ALAN WILSON
ATTORNEY GENERAL

August 8, 2011

Kela E. Thomas, Director
Department of Probation, Parole and Pardon Services
2221 Devine Street, Suite 600
Columbia, SC 29250

Dear Director Thomas:

In a letter to this office you raise concerns regarding expungement orders. You point out the following information:

> . . . the Department of Probation, Parole and Pardon Services [DPPPS], is responsible for the proper care, treatment, supervision and management of offenders under its control. S.C. Code Ann. §§24-21-220, -280, -560, & -660 (2007 & Supp. 2009). Part of that responsibility requires that the probation agent keep detailed records of his work during the course of supervision. §24-21-280 (A) (2007). Those records are compiled in the Department's "offender file" – a combination of paper and/or digital documents and electronic information stored on the Department's "Offender Management System." In addition to records of the agents' work and the offender's progress, the offender file also included sentencing documents such as indictments, sentencing sheets, and copies of the arrest warrants and incident reports that support the conviction and adjudication for which the offender is being supervised. Due to nature of these records and the nature of probation, parole, or any other supervision program the Department is required or authorized to manage, the entire offender file would not exist but for the criminal proceedings that were brought against the offender.

You question whether "an order for expungement requires destruction of all or part of [DPPPS's] offender file?"

Law/Analysis

A number of statutory provisions authorize expungement or destruction of certain records upon certain circumstances which are relevant to your inquiry. For example, §44-53-450 provides for expungement of records for first offense possession of certain drug offenses:

> (A) Whenever any person who has not previously been convicted of any offense under this article or any offense under any state or federal statute relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under Section 44-53-370 (c) and (d), or Section 44-53-375(A), the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions as it requires, including the requirement that such person cooperate in a treatment and rehabilitation program of a state-supported facility or a facility approved by the commission, if available. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions. However, a nonpublic record shall be forwarded to and retained by the Department of Narcotic and Dangerous Drugs under the South Carolina Law Enforcement Division solely for the purpose of use by the courts in determining whether or not a person has committed a subsequent offense under this article. Discharge and dismissal under this section may occur only once with respect to any person.
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> (B) Upon the dismissal of the person and discharge of the proceedings against him pursuant to subsection (A), the person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained as provided in subsection (A)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that the person was dismissed and the proceedings against him discharged, it shall enter the order. The effect of the order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information. No person as to whom the order has been entered may be held pursuant to another provision of law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest, or indictment or information, or trial in response to an inquiry made of him for any purpose. . . .

Additionally, §22-5-920 permits a defendant convicted as a youthful offender[1] to apply for an expungement, stating:

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[1]"Youthful offender" is defined in §24-19-10 (d).

> (B) Following a first offense conviction as a youthful offender for which a defendant is sentenced pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, the defendant, after five years from the date of completion of his sentence, including probation and parole, may apply, or cause someone acting on his behalf to apply, to the circuit court for an order expunging the records of the arrest and conviction. However, this section does not apply to an offense involving the operation of a motor vehicle, to a violation of Title 50 or the regulations promulgated under it for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses authorized, to an offense classified as a violent crime in Section 16-1-60, or to an offense contained in Chapter 25, Title 16, except as otherwise provided in Section 16-25-30. If the defendant has had no other conviction during the five-year period following completion of his sentence, including probation and parole, for a first offense conviction as a youthful offender for which the defendant was sentenced pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, the circuit court may issue an order expunging the records. No person may have his records expunged under this section more than once. A person may have his record expunged even though the conviction occurred before the effective date of this section. A person eligible for a sentence pursuant to the provisions of Chapter 19, Title 24, Youthful Offender Act, and who is not sentenced pursuant to those provisions, is not eligible to have his record expunged pursuant to the provisions of this section.
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> (C) After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of its expungement to ensure that no person takes advantage of the rights permitted by this section more than once. This nonpublic record is not subject to release under Section 34-11-95, the Freedom of Information Act, or another provision of law, except to those authorized law enforcement or court officials who need this information in order to prevent the rights afforded by this section from being taken advantage of more than once.

Neither the courts of this State nor this office have previously addressed specifically the expungement requirements of DPPPS pertaining to the issues expressed in your letter. This office, however, has provided opinions addressing which records in general are required to be destroyed pursuant to provisions of the South Carolina Code.

In an opinion dated July 8, 1996, we cited to an opinion dated February 26, 1979, where this office interpreted §17-1-40[2] and §44-53-450. We set forth in that opinion our position as to what must be destroyed when an expungement is ordered pursuant to these statutes. We concluded as follows:

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[2]Section 17-1-40 (A) provides that:

> [i]t is the opinion of this office that the aforesaid statutes apply only to the bookkeeping entries which serve as the recording of the arrest and ensuing charge in question. Thus, the arrest and booking record, files, mug shots and fingerprints pertaining to the charge in question may be obliterated or purged under Sec. 17-1-40. In a case involving Sec. 44-53-450 all entries made pertaining to the arrest and the ensuing indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to such section may be obliterated or purged with the exception being the nonpublic record retained to show the first offense. Any other material or evidence not serving as an entry made in the usual course of business for recording the arrest and ensuing charge will not be subject to the expungement statutes quoted above. Furthermore, it is the opinion of this Office that the work product of law enforcement agencies pertaining to investigation of criminal activity, and the evidence of criminal activity, do not constitute bookkeeping entries for recording of an arrest and the ensuing charge, and are not covered by the aforesaid statutes. [Emphasis added].

An opinion of this office dated December 13, 2000, dealt with the question of whether records contained in a personnel file must be expunged where those records were compiled as part of an internal investigation. The investigation resulted from an incident in which an individual was eventually accepted into a pretrial intervention program. An expungement order was issued upon the dismissal of the charges pursuant to §17-22-150.[3] Referring to the opinions cited above, this opinion concluded:

> . . . it does not appear that the provision in §17-22-150 for an order for the destruction of "all official records relating to [an] arrest [and] evidence pertaining to the charge" would reach additional records compiled as part of an internal personnel action conducted by . . . (the state agency) . . . as an employer.

> [a] person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency.

[3]Section 17-22-150 provides:

> . . . the offender may apply to the court for an order to destroy all official records relating to his arrest and no evidence of records pertaining to the charge may be retained by any municipal, county, or state entity or any individual, except as otherwise provided by Section 17-22-130.

In an opinion dated September 10, 2007, this office determined that the complete investigatory file relating to a law enforcement officer's prior arrest, which was contained in the Criminal Justice Academy's certification file, was relevant as part of a certification review by the Academy in reviewing the individual's "good character" and was not subject to destruction pursuant to an expungement order. Citing to earlier opinions, we again distinguished between so-called "bookkeeping entries" and a law enforcement agency's "work product" for purposes of enforcing an expungement order under the provisions.

In an opinion dated September 27, 2007, we addressed whether an article pertaining to an incident involving a student charged as an adult that remained on the website of a police department was an "official record" which should have been expunged along with the student's criminal records. Citing to prior opinions of this office, we advised that:

> . . . while "official records" are to be destroyed, other files or materials related to a particular charge compiled for another purpose may continue to be retained.

We also refer to the decision by the South Carolina Court of Appeals in State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), which discussed the scope of the expungement provisions of §17-22-150, and whether the conduct giving rise to an incident which ultimately led to an offender going through pretrial intervention could be used to impeach him in a later, unrelated trial. The Court noted the "fresh start" intentions of the Legislature in enacting §17-22-150, but it concluded:

> [t]he Act, however, does not extend the same protection to the conduct giving rise to the arrest. That is, while the Act provides that the offender may deny that he was arrested, it does not provide that he may deny the conduct leading up to the arrest.
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> The Act specifically protects only the arrest, and makes no mention of the underlying conduct. Had the legislature intended to protect the conduct, the Act would have made that protection explicit.

Joseph, 491 S.E.2d at 278-79. While we recognize the statements in Joseph are merely *dicta*, they do provide a judicial interpretation that the scope of §17-22-150 regarding an order for the destruction of "all official records relating to [an] arrest [and] evidence pertaining to the charge" would not reach additional records compiled and retained for other purposes. See Op. S.C. Atty. Gen., December 13, 2000.

A recent decision by the South Carolina Supreme Court in Compton v. S.C. Department of Corrections, 392 S.C. 361, 709 S.E.2d 639 (2011), reached a decision which supports our conclusions in the opinions cited above. In Compton, the Court examined whether the South Carolina Department of Corrections (SCDC) could be enjoined from forwarding certain information regarding Compton's criminal history to DPPPS. The record showed that Compton fled South Carolina between the time he committed the crimes in 1977 and the entry of his guilty pleas. Fugitive from Justice charges were later dismissed. Compton later escaped from prison in 1995 and was not returned to the custody of the SCDC until seven years later. The Escape charge was ultimately *nol prossed*. A circuit court then issued an order

to destroy the arrest warrant records pertaining to the 1995 Escape charge. However, Compton's Inmate Classification Summary Report ("Report") from SCDC included notations regarding his escape history, specifically showing two entries for the 1977 and 1995 escapes. This information was maintained as part of Compton's "Escape Screen." The Report referenced the charges for which Compton was incarcerated, in addition to reflecting that he was "Escaped-AWOL" from 1995 through 2002, under the heading "History of Movements." The Report also noted an "Escape" in 1982 under the heading "History of Earned Work Credit Assignments." The SCDC argued that it maintained records of Compton's movements, regardless of whether there was an associated criminal prosecution, for security and classification purposes, *i.e.*, the SCDC's policies provide that an escape history will dictate the level of confinement that an inmate will be assigned. The SCDC later forwarded all of the information in the Report to DPPPS for Compton's parole hearing. During the hearings, DPPPS questioned Compton about his escape history. Parole was denied. Compton then brought a declaratory judgment action against the SCDC. Compton alleged the SCDC failed to comply with the order to destroy records of his 1995 escape, and he argued that any reference to the1995 escape should be destroyed pursuant to §17-1-40. The circuit court disagreed with Compton. It held the entries in the Report were not subject to destruction under §17-1-40, because the entries were maintained for security and classification purposes. However, the circuit court enjoined the SCDC from forwarding information of the 1995 escape to DPPPS based on its reading of the statute. The circuit court extended its order to cover Compton's 1977 flight. It also enjoined SCDC from forwarding records of a 1982 escape, because there was no evidence of the charge in the SCDC records. Id., 709 S.E.2d at 640-41.

The SCDC appealed. The South Carolina Supreme Court first held that Compton was entitled to preliminary injunctive relief, because the evidence pertaining to the charges prevented his consideration for parole by DPPPS. The Court then addressed the application of §17-1-40 under the circumstances presented, noting that the provision applies only to "evidence of the record pertaining to the criminal charge," which includes but is not limited to the arrest and booking records, files, mug shots, and fingerprints. Id., 709 S.E.2d at 643. [Emphasis added]. The Court explained that §17-1-40 "therefore does not apply to any recording of historical events beyond the charge itself." Id.

> For example, the facts precipitating the charge are not covered by this statute because they are mere events that exist irrespective of any criminal proceedings. As applied to the instant case, the distinction drawn under section 17-1-40 (A) is the distinction between "capital-e Escape" - a criminal charge - and "lower-case-e escape" - a mere fact that a person was AWOL. Section 17-1-40 (A) prohibits the retention, and by extension the dissemination, of the former; it contains no restrictions with respect to the latter.

Id. Because evidence showed the notions on Compton's "Escape Screen" were related to the charges filed against him in 1977 and 2002, the Court upheld the order enjoining the SCDC from forwarding this information to DPPPS. However, the Court ruled the SCDC was not enjoined from forwarding notations of historical events to DPPPS, such as the fact that Compton was AWOL from prison, which was found under Compton's "History of Movements" and "History of Earned Work Credit Assignments" contained in the Report. Id.

Conclusion

Based on the foregoing, it is the opinion of the office that, given the facts outlined in your letter, an expungement order pursuant to the statutes quoted above would not require DPPPS to destroy records in the "offender file" representing information related to a particular charge compiled for purposes other than recording an arrest and the ensuing criminal charges but are instead used as entries made in the usual course of business pursuant to duties imposed on DPPPS under valid statutes. However, it is the opinion of this office that an expungement order pursuant to these statutes would require the destruction of records of the actual criminal charge, such as the underlying arrest and booking record, indictment, sentencing sheet, or other "bookkeeping entries" for recording the arrest and the ensuing charge which are in the "offender file."

Very truly yours,

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Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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