

Testimony of Phillip Lemman, Office of the State Court Administrator

On Senate Bill 388

Senate Judiciary Committee

February 13, 2019

SB 388 requires the Governor or her designee to notify the presiding judge of a circuit court when the Governor issues a pardon to a person who has been convicted in that court. Upon receiving the notice, the presiding judge is directed to order the sealing “the record of conviction and other official records in the case . . .” The bill also directs the court to send a certified copy of the sealing order to “such agencies as directed by the court.”

The Judicial Department has no position on the bill but is providing the following information to inform the legislature how we believe the bill would work, if adopted.

Under current law, no statute requires the Governor to notify the court of conviction when a pardon is issued or requires the court to include the pardon notice in the case file or affects the status of the court case file as a record accessible by the public. As a general matter, criminal case files (electronic or hard copy) and case registers are accessible by the public.

If adopted, SB 388 would change that by directing the Governor to notify the presiding judge of the circuit court in which the conviction occurred. The presiding judge is directed to issue an order sealing the case and the court clerk is directed to forward a certified copy of the order to agencies specified by the court.

SB 388 does not specify a process for this to occur but OJD likely would use a process similar to what occurs when a motion to set aside the record of an arrest or conviction has been granted. In ruling on that motion, the court might have received information from the prosecuting attorney, the Oregon State Police, and the victim of the crime. Then, as stated in ORS 137.225:

(3) “. . . Upon the entry of the order, the applicant for purposes of the law shall be deemed not to have been previously convicted, or arrested, cited or charged as the case may be, and the court shall issue an order sealing the record of conviction and other official records in the case, including the records of arrest, citation or charge whether or not the arrest, citation or charge resulted in a further criminal proceeding.

(4) The clerk of the court shall forward a certified copy of the order to such agencies as directed by the court. A certified copy must be sent to the Department of Corrections when the person has been in the custody of the Department of Corrections. Upon entry of the order, the conviction, arrest, citation, charge or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to its occurrence.”
(emphasis added)

In general, the court's order would seal the court register and case file, making both of those inaccessible to the public. The order also could be sent to the arresting agency, to OSP to modify the Law Enforcement Data Systems, and to the Department of Corrections.

This does not consistently occur in cases where a pardon is issued. OJD staff quickly found two cases in which the person was pardoned in December 2016, and in both instances the case register remains available online.

Using this existing set-aside process would benefit the courts by:

- Using a known process.
- Giving judges discretion over what records to seal, including in cases where the Governor issues a partial pardon and does not give clemency in all convictions within a specific case.
- Allowing courts to treat the pardon notice like a motion to set aside and have it become part of the court file and therefore become sealed.

There is one issue that the legislature might want to clarify as it considers SB 388: whether it intends records from the case file that are involved in the governor's clemency process to be sealed. Under ORS 144.650 - .670, records that likely are present in a case file are given to the Governor as part of her review of the clemency request. These victim statements, photographs, and reports become part of the Governor's file. If the Governor grants the pardon, those statutes require some of those records be included in the Governor's report to the Legislative Assembly and then require the Governor's file to be given to the Secretary of State, where "they shall be kept as public records, open to public inspection."

These records might be considered "other official records in the case" referred to in ORS 137.225 that are subject to the court's order to seal. If the legislature wants to prevent that result, it might be helpful to amend SB 388 to specify how those records should be treated.

I would be glad to answer any questions.