

SUBJECT: Expanding eligibility for orders of nondisclosure for criminal records

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 4 ayes — Herrero, Moody, Shaheen, Simpson

0 nays

3 absent — Canales, Hunter, Leach

SENATE VOTE: On final passage, May 5 — 26-5 (Bettencourt, Huffman, Nelson, Nichols, L. Taylor)

WITNESSES: (*On House companion bill, HB 3936*)

For — Greg Glod, Texas Public Policy Foundation; Doug Deason; Paul Quinzi; (*Registered, but did not testify*): Matt Simpson, ACLU of Texas; Kathryn Freeman, Christian Life Commission; Traci Berry, Goodwill Central Texas; JoAnn Fleming, Grassroots America; Robin Lennon and Jim Lennon, Kingwood Tea Party; Annie Spilman, National Federation of Independent Business/TX; Mike Buster, Jack Graham, and David Shivers, Prestonwood Baptist Church; Josiah Neeley, R Street Institute; Lori Henning, Texas Association of Goodwills; Jenna White, Young Conservatives of Texas; Leah Lobsiger; Richard Tenenbown)

Against — (*Registered, but did not testify*): William Squires, Bexar County District Attorney; Kelley Shannon, Freedom of Information Foundation of Texas; Justin Wood, Harris County District Attorney's Office; Brian Eppes, Tarrant County Criminal District Attorney's Office; Michael Schneider, Texas Association of Broadcasters; Donnis Baggett, Texas Press Association)

On — Patricia Cummings, Texas Criminal Defense Lawyers Association; Sarah Pahl, Texas Criminal Justice Coalition; (*Registered, but did not testify*): Shannon Edmonds, Texas District and County Attorneys Association)

BACKGROUND: Deferred adjudication is a form of probation under which a judge postpones the determination of guilt while the defendant serves probation. It can result in the defendant being discharged and dismissed upon successful completion of that probation. Orders of nondisclosure are court orders that seal criminal records from the public but allow limited access by criminal justice agencies and certain others. Orders of nondisclosure are available only in certain cases in which individuals receive deferred adjudication.

Under Government Code, sec. 411.081(d), persons receiving a discharge and dismissal from deferred adjudication who also meet certain conditions may ask the court for an order of nondisclosure of their criminal records. Under sec. 411.081(e), individuals are entitled to request an order of nondisclosure only if they are not convicted of or placed on deferred adjudication for any offense other than a fine-only traffic offense while they are on deferred adjudication or during the waiting period for asking for non-disclosure.

In addition, under sec. 411.081(e), individuals are not entitled to ask for nondisclosure if they were placed on deferred adjudication for or have previous convictions or deferred adjudications for certain offenses, including those that require registration under the state's sex offender registration laws; aggravated kidnapping; murder; capital murder; injury to a child, elderly individual, or disabled individual; abandoning or endangering a child; stalking; offenses involving family violence; and violations of certain court orders or conditions of bonds in family violence, sexual assault or abuse, or stalking cases.

In eligible cases, courts shall issue orders of nondisclosure after notice to the prosecutor, an opportunity for a hearing, and determinations that the person was eligible to file a request for nondisclosure and that the order would be in the best interest of justice.

Under Government Code, sec. 411.081(g-3), courts cannot disclose to the public information in records that are subject to orders of nondisclosure. Courts can disclose the information only to criminal justice agencies, for

criminal justice or regulatory licensing purposes, to entities listed in Government Code, sec. 411.081(i), or to the person who is the subject of the order. Under Government Code, sec. 411.081(i), criminal history record information that is subject to a nondisclosure order may be disclosed to non-criminal justice agencies specified in the section. (There are three Government Code, secs. 411.081(i), due to multiple bills that amended the section being enacted by the 83rd Legislature.)

Under sec. 411.081(d)(1) and (2), individuals can ask a court for an order of nondisclosure upon the discharge and dismissal if placed on deferred adjudication for certain misdemeanors but must wait two years for others. Individuals must wait two years after the discharge and dismissal of their case if placed on deferred adjudication for a misdemeanor under Penal Code, ch. 20 (kidnapping, unlawful restraint, and human smuggling); ch. 21 (sex offenses); ch. 22 (assaultive offenses); ch. 25(family violence offenses); ch. 42 (disorderly conduct); and ch. 46 (weapons). If placed on deferred adjudication for a felony, the waiting period to ask for a nondisclosure order is five years after the discharge and dismissal.

Under Government Code, sec. 411.081(g-2), persons whose criminal history records have been sealed under orders of nondisclosure are not required to state in applications for employment, information, or licensing that they have been subject to criminal proceedings relating to the offense.

DIGEST: SB 1902 would expand eligibility to request orders of nondisclosure and would revise the process for issuing orders of nondisclosure in some situations. Eligibility would be expanded from current provisions allowing the orders only for some individuals placed on deferred adjudication to allow requests for orders from persons convicted and placed on probation for certain misdemeanors.

The bill would reorganize the provisions dealing with eligibility for the orders and the procedures for issuing them. Most current provisions would be transferred from various sections of Government Code sec. 411.081 to a new subchapter titled E-1 within Government Code, ch. 411.

Overall eligibility requirements. SB 1902 would establish in Government Code, sec. 411.074 conditions similar to current ones that define overall eligibility for orders of nondisclosure.

Similar to current law, those eligible for an order of nondisclosure would become ineligible if while on deferred adjudication or after sentencing for a misdemeanor conviction and during any required waiting period the individual was convicted of or placed on deferred adjudication for any offense other than a fine-only traffic offense.

In addition, as under current law, orders of nondisclosure could not be issued for those who had been convicted or placed on deferred adjudication for, or who had a previous conviction or deferred adjudication for, offenses that require registration under the state's sex offender registration law and certain offenses currently listed in Government Code, sec. 411.081(e). The bill would add human trafficking and continuous human trafficking to this list of offenses that would disqualify someone from a nondisclosure order.

SB 1902 would establish an additional criterion not in current law that would prohibit someone from receiving an order of nondisclosure if the court made an affirmative finding that the offense for which nondisclosure was being requested involved family violence.

Orders without petition for deferred adjudication for certain misdemeanors. The bill would establish procedures for those placed on deferred adjudication for certain misdemeanors to be issued orders of nondisclosure without a petition having to be filed with the court. Eligibility under these provisions would apply to individuals with no previous convictions or placement on deferred adjudication for an offense except for a fine-only traffic offense.

Eligibility for an order of nondisclosure under these provisions would not apply to individuals:

- placed on deferred adjudication for a misdemeanor offense under

- the following Penal Code sections: ch. 20 (kidnapping, unlawful restraint, and human smuggling); ch. 21 (sex offenses); ch. 22 (assaultive offenses); ch. 25 (family violence offenses); ch. 42 (covering disorderly conduct and related offenses); ch. 43 (public indecency, including prostitution and obscenity); ch. 46 (weapons); and ch. 71 (organized crime); and
- for whom a court had made an affirmative finding that it was not in the best interest of justice that the person receive an order of nondisclosure.

If a judge placing someone on deferred adjudication for a misdemeanor eligible for an order of nondisclosure determined that it was not in the best interest of justice for the person to receive an automatic order, the judge would have to file an affirmative finding to that effect.

Courts would be required to issue an order of nondisclosure if an eligible individual completed deferred adjudication under this section, received a discharge and dismissal of their case, and met the overall requirements in Government Code, sec. 411.074. The bill would establish deadlines for courts to issue the order relative to when they discharged and dismissed the proceedings.

Before an order of nondisclosure could be issued, the person receiving the order would be required to pay a \$28 fee to the court, the same fee required of those who file petitions with court requesting an order.

Orders for deferred adjudications for certain felonies, certain misdemeanors. SB 1902 would establish eligibility for orders of nondisclosure for individuals placed on deferred adjudication for certain felonies and misdemeanors who would not qualify for orders of nondisclosure under the above requirements. These provisions would be similar to current law provisions for those on deferred adjudication for certain felonies and misdemeanors.

Such requests could be made if the individual was not prohibited by Government Code, sec. 411.074 and if the current waiting periods of two

or five years were met. The bill would add offenses for public indecency under Penal Code, ch. 43 to the list of offenses that require a two-year waiting period.

In these cases, courts would issue orders of nondisclosure after notice to the prosecutor, an opportunity for a hearing, and determinations that the person was eligible to file a request for nondisclosure and that the order would be in the best interest of justice.

Orders after convictions, probation for certain misdemeanors. SB 1902 would authorize requests for orders of nondisclosure for those who were convicted of certain misdemeanors and placed on probation and who did not have their probation revoked.

Convictions for misdemeanors under the following offenses would be excluded: driving or operating a watercraft by a minor under the influence of alcohol, driving while intoxicated, flying while intoxicated, boating while intoxicated, assembling or operating an amusement ride while intoxicated, or violations of court orders enjoining organized criminal activity.

Individuals asking for an order of nondisclosure would have to qualify under Government Code 411.074 and could not have had a previous conviction for or been placed on deferred adjudication for another offense other than a fine-only traffic offense.

In these cases, courts would issue orders of nondisclosure after notice to the prosecutor, an opportunity for a hearing, and determinations that the person was eligible to file a request for nondisclosure and that the order would be in the best interest of justice.

Requests could be made under these circumstances two years after the end of probation for misdemeanors under: ch. 20 (kidnapping, unlawful restraint, and smuggling of persons); ch. 21 (sex offenses), ch. 22 (assaultive offenses); ch. 25 (offenses against the family); ch. 42 (disorderly conduct and related offenses); ch. 43 (public indecency); and

ch. 46 (weapons). For other misdemeanors, requests could be made after probation was completed.

Orders after convictions, confinement for certain misdemeanors. The bill would establish eligibility to request orders of nondisclosure for those convicted of and sentenced to terms of confinement for certain misdemeanors. Convictions for misdemeanors under the following offenses would be excluded: driving or operating a watercraft by a minor under the influence of alcohol, driving while intoxicated, flying while intoxicated, boating while intoxicated, assembling or operating an amusement ride while intoxicated, or violations of court orders enjoining organized criminal activity.

Individuals asking for an order of nondisclosure would have to qualify under Government Code, sec. 411.074 and could not have had a previous conviction for or have been placed on deferred adjudication for another offense other than a fine-only offense under the Transportation Code.

In these cases, courts would issue orders of nondisclosure after notice to the prosecutor, an opportunity for a hearing, and determinations that the person was eligible to file a request for nondisclosure and that the order would be in the best interest of justice. Such requests could be made two years after the end of a term of confinement.

Other provisions. Other provisions of SB 1902 would:

- make criminal history record information related to a conviction that was the subject of an order of nondisclosure able to be admitted into evidence during a trial for a subsequent offense or disclosed to a prosecutor for criminal justice purposes;
- require that when courts pronounce a sentence they inform defendants of their right to ask a court for an order of nondisclosure, unless the defendant was ineligible to obtain an order due to the nature of the offense or the defendant's criminal history;
- require courts dismissing proceedings against defendants on

- deferred adjudication to grant an order, if required, or to inform a defendant about eligibility to receive an order;
- add banks and other financial institutions to the list of entities that can receive information subject to orders of nondisclosure if it related to an employee, contractor, subcontractor, intern, volunteer, or an applicant for employment; and
 - allow judges to refer to magistrates cases involving orders of nondisclosure that do not require petitions.

The bill would take effect September 1, 2015, and would apply only to the issuance of an order of nondisclosure for an offense committed on or after that date. SB 1902 would prevail if it conflicted with another act of the 84th Legislature.

SUPPORTERS
SAY:

SB 1902 would allow an expanded but limited and appropriate group of ex-offenders who have paid their debt to society to ask to have their criminal records sealed to help them rebuild their lives. Current law allowing only certain individuals who successfully complete deferred adjudication to ask for orders of nondisclosure is too narrow and excludes many deserving individuals.

When criminal records are publically available, ex-offenders can struggle to rebuild their lives. They can have difficulties with access to housing, jobs, and school, which can effect recidivism. At some point, some low-level ex-offenders with misdemeanor convictions, who have done what was asked of them of them and gone on to lead law-abiding lives deserve a second chance at a life without a criminal record.

SB 1902 would provide that chance by expanding eligibility for orders of nondisclosure to certain first-time offenders with convictions for specified misdemeanor offenses who have been placed on probation or served a sentence of confinement. This would recognize that these offenders met their obligations after an offense and would provide an incentive for them to continue to abide by the law.

The bill would maintain current safeguards and add additional ones to ensure that eligibility for orders of nondisclosure was extended only to an appropriate group of offenders. As under current law, those with certain sex, serious, and family violence offenses listed in Government Code, sec. 411.074(e) would be excluded from eligibility for the orders. The bill would add offenses with an affirmative finding of family violence and human trafficking offenses to the list of offenses that exclude someone from eligibility.

In the case of misdemeanor convictions resulting in probation or confinement, the bill would exclude those with driving while intoxicated, other intoxication offenses, and violations of court orders enjoining organized criminal activity. Also excluded would be those with previous convictions or deferred adjudications for any offense other than a fine-only traffic offense. As under current law, individuals would have to successfully complete their deferred adjudication or probation terms and not commit another crime during that term or during a waiting period. For all these cases, there would be oversight and checks and balances to ensure only appropriate orders of nondisclosure were issued because prosecutors would have to be notified, a hearing could be held, and a determination would have to be made that an order of nondisclosure was in the best interest of the public.

SB 1902 would not influence decisions for deferred adjudications and trials. There would not be a disincentive for deferred adjudication as those seeking orders of disclosure after a conviction that resulted in confinement would have to wait two years. For some, deferred adjudication could result in a streamlined order of nondisclosure, and in certain cases of convictions and probation, orders could be requested upon completion of probation.

To help reduce the barriers to obtaining orders of nondisclosure, the bill would establish a streamlined process for those with eligible first misdemeanor offenses who were given deferred adjudication so that these cases would proceed without a petition. There would be judicial discretion and checks and balances in these cases because nondisclosure would

occur if a court made an affirmative finding that nondisclosure was not in the best interest of justice.

For others, SB 1902 would impose reasonable timelines for requests for orders so that these individuals could prove they would remain law abiding before getting their records sealed. Some of those completing a probation term could ask for an order after their term, and those serving confinement would have to wait two years. This would be in line with current law waiting periods for those receiving deferred adjudication for eligible misdemeanors and felonies.

Records under a nondisclosure order would continue to be available for criminal justice purposes as they are under current law, and the bill would say explicitly that information related to a conviction that was the subject of a nondisclosure order under the bill could be used as evidence during a trial for a subsequent offense.

OPPONENTS SAY: SB 1902 would go too far in expanding those who can have their records sealed under an order of nondisclosure. Nondisclosure of records was designed for a limited group of offenders who receive deferred adjudication under which they were not convicted. Access to public records can be important for employers, landlords, the press, and others, and as eligibility for nondisclosure is expanded, this access decreases.

SB 1902 would allow some with convictions for relatively serious offenses to be eligible for nondisclosure. These convictions could include misdemeanor offenses that can carry sentences of up to year in confinement, such as assault and theft. Some of these offenses could have been handled in jury trials, something for which the information generally remains public.

The bill could increase trials by providing a disincentive for some to agree to deferred adjudication. Currently, because of the opportunity to have records sealed, some individuals may agree to forgo a trial and accept deferred adjudication and the rehabilitation programs or other requirements that come with it. Under the bill, some offenders might

choose to go to trial with the possibility of confinement and then pursue an order of nondisclosure rather than agree to the terms of deferred adjudication.

For some offenders, SB 1902 would provide a process for the sealing of some records without requiring a petition and without a chance for the prosecutor to object or to request a hearing. This would remove oversight and checks and balances in the system that work to ensure that courts have full information about an individual and that orders of nondisclosure are granted only in appropriate cases.

NOTES: The House companion bill, CSHB 3936 by Herrero, was reported favorably from the House Criminal Jurisprudence Committee on May 4.