

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser



Public Hearing on

B22-560, the “Second Chance Amendment Act of 2017”

Bill 22-045, the “Criminal Record Expungement Amendment Act of 2017”

Bill 22-404, the “Criminal Record Accuracy Assurance Act of 2017”

Bill 22-447, the “Record Sealing Modernization Amendment Act of 2017”

Testimony of
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Committee on the Judiciary and Public Safety
Charles Allen, Chairperson
Council of the District of Columbia

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9:30am
Room 120
John A. Wilson Building

Good morning, Chairperson Allen, members, and staff of the Committee on the Judiciary and Public Safety. I am Kevin Donahue, Deputy Mayor for Public Safety and Justice, and I am here to testify in full support of Mayor Bowser's "Second Chance Amendment Act of 2017" and to discuss why now is the time to reform criminal record sealing. During the course of my testimony, I will also address the other proposed legislation on the agenda. My testimony today is based on our belief that everyone deserves a second chance.

The Current Record Sealing System in the District

Let me start by describing the status quo that we believe needs to be reformed. Our current criminal records system is punitive. It is based on an outdated worldview that assumes there is an ongoing risk to public safety posed by those who have had any interaction with the criminal justice system – even if that contact does not result in either a trial or conviction. The current system does not adequately weigh the deleterious impact of a criminal record on a person's life. It is not grounded in recent research and literature. And, perhaps most importantly, it unnecessarily creates a false choice between public safety and reentry. In fact, public safety is enhanced when we give individuals access to opportunity and it is diminished when we put up barriers that make opportunity more distant and unachievable.

Each year, thousands of individuals are arrested in the District. They are arrested for offenses ranging from violent felonies to misdemeanors and outstanding warrants. Once arrested, each person will have a criminal record for a minimum of two years – even in a case where the arrest does not result in a trial, let alone a conviction. Currently, the burden is almost always on the individual to file a petition with the D.C. Superior Court asking a judge to allow their arrest record to be sealed. The person must convince a judge that it is in the interest of justice to grant their motion to seal their record. The Superior Court judge has the discretion to reject the petition.

While some misdemeanor convictions are eligible to be sealed, the large majority of criminal offenses – including almost every felony – are never eligible for sealing. Additionally, there are significant waiting periods before a person is eligible to file a petition with Superior Court. Furthermore, before a person is eligible to petition to seal an eligible misdemeanor conviction or felony failure to appear conviction, they must be "off papers" for eight years.¹ Lastly, for convictions, the resident is limited with regard to how many convictions may be sealed, and only the most recent conviction may be sealed, effectively establishing the cap at one.

The District is not alone in carrying forward a legacy of old criminal record sealing laws. Policy limitations and procedural hurdles are common across the country. We believe it is time to overcome these limitations and enact meaningful, progressive reforms to our criminal record sealing process.

The "Second Chance Amendment Act of 2017"

Now, let me discuss Mayor Bowser's proposal. When the Mayor first asked my office to review this issue, we identified three broad ways to reform the criminal record sealing process:

¹ "Off papers" means that the individual has completed their term of incarceration, probation, supervised release, or parole and has satisfied any other requirements from the court and remained conviction free.

- First, to shorten the time period a person must wait before seeking to seal their record;
- Second, to change the level of discretion that a D.C. Superior Court judge can use when reviewing a petition to seal a record; and
- Third, to expand the types of offenses eligible for record sealing.

The complexities of the D.C. Code require two different types of analysis: one for non-convictions² and one for convictions. I will first discuss how Mayor Bowser’s bill will reform the sealing of non-conviction records.

A. Non-conviction records

In cases of arrests without conviction, District law currently places the burden on individuals to petition the Superior Court to seal their non-conviction record. The process is time-consuming and frustrating. It must be improved.

Mayor Bowser’s bill would mandate the automatic sealing of many non-conviction records and shorten the timeframe for sealing them to 90 days, drastically shorter than the current two to four years.

For individuals arrested for crimes other than those designated under the D.C. Code as “violent or dangerous,”³ the burden to seal the record would shift from that person to the justice system. Under the Mayor’s bill, the Superior Court would seal non-conviction records within 90 days of the termination of the case. Following an order from the Court, the Metropolitan Police Department would seal their records relating to the non-conviction and send a certification back to the Court. The Court would then notify the resident that the records were sealed.

For non-convictions involving charges for violent or dangerous crimes, the person would still be eligible to seal the record after 90 days by filing a motion with the Superior Court. This process would be a significant improvement from the current waiting period of up to four years. It allows an impartial third party, a Superior Court judge, to determine whether there is any remaining public safety value in maintaining the person’s record. This provision recognizes that there will be some limited instances where it is in the public interest to keep a record from being sealed, but it allows for that determination to occur in a much shorter period of time. Examples of this may be individuals with repeated arrests for similar allegations, especially crimes like domestic violence, elder abuse, and sexual assault, where it may be inherently difficult to obtain the cooperation of the victim in order to pursue a prosecution. Under the Mayor’s proposed legislation, if there is no prosecutorial objection, or if an objection is overruled by a judge, the record would be sealed.

² A “non-conviction” is any disposition of a criminal case, other than a guilty plea, a plea of no contest, or a finding of guilt by a court. It includes arrests that do not result in prosecutions and prosecutions that do not result in a finding or admission of guilt.

³ D.C. Official Code §§ 23-1331(3) & 23-1331(4).

The Mayor's Second Chance bill would also retroactively benefit thousands of individuals with existing non-conviction records, not just prospectively. The Mayor's bill would make any person with a non-conviction record eligible to file a motion to seal that record beginning 90 days from the termination of the case. Thousands of people would be eligible to seal their non-conviction record as soon as this bill goes into effect.

B. Conviction Records

Recent studies focus on a concept called "redemptive time," which states that after a person is released from jail and remains free of any subsequent convictions for a period of time, that person's likelihood to recidivate is the same as a member of the general public. In light of this research and based on the Mayor's desire to help fully reintegrate returning citizens into the community, the Mayor's bill would lower the number of years required to be "off papers" to seal an eligible conviction from eight years to five. The reduced waiting period would help bring the District closer in line with the findings of the research.

We also thought it was important to consider changing the number of convictions an individual would be eligible to seal. As I mentioned in my opening, District law currently allows only the most recent single conviction to be sealed.⁴ We believe this limitation is overly punitive for returning citizens, so we have proposed that up to five convictions may be sealed.

We also believe there is a need to expand the offenses which are eligible for sealing. Current law makes every misdemeanor conviction eligible for sealing, unless it has been specifically designated as ineligible by D.C. Official Code § 16-801(9).⁵ Only one felony is eligible for

⁴ D.C. Official Code § 16-801(5).

⁵ Those misdemeanors include:

- (A) Interpersonal violence as defined in § 16-1001(6)(B), intimate partner violence as defined in § 16-1001(7), and intrafamily violence as defined in § 16-1001(9).
- (B) Driving while intoxicated, driving under the influence, and operating while impaired (§ 50-2201.05);
- (C) A misdemeanor offense for which sex offender registration is required pursuant to Chapter 40 of Title 22, whether or not the registration period has expired;
- (D) Criminal abuse of a vulnerable adult (§ 22-936(a));
- (E) Interfering with access to a medical facility (§ 22-1314.02);
- (F) Possession of a pistol by a convicted felon (§ 22-4503(a)(2) [see now § 22-4503(a)(1)]);
- (G) Failure to report child abuse (§ 4-1321.07);
- (H) Refusal or neglect of guardian to provide for child under 14 years of age (§ 22-1102);
- (I) Disorderly conduct (peeping tom) (§ 22-1321);
- (J) Misdemeanor sexual abuse (§ 22-3006);
- (K) Violating the Sex Offender Registration Act (§ 22-4015);
- (L) Violating child labor laws (§§ 32-201 through 32-224);
- (M) Election/Petition fraud (§ 1-1001.08);
- (N) Public assistance fraud (§§ 4-218.01 through 4-218.05);
- (O) Trademark counterfeiting (§ 22-902(b)(1));
- (P) Attempted trademark counterfeiting (§§ 22-1803, 22-902);
- (Q) Fraud in the second degree (§ 22-3222(b)(2));
- (R) Attempted fraud (§§ 22-1803, 22-3222);
- (S) Credit card fraud (§ 22-3223(d)(2));
- (T) Attempted credit card fraud (§ 22-1803, 22-223) [§§ 22-1803, 22-3223];
- (U) Misdemeanor insurance fraud (§ 22-3225.03a);

sealing: failure to appear in court. It is important to consider changing the types of eligible offenses methodically, based on expert research and data, so that we can account for the sheer breadth and complexity of our criminal code. This is why the Mayor's bill would task an independent body, the Criminal Code Revision Commission (CCRC), with reviewing the District's criminal laws to identify any additional offenses that should be eligible for sealing, as well as whether and how to adjust the sealing waiting times for different types of convictions. The CCRC is composed of criminal justice experts who are conducting a multi-year analysis of the District's criminal laws and proposing reforms to standardize criminal provisions and eliminate outdated or contradictory laws. They are ideally suited to conduct the impartial and informed review required by the Mayor's bill.

C. Amendments to the Bill

Since we submitted the Mayor's bill to Council, my office has continued to research issues around record sealing. As a result, I would like to offer two adjustments to improve the clarity of the bill.

First, we believe D.C. Official Code § 16-801 should be amended to include a definition of a "non-conviction" in order to remove any ambiguities as to what the term encompasses and provide clarity to the public and judges. We suggest a definition of "any disposition other than a plea of guilty, no contest, or a finding of guilt."

Second, I propose including the phrase "crime of violence" on page 4, line 85 of the Mayor's bill to go along with the phrase "dangerous crime." The exclusion of this term was a drafting error, and the change should be made in order to mirror the references to both types of offenses in the current D.C. Official Code.

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- (V) Attempted insurance fraud (§§ 22-1803, 22-3225.02, 22-3225.03);
 - (W) Telephone fraud (§§ 22-3226.06, 22-3226.10(3));
 - (X) Attempted telephone fraud (§§ 22-1803, 22-3226.06, 22-3226.10);
 - (Y) Identity theft, second degree (§§ 22-3227.02, 22-3227.03(b));
 - (Z) Attempted identify theft (§§ 22-1803, 22-3227.02, 22-3227.03);
 - (AA) Fraudulent statements or failure to make statements to employee (§ 47-4104);
 - (BB) Fraudulent withholding information or failure to supply information to employer (§ 47-4105);
 - (CC) Fraud and false statements (§ 47-4106);
 - (DD) False statement/dealer certificate (§ 50-1501.04(a)(3));
 - (EE) False information/registration (§ 50-1501.04(a)(3));
 - (FF) No school bus driver's license (18 DCMR § 1305.1);
 - (GG) False statement on Department of Motor Vehicles document (18 DCMR § 1104.1);
 - (HH) No permit — 2nd or greater offense (§ 50-1401.01(d));
 - (II) Altered title (18 DCMR § 1104.3);
 - (JJ) Altered registration (18 DCMR § 1104.4);
 - (KK) No commercial driver's license (§ 50-405);
 - (LL) A violation of building and housing code regulations;
 - (MM) A violation of the Public Utility Commission regulations; and
 - (NN) Attempt or conspiracy to commit any of the foregoing offenses (§§ 22-1803, 22-1805a).

Council Bills to Reform Record Sealing

I will now provide the Executive's views on the other three bills being considered today. I want to thank Councilmembers David Grosso, Robert White, and Trayon White for their thoughtful contributions to this effort, and I look forward to working with them and the Committee as we seek to produce a final bill that best meets the needs of our residents.

A. Criminal Record Accuracy Assurance Act of 2017

Bill 22-404, the "Criminal Record Accuracy Assurance Act of 2017," would prevent criminal history providers from reporting criminal history information related to records that have been sealed, expunged, or set aside, as well as records of non-convictions. The bill also requires that criminal history providers issue reports that are no more than 60 days old, in order to best ensure accuracy. The bill would be enforced by the Office of Human Rights. We believe this bill complements the reforms proposed by Mayor Bowser's legislation, although we'd like to work with the Committee on how enforcement actions would be taken against companies located outside the District or outside the country.

B. Criminal Record Expungement Amendment Act of 2017

Bill 22-45, the "Criminal Record Expungement Amendment Act of 2017," would shorten the waiting period for a person to seal their record from eight years to three years. The bill would expand the crimes eligible for sealing by including all misdemeanors, as well as felony theft and felony drug possession. We support the bill's objective, which is to expand the crimes eligible for sealing and shorten waiting periods for sealing. I would, however, recommend conducting the independent, expert analysis of the District's criminal laws, as proposed in the Mayor's bill, to best determine any additional offenses that should be made eligible for sealing. Conducting an independent analysis would allow us to move forward in a deliberate, thoughtful way.

C. Record Sealing Modernization Amendment Act of 2017

Bill 22-447, the "Record Sealing Modernization Amendment Act of 2017," contains several ideas we support, such as: determining eligibility for sealing based on the severity of the crime, shifting the burden in certain situations from the individual to the justice system, and decreasing the timeframes associated with sealing eligible offenses. There are also several other aspects of the bill that we support. We agree, for example, that there should be an automatic expungement of crimes in cases of proven actual innocence, or in cases with criminal records relating to crimes that have since been decriminalized or legalized. However, I believe that generally defaulting to expungement for the majority of records will compromise public safety. This is why we think record sealing is a better approach than record expungement in most cases. We must make sure that we are striking the right balance between public safety concerns and our reentry policy goals.

Working Together to Improve Our Residents' Lives

I am eager to work with the Council as we move forward with these important reforms to our criminal justice system. I thank all the witnesses who testified on this important subject today. Moving forward, my hope is that this will be a continuing dialogue between policymakers, returning citizens, advocates, and experts – all of whom have a shared vision of building better pathways for our residents.

I want to end with this thought. This is an issue that I believe should be approached as a partnership between the Executive, the Council, and all other interested parties. I am here to have a conversation and be collaborative, because we are all pushing in the same direction. It is clear that many people are going to contribute constructive ideas to this process. Through consideration of the legislative ideas of all interested parties, we can craft a reform that both helps returning citizens and creates a safer city. . It is clear that we agree on more things than we disagree. I look forward to working with each of you on this important and timely legislative reform.

Thank you for the opportunity to testify today. I welcome any questions.