



Lynda M. Connolly
Chief Justice

Trial Court of the Commonwealth District Court Department

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TRANSMITTAL NO. 1083
Last Transmittal No. to:
First Justices 1082
Other Judges 1082
Clerk-Magistrates 1082
CPOs 1082

M E M O R A N D U M

TO: District Court Judges, Clerk-Magistrates and Chief Probation Officers
FROM: Honorable Lynda M. Connolly, Chief Justice
DATE: May 2, 2012
SUBJECT: **CORI law changes effective May 4, 2012**

The recent law reforming the use of Criminal Offender Record Information (“CORI”), St. 2010, c. 256, entitled “An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release” (“c. 256”), was signed on August 6, 2010. Some provisions in c. 256 became effective on November 4, 2010, and were summarized in Transmittal No.1056. While that Transmittal originally indicated that the balance of the provisions were to become effective on February 6, 2012, a subsequent session law, St. 2010, c. 359, § 102, specified that they become effective May 4, 2012.

This memorandum summarizes the provisions pertinent to the District Court that are effective May 4, 2012, such as changes to the sealing law and the creation of new crimes. The full text of c. 256 is available at <http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter256>. (Note that this hyperlink works only in the WordPerfect version of this Memorandum. You may also manually type the address into your web browser.)

1. Record sealing and unsealing. Chapter 256 makes several changes to the law regarding the sealing and unsealing of criminal records.

(a) Sealing CWOFS. Section 131 of c. 256 amends G.L. c. 276, § 100C to allow judges to seal CWOFS upon dismissal. Prior to this amendment, cases that had been continued without a finding could be sealed only by the Commissioner of Probation and only after the applicable waiting periods under G.L. c. 276, § 100A had expired.

The “MOTION TO SEAL RECORD” form has been amended to reflect this change, and it is attached. The form is also available in the Forms area of our intranet and internet websites, as is a sample “FINDINGS AND ORDER ON MOTION TO SEAL RECORD.”

As a reminder, please note that the sealing rules under G.L. c. 276, § 100C have been qualified by *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), and *Commonwealth v. Doe*, 420 Mass. 142 (1995). To seal criminal cases ending in a not guilty, no probable cause, nolle prosequi, dismissal, or now dismissal after a CWOFS, a judge must make “specific, on the record findings that sealing was necessary to effectuate a compelling government interest” that outweighs the public’s First Amendment

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presumption of access, and that sealing is the least restrictive means of achieving that interest. The defendant must show “[s]omething more than a general interest in reputation and privacy” and demonstrate that “he or she risks suffering specific harm if the record is not sealed.” While this need not rise to the level of “actual likelihood of immediate harm,” the defendant must show that it is “substantially probable that future opportunities are likely to be affected adversely” if the record is not sealed. See *Doe*, *supra* at 148, 149 n.7, 151-153.

Further, the *Pokaski* and *Doe* cases set out the procedure that is to be used in such instances. The defendant must file a motion to seal, which the judge should initially consider at a preliminary hearing to determine whether a prima facie case in favor of sealing has been made. If not, the motion should be denied. **The initial prima facie hearing should be an in-court ex parte hearing on the record, unless the defendant files a written waiver of the initial hearing.** If a prima facie case for sealing is established, then a formal hearing must be held, with prior notice to the Commonwealth, the probation department, any other interested party, and after public notice has been given by posting the motion on a court bulletin board for at least seven days. After the formal hearing, if the judge allows the motion to seal, the judge must make the specific findings required by *Pokaski* on the record. If the judge allows the motion, the form “PETITION TO COURT TO SEAL RECORD OF ADULT CRIMINAL AND/OR JUVENILE MASSACHUSETTS COURT APPEARANCES AND DISPOSITION” must also be filled out and signed to notify the Office of the Commissioner of Probation of the court’s order. A copy of this revised petition is attached.

For additional information on how subsequent cases have interpreted the *Pokaski* standard, please see the *Guide to Public Access, Sealing & Expungement of District Court Records*, available at <http://trialcourtweb/courtsandjudges/courts/districtcourt/pubaccesscourtrecords.pdf>. This Guide will be revised upon passage of CORI regulations promulgated by the Department of Criminal Justice Information Services and the release of CORI request forms issued by the Department.

(b) Sealing law changes on petitions to Probation. Sections 128 and 129 of c. 256 made several amendments to G.L. c. 276, § 100A. First, the waiting period for sealing convictions is reduced from 10 years to 5 years for misdemeanors, and from 15 years to 10 years for felonies, and begins to run immediately upon release from incarceration, or where there is no incarceration, upon disposition and prior to the completion of either parole or probation. Second, any violation of G.L. c. 209A, § 7 (domestic abuse restraining order) and G.L. c. 258E, § 9 (harassment prevention order) is considered a felony for purposes of sealing. Third, sex offenses are eligible for sealing 15 years after conviction or any period of incarceration, or after any obligation to register as a sex offender ceases, whichever is later. Sex offenders classified as Level 2 or Level 3 will not be eligible to have their convictions sealed.

Please note that petitions to seal under G.L. c. 276, § 100A are submitted directly to the Commissioner of Probation. They may not be submitted to a judge. The Office of the Commissioner of Probation has amended its “PETITION TO SEAL” form to reflect the above statutory changes, and it is attached.

(c) Unsealing in certain proceedings. Section 130 of c. 256 amends G.L. c. 276, § 100A to allow the unsealing of sealed records in proceedings for domestic abuse prevention orders under G.L.

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c. 209A, as well as care and protection and CHINS (G.L. c. 119, §§ 1-39I), guardianship and conservatorship (G.L. c. 201), divorce and separate support (G.L. c. 208 and 209), child custody (G.L. c. 209B), paternity (G.L. c. 209C), and adoption (G.L. c. 210, §§ 1-11A) proceedings. In such cases, judges are to utilize the following procedure:

“[A] party having reasonable cause to believe that information in a sealed criminal record of another party may be relevant to (1) an issue of custody or visitation of a child, (2) abuse, as defined in section 1 of chapter 209A or (3) the safety of any person may upon motion seek to introduce the sealed record into evidence. The judge shall first review such records in camera and determine those records that are potentially relevant and admissible. The judge shall then conduct a closed hearing on the admissibility of those records determined to be potentially admissible; provided, however, that such records shall not be discussed in open court and, if admitted, shall be impounded and made available only to the parties, their attorneys and court personnel who have a demonstrated need to receive them.”

(d) Report of “no record” by clerks. Section 132 of c. 256 amends G.L. c. 276, § 100C to give clerk-magistrates, in addition to the Commissioner of Probation, the authority, when responding to inquiries from authorized persons other than any law enforcement agencies or courts, to report in the case of a sealed record that no record exists.

(e) Immediate access to sealed records by criminal justice agencies. Section 133 of c. 256 adds G.L. c. 276, § 100D, providing criminal justice agencies immediate access to sealed records:

“Section 100D. Notwithstanding any provision of section 100A, 100B, or 100C of this chapter, criminal justice agencies as defined in section 167 of chapter 6 shall have immediate access to, and be permitted to use as necessary for the performance of their criminal justice duties, any sealed criminal offender record information as defined in section 167 of chapter 6 and any sealed information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 17.”

2. Criminal Record Review Board. Section 12 of c. 256 rewrites G.L. c. 6, § 168, replacing the former Criminal History Systems Board with a Criminal Record Review Board¹ within the Department of Criminal Justice Information Systems, established by G.L. c. 6, § 167A. The board is charged with the responsibility to hear complaints and investigate violations of the CORI law, G.L. c. 6, § 168(b), and may refer a complaint for criminal prosecution under G.L. c. 6, § 178.

3. Access to CORI. Chapter 256 establishes an internet database from which CORI can be obtained, subject to certain requirements. Specifically, §§ 18-25, 33, and 37 of c. 256 amend G.L. c. 6, §§ 171, 172C, and 173, add G.L. c. 6, § 171A and 172B½, and rewrite G.L. c. 6, §§ 172, 172A, 172E, and 178A, setting out procedures as to how CORI may be obtained, by whom, and the circumstances

¹ Members of the board are the Secretary of Public Safety, who shall serve as chairman, the Attorney General, the Chairperson of the Massachusetts Sentencing Commission, the Chief Counsel for the Committee for Public Counsel Services, the Chairman of the Parole Board, the Commissioner of the Department of Correction, the Commissioner of Probation, the Commissioner of the Department of Youth Services and the Colonel of State Police, or their designees, all of whom shall serve ex officio, and nine persons to be appointed by the Governor for a term of three years.

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under which the information may be obtained. Regulations will be promulgated setting forth the information that a requestor will be required to provide in order to query the database. G.L. c. 6, § 172(c).

Notably, §§ 172(a) and 178A of G.L. c. 6 list specific persons and entities who may make CORI requests,² the records that are produced, and the purposes for which the records may be requested. For instance, criminal justice agencies may obtain all CORI, including sealed records, for the actual performance of their criminal justice duties. G.L. c. 6, § 172(a)(1). However, even in the absence of sealing, dissemination of CORI to employers, landlords, and professional licensing authorities, G.L. c. 6, § 172(a)(3), and to members of the general public, G.L. c. 6, § 172(a)(4), is restricted to a greater or lesser degree based upon the severity of the offense and the nature of the disposition. Access is also time-limited based upon these factors, with information about more serious offenses to remain available for a longer period after disposition. As to accessing one's own record, § 35 of c. 256 rewrites G.L. c. 6, § 175, establishing procedures by which a person may review and seek correction of his or her own CORI record ("self-auditing"). The Department of Criminal Justice Information Services is required to promulgate regulations regarding access to CORI.³

Finally, both G.L. c. 6, § 171A, added by § 19 of c. 256, and G.L. c. 6, § 172(c), set out the rights of applicants for employment, volunteer appointments, housing, and professional licenses regarding the use of CORI in their application.

4. CORI violations. Section 36 of c. 256 rewrites G.L. c. 6, § 178 and adds § 178½ to expand the unlawful obtaining and communicating of CORI records to include unlawfully requiring a person to provide CORI records, obtaining and communicating juvenile delinquency records, and using CORI records to harass another. Further, G.L. c. 6, § 172, which is rewritten by § 21 of c. 256 and which limits how and by whom CORI may be obtained, states in § 172(e), "Except as authorized by this section, it shall be unlawful to request or require a person to provide a copy of his criminal offender record information. Violation of this subsection is punishable by the penalties set forth in section 178."

² These include the Jury Commissioner, clerks of court and assistant clerks (for juror data permitted under G.L. c. 234A, § 33), the Departments of Telecommunications and Cable, Public Utilities (for bus driver applicants), Children and Families, Youth Services, and Early Education and Care, persons providing home or community based services for elderly or disabled persons, the G.L. c. 119A IV-D agency, long term care facilities, assisted living residences, community care facilities, operators of children's camps, providers of activities or programs for children, schools that have contracted with taxicab companies, the Commissioner of Banks, camps and schools employing persons for climbing wall or challenge courses, crime victims and witnesses, the Motor Vehicle Insurance Merit Rating Board, district attorneys, schools, the Massachusetts Port Authority, the Pension Fraud Unit within the Public Employee Retirement Administration Commission, special education school programs, research programs, and family members of homicide victims.

³ Sections 3-7 of c. 256 added definitions in G.L. c. 6, § 167 for "All available criminal offender record information"; "Commissioner"; "Criminal offender record information"; "Requestor"; "Self-audit"; and "Subject."

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5. **Witness's CORI.** Section 105 of c. 256 amends G.L. c. 233, § 21 by adding: "Upon order of the court, a party may obtain a witness's criminal offender record information from the department of criminal justice information services."

6. **Parole eligibility for drug distribution offenses.** Section 67 of c. 256 authorizes half-time parole eligibility regardless of any minimum mandatory sentence for G.L. c. 94C, § 32 violations (Distributing Class A Drug), in the same manner as certain other violations of G.L. c. 94C authorized by §§ 68-70 and 72, which became effective November 4, 2010 (see Transmittal No. 1056). [*N.B.*: The only such mandatory minimum sentence over which the District Court has final jurisdiction is the 2-year mandatory minimum sentence for G.L. c. 94C, § 32J violations (Distributing Drugs in a School/Park Zone).]

7. **Sex offenders prohibited from ice cream truck vending.** Section 119 of c. 256 adds a new criminal offense, G.L. c. 265, § 48:

"Section 48. A sex offender, as defined by section 178C of chapter 6, who engages in ice cream truck vending, as defined in section 25 of chapter 270, shall be punished by imprisonment in the house of correction for not more than 2½ years or by a fine of \$1,000, or by both such fine and imprisonment. A police officer or officer authorized to serve criminal process may arrest, without a warrant, any person whom he has probable cause to believe has violated this section."

Section 122 of c. 256 adds G.L. c. 270, § 25, which sets out the following definitions:

"'Ice cream', any frozen dairy or frozen water-based food product.

"'Ice cream truck', any motor vehicle used for selling, displaying or offering to sell ice cream.

"'Ice cream truck vending', the selling, displaying or offering to sell ice cream or any other prepackaged food product from an ice cream truck."

General Laws c. 270, § 25 also prescribes procedures for the permitting of ice cream truck vending, and provides for a \$500 per day assessment for vending without a permit.

MOTION TO SEAL RECORD under G.L. c. 276, § 100C or c. 94C, § 44	DOCKET NO(s).	Massachusetts Trial Court District Court Department
DEFENDANT'S NAME		COURT DIVISION

On _____, _____, the criminal charge(s) against me, with the docket number(s) listed above, terminated in:

- a finding or verdict of not guilty.
- a dismissal by a judge.
- a nolle prosequi (dismissal by the prosecutor).
- a finding of no probable cause.

I, therefore, respectfully request this Court to order that the record(s) of the criminal charge(s) be sealed, for the following specific reasons:

(Attach additional pages as necessary.)

DATE	PETITIONER'S SIGNATURE	SIGNED UNDER THE PENALTIES OF PERJURY.
	x	

ORDER OF COURT AFTER PRELIMINARY HEARING OR PETITIONER'S WAIVER

- After preliminary hearing and pursuant to *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), and *Commonwealth v. Doe*, 420 Mass. 142 (1995), the Court finds that no prima facie case in favor of sealing has been shown, and the motion is therefore **DENIED SUMMARILY**.
- After petitioner's waiver of preliminary hearing and pursuant to *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), and *Commonwealth v. Doe*, 420 Mass. 142 (1995), the Court finds that no prima facie case in favor of sealing has been shown, and the motion is therefore **DENIED SUMMARILY**.
- The Court finds that a prima facie case that sealing the record will effectuate a compelling government interest has been shown, and the motion is therefore continued for at least 7 days to _____, 20____ at _____ A.M./P.M. **FOR A FULL HEARING**. The clerk-magistrate shall give the probation department and the district attorney's office notice of the hearing, and shall post a copy of the motion on a public bulletin board until the hearing. The district attorney's office shall post a copy of the motion on a public bulletin board until the hearing. The district attorney's office shall give notice to the victim, if any.

DATE	JUDGE'S SIGNATURE
	x

ORDER OF COURT AFTER FINAL HEARING

Pursuant to *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), and *Commonwealth v. Doe*, 420 Mass. 142 (1995):

- The motion is **DENIED** after full hearing.
- The motion is **ALLOWED** after full hearing; findings of fact and order are attached.

DATE	JUDGE'S SIGNATURE
	x



**TRIAL COURT OF MASSACHUSETTS
OFFICE OF THE COMMISSIONER OF PROBATION
ONE ASHBURTON PLACE, ROOM 405
BOSTON, MASSACHUSETTS 02108
617-727-5300**

Petition to court to seal record of adult criminal and/or juvenile Massachusetts court appearances and dispositions.

PETITIONER'S NAME:

(Print) _____ Date of Birth _____
(Last Name) (First Name) (Middle Name)

Alias/Maiden/Previous Name _____

Mailing Address _____
(Number) (Street) (City) (State) (Zip Code)

Birthplace _____ Father's Name _____ Mother's Maiden Name _____

- Section 100c - Chapter 276 (May Seal) Dismissed, Nolle Prosequi, No Probable Cause, Not Guilty.
- Section 34 - Chapter 94C (Drug controlled substance). (May Seal). First offense.
- Section 34 - Chapter 94C (Drug controlled substance). (Shall Seal). Possession of marijuana, or controlled substance in Class E.
- Section 44 - Chapter 94C (Drug controlled substance). (Shall Seal). Not guilty, complaint dismissed or not pressed.
- Chapter 1102 of 1973 - Conviction of possession of marijuana prior to July 1, 1972. (Shall Seal).

Court No.	Docket No.	Court Appearance Date	Offense	Disposition

Date _____

Signature of Petitioner _____

Petitioner NOT To Write Below This Line

Petition Allowed/Disallowed

Instructions

Upon a hearing on this matter on _____

After the petition is allowed, send the white copy to the Clerk's Office, the yellow copy to the Commissioner of Probation and the pink copy of the petitioner.

I find that SEALING WAS NECESSARY TO EFFECTUATE A COMPELLING GOVERNMENTAL INTEREST.

All copies must be signed by the judge. The yellow copy must be signed by the Chief Probation Officer before being forwarded to the Office of the Commissioner of Probation.

Judge's Signature _____

Date _____

C.P.O. Signature _____

Rec'd by Commissioner of Probation _____

