

ncc.nebraska.gov



NOTE: When a diversion program receives an inquiry from employers, military recruiters, or other members of the public, the program **must** say there is no information or records regarding the youth's participation in juvenile diversion.

Information or records **can** be disseminated to:

- 1- A criminal justice agency as defined in section 29-3509 including:
 - a. Courts; and
 - b. A government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or executive order and which allocates a substantial part of its annual budget to the administration of criminal justice.
- 2- The youth or the person authorized by such youth: The participant has the right to have access to their diversion record after it has been closed and/or sealed. If the participant wants the program to release discharge information to another person, the diversion program should have a signed release from the participant and parent, if the participant is still a minor, authorizing release to that particular person. The person receiving the information also needs to provide the diversion program satisfactory verification of their identity.
- 3- Other persons or agencies authorized by law: this would include the ability to provide accurate information on how the participant performed in the program to the juvenile courts, county attorneys, city attorneys, defense attorneys, and probation officers as authorized in NRS 43-260.05(8).

Section 2: Nebraska Revised Statute §43-2,108.01: The Bill did not change diversion participation from being included under the sealed record statutes, but this Bill did amend portions of the language and added felony offenses transferred to juvenile court.

(1) Sections 43-2,108.01 to 43-2,108.05 (the sealed records statutes) apply only to persons who were under the age of eighteen years when the offense took place and, after being taken into custody, arrested, cited in lieu of arrest, or referred for prosecution without citation, the county attorney or city attorney:

- (a) Declined to file a juvenile petition or criminal complaint;*
- (b) Offered juvenile pretrial diversion or mediation to the juvenile under the Nebraska Juvenile Code;*
- (c) Filed a juvenile court petition describing the juvenile as a juvenile described in subdivision (1), (2), (3)(b), or (4) of section 43-247;*
- (d) Filed a criminal complaint in county court against the juvenile under state statute or city or village ordinance for misdemeanor or infraction possession of marijuana or misdemeanor or infraction possession of drug paraphernalia;*
- (e) Filed a criminal complaint in county court against the juvenile for any other misdemeanor or infraction under state statute or city or village ordinance, other than for a traffic offense, when all offenses in the case are waiverable offenses;*
- (f) Filed a criminal complaint in county or district court for a felony offense under state law or a city or village ordinance that was subsequently transferred to juvenile court for ongoing jurisdiction.*

(2) The changes made by this legislative bill to the relief set forth in sections 43-2,108.03 to 43-2,108.05 shall apply to all persons described in this section, as amended by this legislative bill, for offenses occurring prior to, on, or after the effective date of this act.

Section 3: Nebraska Revised Statute §43-2,108.02: Changed the language regarding how and what information will be provided to juveniles about the record sealing process. Previously the law required the county or city attorney to “provide the juvenile written notice” or information regarding sealed records. The law now states that the Nebraska Supreme Court will develop the written notice about sealing of records and the county or city attorney attaching a copy of that notice to any juvenile petition or criminal complaint.

(1) *By January 1, 2020, the Supreme Court shall promulgate a written notice that:*

(a) States in developmentally appropriate language that, for a juvenile described in section 43-2,108.01, the juvenile's record will be automatically sealed if (i) no charges are filed as a result of the determination of the prosecuting attorney, (ii) the charges are dismissed, (iii) the juvenile has satisfactorily completed the diversion, mediation, probation, supervision, or other treatment or rehabilitation program provided under the Nebraska Juvenile Code, or (iv) the juvenile has satisfactorily completed the county court diversion program, probation ordered by the court, or sentence ordered by the court;

(b) States in developmentally appropriate plain language that, if the record is not sealed as provided in subdivision (1)(a) of this section, the juvenile or the juvenile's parent or guardian may file a motion to seal the record with the court when the juvenile reaches the age of majority or six months have passed since the case was closed, whichever occurs sooner; and

(c) Explains in developmentally appropriate plain language what sealing the record means.

(2) *For a juvenile described in section 43-2,108.01, the county attorney or city attorney shall attach a copy of the notice to any juvenile petition or criminal complaint.*

NOTE: When no charges are filed, charges are dismissed, or the juvenile satisfactorily completes diversion, all of the files related to that offense and diversion participation need to be sealed. The juvenile does not have to do anything additional for that process to take place.

Section 4: Nebraska Revised Statute §43-2,108.03: Adds a requirement that the county or city attorney give the juvenile notice regarding the sealing process and diversion completion, adds automatic seal language, and adds a remedy if the record is not sealed.

(1)(a) If a juvenile described in section 43-2,108.01 was taken into custody, arrested, cited in lieu of arrest, or referred for prosecution without citation but no juvenile petition or criminal complaint was filed against the juvenile with respect to the arrest or custody, the county attorney or city attorney shall notify the government agency responsible for the arrest, custody, citation in lieu of arrest, or referral for prosecution without citation that no criminal charge or juvenile court petition was filed. The county attorney or city attorney shall provide written notification to the juvenile that no juvenile petition or criminal complaint was filed and provide the juvenile with the notice described in section 43-2,108.02.

(b) If a juvenile described in subdivision (1)(a) of this section discovers that his or her record was not automatically sealed, such juvenile may notify the county attorney, who shall cause the record to be sealed by providing the notice required by subdivision (1)(a) of this section.

(2)(a) If the county attorney or city attorney offered and a juvenile described in section 43-2,108.01 has agreed to pretrial diversion or mediation, the county attorney or city attorney shall

notify the government agency responsible for the arrest or custody when the juvenile has satisfactorily completed the resulting diversion or mediation. At the time the juvenile is offered diversion or mediation, the county attorney or city attorney shall provide the notice described in section 43-2,108.02 to the juvenile. The county attorney or city attorney shall also provide written notification to the juvenile of his or her satisfactory or unsatisfactory completion of diversion or mediation.

(b) If a juvenile who was satisfactorily discharged from diversion or mediation discovers that his or her record was not automatically sealed, the juvenile may notify the county attorney, who shall cause the record to be sealed by providing the notice required by subdivision (2)(a) of this section.

(3)(a) If the juvenile was taken into custody, arrested, cited in lieu of arrest, or referred for prosecution without citation and charges were filed but the case was dismissed by the court, the court shall seal the record as set forth in section 43-2,108.05.

(b) If a juvenile described in subdivision (3)(a) discovers that his or her record was not automatically sealed, the juvenile may notify the court, which shall seal the record as set forth in section 43-2,108.05.

(4)(a) If a juvenile described in section 43-2,108.01 has satisfactorily completed the probation, supervision, or other treatment or rehabilitation program provided under the Nebraska Juvenile Code or if the juvenile has satisfactorily completed the probation or sentence ordered by a county court, the court shall seal the records as set forth in section 43-2,108.05.

(b) If a juvenile described in subdivision (4)(a) discovers that his or her record was not automatically sealed, the juvenile may notify the court, which shall seal the record as set forth in section 43-2,108.05.

(5) A government agency or court that receives notice under subdivision (1)(a) or (2)(a) of this section shall, upon such receipt, immediately seal all records housed at that government agency or court pertaining to the citation, arrest, record of custody, complaint, disposition, diversion, or mediation.

(6) When a juvenile described in section 43-2,108.01 whose records have not been automatically sealed as provided in subsection (1), (2), (3), or (4) of this section reaches the age of majority or six months have passed since the case was closed, whichever occurs sooner, such juvenile or his or her parent or guardian may file a motion in the court of record asking the court to seal the record pertaining to the offense which resulted in disposition, adjudication, or diversion in juvenile court or diversion or sentence of the county court. The motion shall set forth the facts supporting the argument that the individual who is the subject of the juvenile petition or criminal complaint has been satisfactorily rehabilitated.

NOTE:

1- When the county or city attorney chooses to not file a criminal charge or juvenile petition, such as giving a warning letter, they must:

- a. Notify the juvenile that they are not filing the case and also give them the sealing record notice developed by the Supreme Court in §43-2,108.02;
- b. Notify the applicable law enforcement or government agency responsible for the custody, citation or referral to the county attorney about their decision to not file the case and direct them to seal all records housed at their agency regarding the law violation; and

- c. Seal all of their records regarding the law violation.
 - d. ** If a juvenile discovers his or her record was not automatically sealed, such juvenile may notify the county attorney, who shall cause the record to be sealed.
- 2- When the county or city attorney offers and the juvenile agrees to participate in juvenile diversion or mediation, they must:
- a. At the time the juvenile is offered diversion or mediation, provide to the juvenile the sealing record notice developed by the Supreme Court in §43-2,108.02;
 - b. Notify the applicable law enforcement or government agency responsible for the custody, citation or referral to the county attorney when the juvenile has satisfactorily completed the resulting diversion or mediation, and direct them to seal all records housed at their agency regarding the law violation;
 - c. Provide written notification to the juvenile of his or her satisfactory or unsatisfactory completion of diversion or mediation; and
 - d. Seal all of their records regarding the law violation and diversion participation upon successful completion, including notifying the diversion program to seal their records if the program is not part of their office.
 - e. ** If a juvenile who was satisfactorily discharged from diversion or mediation discovers his or her record was not automatically sealed, the juvenile may notify the county attorney, who shall cause the record to be sealed.
- 3- A government agency receiving notice under the two scenarios above shall, upon such receipt, immediately seal all records housed at that government agency pertaining to the citation, arrest, record of custody, complaint, disposition, diversion, or mediation.
- 4- When a case is filed and subsequently dismissed by the court, the court will follow the sealing record procedure in §43-2,108.05 and provide the necessary notices to the applicable agencies to seal their records.

Section 5: Nebraska Revised Statute §43-2,108.04: Describes proceedings allowing a juvenile to file a motion to seal their record when the case does not fall under the automatic sealing provisions; requires a county or city attorney to provide a basis for any objection to the seal request; and modifies what the court can consider in determining whether the juvenile has been rehabilitated to a satisfactory degree.

Section 6: Nebraska Revised Statute §43-2,108.05: Describes proceedings for court ordered sealing of records, the effect of having a sealed record, and sealed record accessibility.

- (1) If the court orders the record of a juvenile sealed, the court shall:*
- (a) Order that all records, including any information or other data concerning any proceedings relating to the offense, including the arrest, taking into custody, petition, complaint, indictment, information, trial, hearing, adjudication, correctional supervision, dismissal, or other disposition or sentence, be deemed never to have occurred;*
 - (b) Send notice of the order to seal the record (i) if the record includes impoundment or prohibition to obtain a license or permit pursuant to section 43-287, to the Department of Motor Vehicles, (ii) if the juvenile whose record has been ordered sealed was a ward of the state at the time the proceeding was initiated or if the Department of Health and Human Services was a party in the proceeding, to such department, and (iii) to law enforcement agencies, county attorneys, and city attorneys referenced in the court record;*

(c) Order all notified under subdivision (1)(b) of this section to seal all records pertaining to the offense;

(d) If the case was transferred from district court to juvenile court or was transferred under section 43-282, send notice of the order to seal the record to the transferring court; and

(e) Explain to the juvenile using developmentally appropriate language what sealing the record means. The explanation shall be given verbally if the juvenile is present in the court at the time the court issues the sealing order and by written notice sent by regular mail to the juvenile's last-known address if the juvenile is not present in the court at the time the court issues the sealing order. The sealing order shall include contact information for each government agency subject to the sealing order.

(2) The effect of having a record sealed is that thereafter no person is allowed to release any information concerning such record, except as provided by this section. After a record is sealed, the person whose record was sealed can respond to any public inquiry as if the offense resulting in such record never occurred. A government agency and any other public office or agency shall reply to any public inquiry that no information exists regarding a sealed record. Except as provided in subsection (3) of this section, an order to seal the record applies to every government agency and any other public office or agency that has a record relating to the offense, regardless of whether it receives notice of the hearing on the sealing of the record or a copy of the order. Upon the written request of a person whose record has been sealed and the presentation of a copy of such order, a government agency or any other public office or agency shall seal all records pertaining to the offense.

(3) A sealed record is accessible to the individual who is the subject of the sealed record and any persons authorized by such individual, law enforcement officers, county attorneys, and city attorneys in the investigation, prosecution, and sentencing of crimes, to the sentencing judge in the sentencing of criminal defendants, to a judge making a determination whether to transfer a case to or from juvenile court, to any attorney representing the subject of the sealed record, and to the Inspector General of Nebraska Child Welfare pursuant to an investigation conducted under the Office of Inspector General of Nebraska Child Welfare Act. Inspection of records that have been ordered sealed under section 43-2,108.04 may be made by the following persons or for the following purposes:

(a) By the court or by any person allowed to inspect such records by an order of the court for good cause shown;

(b) By the court, city attorney, or county attorney for purposes of collection of any remaining parental support or obligation balances under section 43-290;

(c) By the Nebraska Probation System for purposes of juvenile intake services, for presentence and other probation investigations, and for the direct supervision of persons placed on probation and by the Department of Correctional Services, the Office of Juvenile Services, a juvenile assessment center, a criminal detention facility, a juvenile detention facility, or a staff secure juvenile facility, for an individual committed to it, placed with it, or under its care;

(d) By the Department of Health and Human Services for purposes of juvenile intake services, the preparation of case plans and reports, the preparation of evaluations, compliance with federal reporting requirements, or the supervision and protection of persons placed with the department or for licensing or certification purposes under sections 71-1901 to 71-1906.01, the Child Care Licensing Act, or the Children's Residential Facilities and Placing Licensure Act;

(e) By the individual who is the subject of the sealed record and by persons authorized by such individual. The individual shall provide satisfactory verification of his or her identity.

(f) At the request of a party in a civil action that is based on a case that has a sealed record, as needed for the civil action. The party also may copy the sealed record as needed for the civil action. The sealed record shall be used solely in the civil action and is otherwise confidential and subject to this section;

(g) By persons engaged in bona fide research, with the permission of the court or the State Court Administrator, only if the research results in no disclosure of the person's identity and protects the confidentiality of the sealed record; or

(h) By a law enforcement agency if the individual whose record has been sealed applies for employment with the law enforcement agency.

(4) Nothing in this section prohibits the Department of Health and Human Services from releasing information from sealed records in the performance of its duties with respect to the supervision and protection of persons served by the department.

(5) In any application for employment, bonding, license, education, or other right or privilege, any appearance as a witness, or any other public inquiry, a person cannot be questioned with respect to any offense for which the record is sealed. If an inquiry is made in violation of this subsection, the person may respond as if the offense never occurred. Applications for employment shall contain specific language that states that the applicant is not obligated to disclose a sealed record. Employers shall not ask if an applicant has had a record sealed. The Department of Labor shall develop a link on the department's web site to inform employers that employers cannot ask if an applicant had a record sealed and that an application for employment shall contain specific language that states that the applicant is not obligated to disclose a sealed record.

(6) Any person who knowingly violates this section shall be guilty of a Class V misdemeanor.

NOTE: Again, the county attorney's office and diversion program must respond that no information exists and seal all records pertaining to the offense. Diversion programs should be familiar with the sealed record notice developed by the Supreme Court and the language in §43-2,108.05(2) and (5) to provide guidance to diversion participants.