



VIRGIN ISLANDS DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

December 11, 2023

Honorable Javan E. James, Sr.
Senator
35th Legislature of the Virgin Islands
3022 Estate Golden Rock
Christiansted, St. Croix, VI 00820

Re: Bill No. 35-0178 – Amendments to Title 5, Virgin Islands Code, Chapter 314, to Add Section 3732(a) – Allowing for Auto-Expungement Due to Lack of Probable Cause – and Title 3, Virgin Islands Code, Chapter 33, Section 881(g)

Dear Senator James:

The Office of the Attorney General appreciates the opportunity to comment on Bill No. 35-0178. Bill No. 35-0178 seeks to amend Title 5 of the Virgin Islands Code, Chapter 314, to add Section 3732(a), which would allow for the automatic expungement of arrest records upon a finding that the arrest lacked probable cause. The bill also aims to amend Title 3 of the Virgin Islands Code, Chapter 33, Section 881(g)(9) to clarify that expunged arrest records held by VIPD are not subject to disclosure under the Open Records Act. The bill was designed to clear a person's record – and improve their ability to move forward – once the Superior Court dismisses a criminal complaint due to lack of probable cause. The Department of Justice has done a preliminary review and offers the following comments.

It is estimated that between 70 and 100 million Americans, or one out of three adults, has some type of criminal record, including an arrest without conviction.¹ Having a conviction on their record can affect a person's ability to obtain employment, higher education and necessary housing. These obstacles can lead to increased poverty, racial disparities, crime and recidivism. While there

¹ <https://www.sentencingproject.org/app/uploads/2022/08/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>

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Letter to Honorable Javan E. James, Sr.

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is real interest in decreasing these barriers and offering citizens a second chance, we must remember there also is public interest in criminal justice, which remains a key government function.

Bill No. 35-0178 proposes to authorize the automatic expungement of criminal records of arrest for which there was no finding of probable cause. The bill states “when the Superior Court dismisses a criminal complaint or an information for lack of probable cause, the Court shall simultaneously enter orders expunging the arrest record, including fingerprints, mugshots, DNA samples, and any other police or judicial proceeding records of a person.” As presented, the bill weakens the territory’s existing laws related to the expungement of criminal records and due process protections that already exist.

Virgin Islands law currently provides for the expungement of criminal records when:

1. A person successfully completes a Pretrial Intervention Program under 5 V.I.C. § 4611 *et seq.*;
2. A person has received a statement of Nolle Prosequi, because the People are unable to meet their burden of proof;
3. A person whose case has been dismissed with prejudice and the person has no other charges or arrest pending; or,
4. A person has been arrested, and no complaint or information has been filed and the statute of limitation has expired.²

Additionally, Virgin Islands law at 5 V.I.C. § 3734 provides that the Court “may expunge the record of a misdemeanor conviction of an individual, including fingerprints, photographs, and DNA samples, and records of other police or judicial proceedings of the individual, upon the petition of the individual and subject to the provisions of this chapter and rules of the Court.”

The proposed legislation goes even further. It creates an avenue for automatic expungement regardless of the seriousness of the crime, the statute of limitations, or the facts and circumstances of a “no probable cause” finding. There are a number of reasons a Court may find there is no probable cause, many unrelated to a person’s actual guilt. They range from absence of a key witness (a sick police officer, an intimidated domestic violence victim) to irregularities in a hearing. The current expungement statute already provides a right to expungement, including mandatory expungement in many cases. As currently existing, the law of expungements in the Virgin Islands provides due process to both residents and the government.

Moreover, Bill No. 35-0178 ignores the statute of limitations protections set for all offenses in the territory. Most felonies must be charged within three years of the date the crime was committed; afterwards, charges may not be filed. As noted above, there is already a mandatory

² See 5 V.I.C. § 3732

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grant of expungement when a case is dismissed, and the statute of limitations has expired. The Department of Justice's preference is to maintain the opportunity for its attorneys and an impartial judge to evaluate a Petition for Expungement for legal sufficiency and appropriateness.

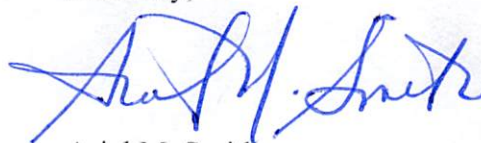
There also are collateral considerations, including DNA samples and the history of prior contact with law enforcement. For example, the proposed law calls for the expungement, or permanent destruction, of fingerprints and DNA samples. Currently, pursuant to Virgin Islands Code, a DNA sample is collected from a suspect upon their arrest of a misdemeanor or felony sex offense. That DNA sample is then uploaded to CODIS, the Combined DNA Index System, which is maintained by the FBI. Within the CODIS system, hits occur when DNA from a crime scene is matched to another DNA profile in the database. This is a valuable tool used by law enforcement to identify suspects in murder, rape and unsolved cold cases. The proposed legislation could prevent a suspect's DNA from being entered into CODIS, eliminating a useful resource for the Virgin Islands.

Further, when a suspect is arrested, information related to the arrest is added to the National Crime Information Center, or NCIC, database. The proposed law would automatically remove this entry. The NCIC is routinely used by law enforcement officers and personnel and is directly related to officer safety. For example, when an officer initiates a traffic stop or prepares to arrest a suspect, the officer can check the NCIC for past arrests, including arrests involving guns or violence, to determine if there is a safety concern. Similarly, a person's prior contact with law enforcement and their history of charges, as recorded in the NCIC, are important pieces of information for prosecutors when evaluating how best to proceed with a case.

In conclusion, as differing circumstances may lead to a finding of no probable cause during the first appearance before the Court, sufficient expungement laws exist to facilitate due process and other concerns that should be considered. It would be beneficial to use our resources to make existing expungement laws more accessible to residents who would otherwise qualify.

This communication reflects the Virgin Islands Department of Justice, Office of the Attorney General's comments and concerns regarding Bill No. 35-0178. If you have any questions, please do not hesitate to contact either myself or Solicitor General Pamela Tepper.

Sincerely,



Ariel M. Smith

U.S. Virgin Islands Attorney General