

Expungement

Digest for Court Staff and Clerks

I.C. 35-38-9

Contact: Henry Flores; email: henry.flores@courts.in.gov

NOTICE TO PUBLIC

This information is written to assist trial courts and circuit clerks. Please do not contact our office with questions because Indiana Supreme Court policies do not permit our office to provide legal advice to the public. We recommend that any person with questions about their case seek the advice of a licensed attorney. The Indiana Coalition for Court Access (<https://indianalegalhelp.org/>) can assist in finding low-cost legal help. Additionally, the Indiana Coalition for Court Access (<https://indianalegalhelp.org/what-if-i-dont-qualify/>) and Bar Associations provide options if you do not qualify for low-cost legal aid.

Expungement Case Type

Under Ind. Admin. Rule 8(B)(3), expungement cases are filed under a new cause number using the XP case type.

Confidentiality of Expungement Documents

The petition, case file, and all documents filed in the expungement case are open to the public until an order granting the expungement is issued. Pursuant to Ind. Access to Court Records Rule 5(c)(1), because the petition must contain the petitioner's SSN, the confidential information shall be filed on green paper (if paper filing) or filed as a confidential document (if e-filed). A separate document with the confidential information redacted shall be filed on white paper (if paper filing) or filed as a public document (if e-filing). A separate A.C.R Form, found in the Appendix to the Ind. Access to Court Records Rules, identifying the information excluded from public access and the Rule 5 grounds for exclusion shall also be filed.

If the expungement is granted, the expungement case file and all records under the expungement case number become a confidential case file under A.C.R. Rule 5(A)(1); I.C. 35-38-9-10(i).

If the expungement is denied, the expungement case file and all records under the expungement case number remain publicly accessible. The denial order is distributed on white paper.

The expungement statute is a restricted use and sealing statute, court records are not deleted or destroyed under Ind. Code 35-38-9.

Expungement Petition Types

Section 1 Expungement Petitions (Arrests)

- Effective July 1, 2022, I.C. 35-38-9-1 now permits expungements for an arrest if the criminal charges, or juvenile delinquency allegation, resulted in an adjudication for an infraction.
- Previously, expungements under IC 35-38-9-1 were prohibited while a person was participating in a pretrial diversion program. Beginning July 1, 2022, those participating in a pretrial diversion program may seek expungement if authorized by the prosecuting attorney.
- IC 35-38-9-1(b) now provides for automatic expungements of arrests in certain circumstances:
 - If a court dismisses all criminal charges or juvenile delinquency allegations filed and pending against a person (IC 35-38-9-1(b)(1)):
 - one (1) year has passed since juvenile delinquency allegations were filed against a child and there is no disposition; and the state is not actively prosecuting the allegations (I.C. 35-38-9-1(b)(2)); or
 - If in a criminal trial a defendant is acquitted of all charges, or the defendant's conviction is later vacated; or if in a juvenile proceeding the court finds all allegations not true, or the juvenile's true finding is later vacated (I.C. 35-38-9-1(b)(3));

- the court shall immediately order all records related to the criminal charges or juvenile delinquency allegations expunged. An expungement order that is issued based on non-prosecution under subdivision (2) goes into effect immediately. An expungement order issued under subdivision (1) or (3) may not go into effect earlier than sixty (60) days from the date of the dismissal, acquittal, or no true finding. However, upon motion by the prosecuting attorney, if the court finds that specific facts exist in the case which justifies a delay, the court may delay implementation of an expungement order under subdivision (1) or (3) for up to one (1) year from the date of the dismissal, acquittal, or no true finding.
- IC 35-38-9-1(c) permits an individual to petition a court exercising criminal jurisdiction in the county if:
 - The person is arrested, and one (1) year has elapsed since the date of the arrest; and no charges are pending against the person;
 - Upon receipt of the petition, the judge shall immediately order the expungement of all records related to the arrest. Expungement under this subsection does not shorten the statute of limitations. A prosecutor may still file a charge under this subsection. Section 1 expungement petitions address records of arrests, criminal charges, and delinquent child allegations:
 - that did not result in conviction or juvenile adjudication, even if the arrest, criminal charge, or juvenile delinquency allegation resulted in an adjudication for an infraction (I.C. 35-38-9-1(a)(1)(A));
 - in which the resulting conviction or juvenile adjudication was vacated (I.C. 35-38-9-1(a)(1)(B)); or
 - a conviction that was expunged under sections two (2) through five (5) I.C. 35-38-9-1(a)(1)(B).
 - This clause is self-executing for expunged convictions. If a trial court grants an expungement of a conviction under sections two (2) through five (5), the court shall also order any records under section one (1) related to the expunged conviction(s), to be sealed or redacted in accordance

with I.C. 35-38-9-1. I.C. 35-38-9-6(g); I.C. 35-38-9-7(e).

A single petition may address multiple arrests or charging incidents, but a Section 1 petition may not also include arrests that resulted in convictions that were not vacated, unless those convictions were ordered expunged under sections two (2) through five (5).

To be eligible for relief, absent authorization by the prosecution, the petitioner must not be currently participating in a pre-trial diversion program. I.C. 35-38-9-1(a)(2). Notwithstanding the automatic expungement provisions set forth in Section 1, the petitioner must also have fulfilled the requisite waiting period of one (1) year following the date of arrest, criminal charge, juvenile delinquency allegation, or the vacation of the petitioner's conviction by the appellate court, whichever is later, unless the prosecutor has consented to a shorter waiting period.

A filing fee is not required for Section 1 expungement petitions. The petition is verified and includes the following information, required by I.C. 35-38-9-1(e):

- Petitioner:
 - DOB;
 - SSN;
 - Driver's license number; and
 - Aliases or other names;
- Information pertaining to each arrest or charging event, when known:
 - Date of arrest, criminal charges, or juvenile delinquency allegation;
 - County in which arrest occurred or where charges or allegations were filed;
 - Law enforcement agency employing the arresting officer;
 - Court which charges or allegations were filed;
 - Case or cause number; and
 - List of each criminal charge filed and its disposition.

The court is required to serve a copy of all Section 1 petitions on the prosecuting attorney. I.C. 35-38-9-1(f).

Section 2, 3, 4, and 5 Expungement Petitions (Convictions)

Section 2 expungement petitions address misdemeanors and D felonies (or Level 6 felonies) alternatively sentenced as misdemeanors. Absent prosecutorial consent, the petitioner cannot file a Section 2 expungement petition until five (5) years after the date of conviction.

- With respect to Level 6 felonies reduced to a misdemeanor, the waiting period to obtain an expungement begins on the date a felony conviction is entered and does not start anew if that conviction is later reduced to a misdemeanor.

Section 3 expungement petitions address D felonies (or Level 6 felonies) that did not result in bodily injury. Absent prosecutorial consent, the petitioner cannot file a Section 3 petition until eight (8) years after the date of conviction.

Section 4 expungement petitions address other non-excluded felonies that did not result in bodily injury. Absent prosecutorial consent, the petitioner cannot file a Section 4 petition until eight (8) years after the date of conviction or three (3) years after the completion of the sentence.

Section 5 expungement petitions address remaining non-excluded felonies. Absent prosecutorial consent, the petitioner cannot file a Section 5 expungement petition until ten years after the date of conviction or eight (8) years after the completion of the sentence.

All petitions seeking expungement of a conviction require payment of the civil filing fee. This fee may be waived if the petitioner is indigent.

A petitioner may file a Section 2 – 5 expungement petition only once in his or her lifetime. I.C. 35-38-9-9(i). To be considered “one petition,” petitions filed in separate counties for offenses committed in those counties must be filed within one 365-day period.

However, effective July 1, 2019, if the statute is amended after expungement has been granted in a manner which provides greater relief to a petitioner, the petitioner may file a petition for a supplemental order of expungement in the court that granted the expungement which “succinctly set forth the relief the petitioner seeks.” I.C. 35-38- 9-9(l). If

the court finds that the petitioner was granted relief prior to the amendment, and that the petitioner is otherwise entitled to the relief set forth in the amendment, the court shall grant the supplemental petition consistent with the amendment. I.C. 35-38-9-9(l).

A petition for expungement of a conviction may expunge more than one conviction at the same time. The petitioner is required to consolidate all convictions from the same county in a single petition, and to address convictions from separate counties, one petition must be filed in each county. I.C. 35-38-9-9(h).

The Section 2 – 5 expungement petition is verified, must describe any other petitions filed under the respective chapter, and set forth the information listed in I.C. 35-38-9-8(b), including:

- Petitioner:
 - Full name, other legal names, or aliases;
 - DOB;
 - SSN;
 - Driver’s license number;
 - Addresses from date of commission of first offense to date of petition;
- List of all convictions, including records any collateral action:
 - Cause number;
 - Date of conviction;
 - Date of appellate opinion, if applicable.

A “collateral action” means an action or proceeding, including an administrative proceeding, that is factually or legally related to an arrest, a criminal charge, a juvenile delinquency allegation, a conviction, or a juvenile delinquency adjudication. The term includes a proceeding or action concerning a seizure, a civil forfeiture, and a petition for specialized driving privileges. I.C. 35-38-9-0.5.

Pursuant to I.C. 35-38-9-9.5, upon receipt of a request to expunge records related to a collateral action and a properly certified expungement order, a circuit or superior court in the county in which the collateral action occurred shall consider the following procedural requirements:

- Notify the prosecuting attorney of the county in which the court is located of the request and set the matter for hearing; or
- If the record conclusively establishes that the petitioner is entitled to an expungement of records related to a collateral hearing, the court may grant the request without a hearing;
- If the underlying expungement was granted under sections 1 through 3 the records of the collateral action shall be expunged or marked as expunged (for an expungement granted under sections 4 through 5 of this chapter), unless the court finds that the collateral action does not relate to the expunged arrest or conviction;
- A request to expunge a collateral action may be made at any time after the original expungement order is issued;
- The petition should, if possible, be filed under the cause of the collateral action; and
- No filing fee is required.
- Affirmation that no criminal investigation or charges are pending;
- Information pertaining to each conviction:
 - Case or cause number;
 - Date of arrest;
 - Date of conviction;
- Affirmations that:
 - Petitioner has not committed a crime within the required waiting period (I.C. 35-38-9-8(b)(6)); and
 - The required waiting period has elapsed (unless a copy of the prosecuting attorney's written consent to a shorter period is attached) (I.C. 35-38-9-

8(b)(9)).

The petitioner is required to serve a copy of the petition upon the prosecuting attorney in accordance with the Indiana Rules of Trial Procedure. I.C. 35-38-9-8(e).

Granting Expungement: What Happens to The Records?

Records Exempt from Alteration

I.C. 35-38-9-0.6 exempts internal records of

- law enforcement agencies; or
- public defender agencies;

that are not intended for release to the public.

- A nonpublic record that relates to a diversion or deferral program; or
- A disciplinary record or proceeding as it relates to a certification or public entity.

Section 1 Orders

These orders apply to both automatic expungements and petitions brought under I.C. 35-38-9-1 involving arrests, criminal charges, or juvenile adjudications without convictions, arrests that resulted in only infractions, or convictions that have been expunged. When granted, the petition will result in the removal of information concerning:

- arrest;
- criminal charges;
- juvenile delinquency allegation;
- vacated conviction;
- vacated juvenile delinquency allegation; and
- information from a collateral action that identified the petitioner.

from the “alphabetically arranged criminal history information system” maintained by the Indiana State Police and/or local or regional law enforcement agency. I.C. 35-38-9-1(h)(1).

Section 1 orders must include the information in I.C. 35-38-9-1(e), including the:

- date of the arrest, criminal charges, or juvenile delinquency allegation;
- date of conviction (if applicable);
- case number or court cause number;
- county of arrest, filing of information or indictment, or filing of juvenile delinquency allegation;
- law enforcement agency of arresting officer;
- name of the arresting officer;
- court in which the charges or allegations were filed;
- petitioner's name, aliases, or other names;
- petitioner's DOB;
- petitioner's SSN;
- petitioner's driver's license number; and
- a list of each criminal charge and its disposition.

A Section 1 order requires redaction or permanent sealing from public access of the records of the sentencing court, juvenile court, Court of Appeals, Supreme Court, and records that identify the petitioner in a collateral action. Records in the possession of the Appellate Clerk are also redacted or sealed, and opinions or memorandum decisions that appear on the computer gateway are also redacted to remove the petitioner's name. I.C. 35-38-9-1(h)(4).

Records expunged or sealed under Section 1 must be removed or sealed in accordance with this section but may not be deleted or destroyed. Records expunged or sealed under this section remain available to the court and criminal justice agencies as needed to carry out their official duties. I.C. 35-38-9-1(k).

IC 35-38-9-6 - Section 6 Orders

These orders apply only to petitions brought under I.C. 35-38-9-6 involving "Section 2" convictions (misdemeanors, and Class D felonies and Level 6 felonies reduced to misdemeanors) and "Section 3" convictions (Class D felonies and Level 6 felonies with no

bodily injury).

When granted, the order will prohibit the release of conviction records, including any records relating to the conviction, any records, relating to a collateral action, and an arrest or offense in which no conviction was entered that was committed as part of the same episode of conduct as the case ordered expunged in possession of the:

- Indiana DOC;
- Indiana BMV;
- law enforcement agency who incarcerated or provided treatment or services; or
- other person who provided treatment services. I.C. 35-38-9-6(a)(1).

Law enforcement officers acting in the course of their official duty may still access conviction records expunged under a Section 6 order. In addition, the BMV is still permitted to report information about a conviction for a violation of a traffic control law to the Commercial Driver's License Information System (CDLIS). I.C. 35-38-9-6(a)(3)(G); I.C. 35-38-9-7(c).

Expunged conviction records in possession of the ISP Central Records Depository are sealed. These records are disclosable to the following parties with a court order:

- Prosecutor and/or defense attorney, if necessary, to professional duties; and
- Probation department if necessary to prepare a presentence report.

Expunged conviction records in possession of the ISP Central Records Depository disclosable to the following parties *without* a court order:

- FBI and Department of Homeland Security;
- Ind. Supreme Court, Board of Law Examiners (executive director and employees) to determine if an applicant to bar has good moral character;
- Person complying with Secure and Fair Enforcement Mortgage Licensing Act (12U.S.C. 5101 et seq.);
- Indiana BMV, the Federal Motor Carrier Administration, and the CDLIS when

disclosure is required under I.C. 9-24-6-2(d);

- Schools for the purposes of employment and/or to grant access or admission to the school to an applicant contractor or a contractor if the person, contractor, or applicant contractor is likely to have contact with a student enrolled in the school, regardless of the age of the student.

The trial court's paper file is clearly marked "**EXPUNGED PER I.C. 35-38-9-6, Permanently Sealed,**" so court staff will know the file may not be given to anyone without court order.

Pursuant to I.C. 35-38-9-6(h), the Section 6 order must contain the information described in I.C. 35-38-9-8(b), including:

- Petitioner:
 - Full name, other legal names, or aliases;
 - DOB;
 - SSN;
 - Driver's license number;
 - Addresses (from the date of the offense to the date of the petition)
- For each conviction:
 - The cause number or case number;
 - Date of arrest;
 - Location of arrest (city and county);
 - Date of conviction;
 - If applicable, appellate cause number and the date of appellate decision;
 - All collateral actions.

A Section 6 order will not affect an existing or pending driver's license suspension. I.C. 35-38-9-6(b). A Section 6 order will also not affect the sex offender registration requirement or any person's ability to access the offender's records. I.C. 35-38-9-6(e).

However, expunged convictions are clearly marked as “expunged” on the sex offender registry web site.

The right of a person convicted of a crime of domestic violence to possess a firearm may be restored only in accordance with I.C. 35-47-4-7, even if the crime is expunged.

IC -35-38-9-7 - Section 7 Orders

These orders apply only to petitions brought under I.C. 35-38-9-7 involving “Section 4” convictions (Class D felonies (and Level 6 felonies) with bodily injury and other felonies without serious bodily injury) and “Section 5” convictions (remaining non-excluded felonies). I.C. 35-38-9-5(b).

When a Section 7 order is issued, court records (including the court’s paper file and paper copies of the judgment of conviction, sentencing order, probation order, and abstract of judgment) will remain public record, but are clearly marked “**EXPUNGED PER I.C. 35-38-9-7**”.

Any public records related to the petitioner’s arrest, conviction, a collateral action, or sentence including electronic records available via a public access website are clearly marked “EXPUNGED.” I.C. 35-38-9-7(b).

When a Section 7 order is granted, records that relate to the conviction and any records concerning a collateral action, that are in the possession of the:

- Indiana State Police;
- Bureau of Motor Vehicles; or
- any law enforcement agency

are marked expunged, and an entry is added to the person’s record of arrest, conviction, or sentence in the criminal history database stating that the record is marked as expunged.

I.C. 35-38-9-7(c).

Pursuant to I.C. 35-38-9-7(d), the Section 7 order must contain the information described in I.C. 35-38-9-8(b), including:

- Petitioner:
 - full name, other legal names, or aliases;
 - DOB;
 - SSN;
 - driver's license number;addresses (from the date of the offense to the date of the petition)
- For each conviction:
 - the cause number or case number;
 - date of arrest;
 - location of arrest (city and county);
 - date of conviction;
 - If applicable, appellate cause number and the date of appellate decision;
and
 - all collateral actions.

A Section 7 expungement order does not affect an existing or pending driver's license suspension (I.C. 35-38-9-7(b)) and does not prevent the Indiana BMV from reporting conviction information to the CDLIS. I.C. 35-38-9-7(c).

Distribution of Expungement Orders

All expungement orders are distributed to the petitioner, the petitioner's attorney, and the county prosecutor's office.

Expungement orders are also distributed to all entities in possession of records related to the expunged case(s), including:

- County Clerk;
- County Sheriff's Department;

- All service providers and law enforcement agencies who are in possession of records related to expunged cases;
- The attorney for a local law enforcement entity required to act under the order (required by Trial Rule 4.6(A)(4));
- The Indiana State Police
 - Attn: Records Division
 - 100 N. Senate Ave., Rm. N301 (East)
Indianapolis, IN 46204_
Expungement@isp.in.gov
- Other entities may also possess records related to expunged cases. If any of the below circumstances apply, the expungement order is also be sent to:
- **If a no contact order was issued in one or more of the expunged cases.**

Indiana Supreme Court, Office of Court Services—Court Technology
251 N. Illinois St., Suite 700
Indianapolis, IN 46204
- **If one or more of the expunged cases was appealed.**

Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court
216 State House, 200 West Washington Street
Indianapolis, IN 46204
- **If Petitioner’s Official Driver Record contains entries related to any of the expunged cases.**

Indiana Bureau of Motor Vehicles
IGC North, Room 402

100 North Senate Avenue
Indianapolis, IN 46204

courtdocuments@bmv.in.gov

- **If Petitioner had a conviction in any of the expunged cases, and was sentenced to executed time in the DOC.**

Indiana Department of Correction

Attn: Records Division

302 W. Washington Street, Room E-334

Indianapolis, IN 46204_

Leah Tyler

ltyler1@idoc.in.gov

- **If the XP order applies to court records stored under a separate MC cause number that pertains to a probation that was transferred to another county.**

Clerks of Other Counties

Steps in Odyssey

Expungement Case

- Create XP case
- Assess filing fees (on Sections 2 – 5 petitions only)
- Add PESR (Petition to Expunge/Seal Filed)
- Add appropriate Order Event: OGPE (Order Granting Petition to Expunge/Seal) or ODPE (Order Denying Petition to Expunge/Seal)
- Entering an OGPE will make the case confidential, while entering an ODPE will leave the case publicly accessible.

Underlying Criminal Case

- For Section 1 orders that grant the sealing of the case: Add the SP1 (Sealed Pursuant to Section 1 of I.C. 35-38-9) event. This will seal the case, add a case

flag, and message that the case should not be disclosed outside of the Court or Clerk without Court authorization.

- For Section 6 orders that grant the sealing of the case: Add the SP6 (Sealed Pursuant to Section 6 of I.C. 35-38-9) event. This will seal the case, add a case flag, and message that the case should not be disclosed outside of the Court or Clerk without Court authorization.
- For Section 7 orders that grant expungement: Add the SP7 (Expunged Pursuant to Section 7 of I.C. 35-38-9) event. The case will remain public.