

**LFC Requester:** \_\_\_\_\_

**AGENCY BILL ANALYSIS  
2019 REGULAR SESSION**

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**    X    **Amendment**    \_\_\_\_\_  
**Correction**    \_\_\_\_\_    **Substitute**    \_\_\_\_\_

**Date** Feb. 11, 2019

**Bill No:** SB493

**Sponsor:** Martinez

**Agency Name  
and Code  
Number:**

Administrative Office of the  
District Attorneys (AODA) 264

**Short  
Title:** Criminal Expungement Act

**Person Writing  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		
0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
0	0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY19</b>	<b>FY20</b>	<b>FY21</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	Unknown	Unknown	Unknown	Unknown	Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB370; HB267  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

SB493 creates the “Criminal Record Expungement Act.” SB493 also repeals Section 29-3-8.1 NMSA 1978 (allowing a person to petition the department of public safety to expunge arrest information on the person's state record or federal bureau of investigation record if the arrest was for a misdemeanor or petty misdemeanor offense and the arrest was not for a crime of moral turpitude).

SB493 creates a process under which a person may petition the district court for an order to expunge arrest records and certain public records. “Expungement” means the removal from access to the general public of a notation of an arrest, complaint, indictment, information, plea of guilty, conviction, acquittal, dismissal or discharge record, including a record posted on a publicly accessible court, corrections or law enforcement internet website.

Arrest records are defined as records that identify a person under arrest or under investigation for a crime that are taken or gathered by an official and that may include information gathered from the national crime information center or another criminal record database, photographs, fingerprints and booking sheets. Arrest records do not include:

- Citations from driving under the influence of intoxicating liquor or drugs maintained by the taxation and revenue department;
- Computer-aided dispatch information; or
- Log books relating to breath-alcohol testing equipment.

Public records are defined as documentation that relates to a person’s arrest, indictment, proceeding, finding or plea of guilty, conviction, acquittal, dismissal or discharge, including information posted on a court or law enforcement website. Public records do not include:

- Arrest record information that reveals confidential sources, methods, information or individuals accused but not charged with a crime and that is maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of any crime;
- Arrest record information that is confidential and unlawful to reveal;
- a district attorney’s or attorney general’s file maintained as a confidential record for law enforcement purposes that is not open for inspection by members of the public; or
- records maintained by the children, youth and families department, the human services department or the public education department when that record is

confidential.

The following persons who have not been convicted are eligible to petition for expungement:

- A victim of identity theft or wrongful arrest, indictment or charge;
- A person released without conviction. The petition cannot be filed until one year after dismissal of the matter. No other charge or proceeding may be pending against the person. “Released without conviction” includes an acquittal or finding of not guilty, a nolle prosequi, a no bill or a dismissal other than a dismissal pursuant to Section 31-20-9 NMSA 1978, a successful completion of a pre-prosecution diversion program, or the proceedings were otherwise discharged;
- A person convicted of some crimes, but special requirements must be met.

Special requirements apply for a convicted person to have records expunged:

- Expungement is not available for an offense committed against a child, an offense that caused great bodily harm or death to another person, a sex offense as defined in Section 29-11A-3 NMSA 1978 or an offense involving driving while under the influence of intoxicating liquor or drugs;
- No other charge or proceeding is pending against the petitioner;
- The petitioner must have completed the sentence and paid any fines or fees owed to the state;
- A certain amount of time must have passed without another criminal conviction. The amount of time depends on the conviction for which expungement is sought. For a violation of a municipal ordinance or a misdemeanor, 2 years; for a misdemeanor conviction for aggravated battery under Section 30-3-5(B) NMSA 1978 or a conviction for a fourth degree felony, 4 years; for a third degree felony, six years; for a second degree felony, eight years; or for a first degree felony or for any offense provided in the Crimes Against Household Members Act, 10 years.
- The court must find that justice would be served by expungement.

To determine if justice will be served by expunging records related to a conviction, the court shall consider

- The nature and gravity of the offense
- The petitioner’s age, criminal history and employment history;
- The length of time that has passed since the offense was committed and the sentence completed;
- The specific adverse consequences the petitioner may be subject to if the petition is denied;
- Any reasons for retention of the records.

Upon a petitioner’s request, the court shall also order expungement of the expunge proceedings.

If an order to expunge is entered, the proceedings shall be treated as if they never occurred, and officials and the person who received the order to expunge may reply to an inquiry that no record exists with respect to the person.

SB493 is effective January 1, 2020.

## **FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SB493 requires the petitioner to notify the district attorney, who shall be given an opportunity to provide to the district court any objections to the petition. Notice is not given to other entities that may be ordered to expunge records. This makes the district attorney the point person for objections. If the district attorneys take it upon themselves to consult with affected entities prior to the expungement hearing, this will take significant time.

There will be increased costs for the courts that hear expungement petitions, and for the agencies that must expunge public records. The administrative office of the courts and the department of public safety are charged with developing rules and procedures to implement the act, including procedures for notifying the accused of the accused's rights under the act.

## **SIGNIFICANT ISSUES**

It is difficult to determine how SB493 will interact with the Inspection of Public Records Act (IPRA). SB493 appears to allow expungement of all public records (but not confidential records) dealing with arrests, indictments, pleas, convictions acquittals and dismissals that come within its scope. (If that is not the intent of the drafters, the intent should be made clearer.) IPRA's provision recognizing confidentiality for law enforcement records is very narrow, providing an exception for law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. That means that most law enforcement records are subject to IPRA, and would therefore potentially be subject to expungement under SB493.

It is not clear what expungement means. SB493 provides that expungement means that a record shall be removed from public access. Does that mean that the record becomes confidential, and not subject to IPRA, but that it still remains available to law enforcement and the courts? That appears to be the case, because provisions of SB493 talk about the orders of expungement prohibiting law enforcement and the courts from releasing copies of the records to any person, except upon order of the court. That suggests that the records remain, but are not accessible by the public. If so, that is hard to reconcile with the provision in SB493 that "the proceedings shall be treated as if they never occurred." If the intent of SB493 is to keep the records confidential as to the public, but available to law enforcement and the courts, that should be made clear.

If an expunged record is not available to law enforcement and the courts, or is available only on court order, it is difficult to determine how SB493 will interact with existing criminal laws. New Mexico's criminal statutes sometimes determine the degree of offense by looking at whether the offense is a first offense or a second or subsequent offense. New Mexico's sentencing statutes, including the "three strikes" law, often tie the sentence to whether the offense is a first or a subsequent offense. Some offenses themselves, such as the felon in possession of a firearm statute, are based on prior convictions. If the record of that underlying conviction does not exist, or is not easily available, how can the subsequent crime be prosecuted?

The broad reach of SB493 may have unintended consequences:

- SB493 may make it difficult to maintain data on arrests, convictions, acquittals, dismissals, etc.

- Court opinions, including appellate opinions, would be “public records” under SB493, and subject to expungement in appropriate circumstances. Yet an opinion on a misdemeanor conviction, a false arrest or an opinion overturning a conviction can be important for its legal analysis and precedential value. Expunging such opinions would be harmful to the judicial system, and could be very costly as many such opinions exist. (If SB493 does not expunge court opinions, then a public record of the proceeding will still be available.)
- SB493 does not allow expungement of records of some crimes that provide for increased sentences for second and subsequent offenses. But SB493 makes it difficult for the legislature to enact laws in the future that provide for increased sentences for second and subsequent offenses. If the prior conviction can be expunged, that sentencing structure does not work.
- SB493 allows expungement of some convictions without regard to whether the court ordered restitution, and whether the defendant has paid the ordered restitution. What happens to the restitution order if the conviction no longer exists?
- SB493 allows expungement of some convictions without regard to whether a related civil suit is pending or whether a related civil suit could still be filed.
- SB493 requires notice of the petition to the district attorney, but not to other entities that may be required to expunge records, and does not require notice to the victim of a crime.
- SB493 allows expungement by victims of identity theft. But the records of the proceeding may also contain information about the person who stole the victim’s identity. That information may be expunged, too.

## **PERFORMANCE IMPLICATIONS**

As discussed above, SB493 makes the district attorney the point person for objections to the expungement. No other entities receive notice of the petition. Is it the district attorney’s responsibility to notify the entities that may be affected, to determine if they object? Is it the district attorney’s responsibility to research the case to determine if expungement of a conviction will serve the interests of justice?

## **ADMINISTRATIVE IMPLICATIONS**

If the court issues an order requiring expungement, the court “shall cause a copy of the order to be delivered to all relevant law enforcement agencies and courts.” It is not clear who makes the determination on which agencies and courts are relevant. Must the petitioner alert the court to the relevant agencies and courts? Is the district attorney responsible for determining which entities and courts are relevant? Is this determination the court’s responsibility?

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

SB493 is very similar to HB370, but there are differences in some of the provisions.  
HB267 Criminal Justice Reforms (includes data sharing of arrest records)

## **TECHNICAL ISSUES**

None noted.

**OTHER SUBSTANTIVE ISSUES**

None noted.

**ALTERNATIVES**

None noted.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Expungement will be governed by existing law, NMSA 1978, Section 29-3-8.1, which allows for petitions to expunge state records or federal bureau of investigation records if the arrest is for a misdemeanor or petty misdemeanor not involving moral turpitude.

**AMENDMENTS**

None proposed.