



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 8, 1996

J. Chad Caldwell, Chief of Police
City of North Charleston
P. O. Box 62558
North Charleston, South Carolina 29418

RE: Informal Opinion

Dear Chief Caldwell:

You ask a number of questions concerning expungement of records and police department compliance with orders of expungement. You note that you have "always understood and interpreted an Order of Expungement to mean that all records, writings, photographs, fingerprint cards, documents, etc., identifying the offender, regarding the expunged conviction were to be destroyed, except those confidential notations made by the department to account for the absence of a records from their system, and to insure that no unauthorized record is expunged." Specifically, the issues set forth below have been raised by you, quoting as follows:

1. Apart from the incident report, booking report, mug shots, fingerprint cards, and disposition data identifying the offender of the specific charge to be expunged, are there any records or case file information related to the investigation referencing the conviction, including information on other defendants or suspects in the case (whose records is not expunged,) etc. that can be retained by the department? Does all documentation, to include the entire case report, and/or all information related to the conviction have to be destroyed, or can the subject's identity be protected by blackening out or sanitizing the identity from the documents? If an automated

system is being utilized that will not allow for editing, what process should be used?

2. Can any reference to the identity the subject who's record is being expunged be blackened out, sanitized, or deleted from the case file information, to protect the offender's identity, but the incident or case file remain [intact] ... absent the offender's identity? Or, does any and all documentation relate to the individual and the conviction to be expunged, have to be completely destroyed?

3. What is the correct and acceptable process or procedure for expunging automated records? If a security measure in the automated system does not provide for, or allow edit/delete capabilities, what is an acceptable method for expunging the record?

4. In regard to microfilmed documents, how and what is an acceptable method for destroying the record and protecting the identity of the subject after the record has been expunged if there are multiple offenders?

5. What is an acceptable method for determining how evidence related to an expunged conviction is to be disposed of or destroyed? Are there particular guidelines or directives addressing the disposition or destruction of evidence related to a charge that has been expunged, or is this a matter that is determined by departmental policy and procedure? Is the evidence ever returned to the offender? What rights, if any, does the offender have for retrieving evidence that may have been a part of the case? What liability might a department incur, if any, for failing to return evidence to an offender?

STATUTES AUTHORIZING EXPUNGEMENT

A number of statutory provisions authorize expungement of criminal records under certain circumstances.

S.C. Code Ann. Sec. 17-1-40, for example, provides as follows:

[a]ny person who after being charged with a criminal offense and such charge is discharged or proceedings against such person dismissed or is found to be innocent of such charge the arrest and booking record, files, mug shots and fingerprints of such person shall be destroyed and no evidence of such record pertaining to such charge shall be retained by any municipal, county or State law-enforcement agency.

Moreover, Section 22-5-910 further states:

[f]ollowing a first offense conviction in a magistrate's court or a municipal court, the defendant after one year from the date of the conviction 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, or to an offense contained in Chapter 25 of Title 16. If the defendant has had no other conviction during the one-year period following the first offense conviction in a magistrate's court or a municipal court, the Circuit Court shall issue an order expunging the records. No person may have his records expunged under this section more than once.

After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of the expungement to ensure that no person takes advantage of the rights of this section more than once.

As used in this section, "conviction" includes a guilty plea, a plea of nolo contendere, or the forfeiting of bail.

Certain juvenile records are authorized to be expunged pursuant to Section 20-7-1335. That Section reads as follows:

[a] juvenile not previously adjudicated delinquent for committing an offense which would have been a crime if committed by an adult, who has been taken into custody, charged with, or adjudicated delinquent for having committed a status

offense or a nonviolent criminal offense may petition the family court for an order destroying all official records relating to his being taken into custody, the charges filed against him, his adjudication, and disposition. The granting of the order is discretionary with the court. However, the court may not grant the order unless it finds that the person who is seeking to have his records destroyed is at least eighteen years of age, has fully and successfully completed any dispositional sentence imposed upon him, and has neither been charged nor is currently charged with committing any additional criminal offenses.

For purposes of this section, an adjudication is considered a previous adjudication only if it occurred prior to the date the subsequent offense was committed.

Under no circumstances is a person allowed to expunge from his record an adjudication for having committed a violent crime, as that term is defined in § 16-1-60.

If the order is granted by the court, no evidence of the record may be retained by any law enforcement agency or by any municipal, county, or state agency or department.

The effect of the order is to restore the person in the contemplation of the law to the status he occupied before he was taken into custody. No person to whom the order has been entered may be thereafter under any provision of any law to be guilty of perjury or otherwise giving false statement by reason of his failure to recite or acknowledge the charge or adjudication in response to an inquiry made of him for any purpose.

Concerning convictions for "bad check" offenses, Section 34-11-90 (e) also provides:

[a]fter a conviction under this section on a first offense, the defendant may, after one year from the date of the conviction, apply, or cause someone acting on his behalf to apply, to the court for an order expunging the records of the arrest and conviction. This provision does not apply to any crime classified as a felony. If the defendant has had no other conviction during the one-year period following the conviction

under this section, the court shall issue an order expunging the records. No person has any rights under this section more than one time. 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 subsection more than once. This nonpublic record is not subject to release under Section 34-11-95, the Freedom of Information Act, or any other provision of law except to those authorized law or court officials who need to know this information in order to prevent the rights afforded by this subsection from being taken advantage of more than once.

Finally, Section 44-53-450 (b) provides for expungement of records for first offense possession of certain drug offenses. Subsection (b) states that

[u]pon the dismissal of such person and discharge of the proceedings against him under subsection (a) of this section, such person if he was not over twenty-five years of age at the time of the offense, and if the offense did not involve a controlled substance classified in Schedule I which is a narcotic drug and Schedule II which is a narcotic drug, 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) of this section) 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 such person was dismissed and the proceedings against him discharged and that he was not over twenty-five years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

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In Op. Atty. Gen., 79-33 (February 26, 1979), this Office interpreted Sections 17-1-40 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 those statutes. We distinguished between the so-called "bookkeeping entries" and the law enforcement agency's "work product." There, we concluded as follows:

[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.

This Opinion remains the Opinion of this Office.

We addressed your second question in another Opinion, dated October 15, 1981. We advised:

[a]s to whether incident reports are subject to being destroyed when other criminal records are required to be destroyed pursuant to an Order of Expungement issued, presumably, pursuant to Sec. 17-1-40, Code of Laws of South Carolina, 1976, this office in an opinion dated February 26, 1979 stated that the referenced statutory provision:

... applies only to the bookkeeping entries which serve as the recording of the arrest and ensuing charge in question. Thus, the arrest and booking

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record, files, mug shots and fingerprints pertaining to the charge in question, may be obliterated or purged under Sec. 17-1-40

Since the foregoing opinion was written, the General Assembly has deemed incident reports to constitute public information pursuant to Section 30-4-50 (8); however, if the incident report contains information as otherwise provided by law, the law enforcement agency may delete that information from the incident report. An incident report discloses the "nature, substance, and location of any crime of alleged crime reported as having been committed." Section 30-4-50 (8). Such reports are more in the nature of the law enforcement officer's investigation of an alleged crime than a "bookkeeping entry" regarding the individual whose records is being expunged. Thus, the October 1, 1981 Opinion, concluding that Incident Reports are not so-called "bookkeeping entries", remains the Opinion of this Office.

You have also asked what is the correct and acceptable process for expunging automated records. This is not answered by the expungement statutes and I am uncertain whether there is a "correct" legal answer beyond the same rules regarding expungement generally, which are set forth above. The question instead centers upon the particular technology involved.

Virtually every expungement statute referenced above uses the same or similar language, *i.e.* the "expungement" of the relevant "records" from the files. South Carolina's Public Records Act, S. C. Code Ann. Sec. 30-1-10 (A) defines a "public record" using the same definition contained in the Freedom of Information Act, Section 30-4-20 (c). There, a "public record" is broadly defined as including "all books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession, or retained by a public body." Obviously, such definition would include computer records as well as microfilm.

In construing an expungement statute, the Court in People v. Hansen, 555 N.E.2d 797, 801 (Ill.App. 4 Dist. 1990) stated:

[t]he intent of the legislature can best be determined by the plain and ordinary meaning of the statutory language Black's Law Dictionary defines "expunge" as "[t]o destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information - including criminal records - in files, computers or other depositories." (Black's Law Dictionary) 522 (5th ed. 1979). "Expungement of record" is defined as "process by which record of criminal

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conviction is destroyed or sealed after expiration of time." (Black's Law Dictionary) 522 (5th ed. 1979). Because the legislature did not specify that only certain portions of the circuit clerk's records relating to arrest may be expunged, and because the purpose of expungement is to erase any records of a conviction, the entire record, including the entire circuit clerk's record may be expunged. (emphasis added).

The difficulty of applying laws relating to expungement to computer entries has been recognized by courts. In Com. v. D.M., 663 A.2d 792, 795 (Pa. Super. 11995), for example, the Court commented at some length upon this problem. There, the Court noted:

[e]xpungement, in the computer age, is a daunting undertaking since the fact of an arrest may find its way into a variety of investigatory regulatory and prosecutory data resources. Expunction may no longer be achieved by removing a paper or obliterating an entry in the files of the local police department. The right which the arrestee most imperatively seeks is a declaration of legally sanctioned deniability concerning the fact of his arrest. These are issues best considered by our legislature and we urge them to do so. Our neighboring jurisdictions have legislatively addressed this problem. See N.J. Rev. State. § 2C: 52-6, 2C:52-14 (1979); NY (Crim. Proc.) Law § 160.50 (Consol. 1994); 10 Del. Code § 1025 (1994); Ohio Rev. Code § 2953.52 (1988).

Beyond these authorities, I can offer little additional information. I would suggest the following possibilities. First, you may wish to seek the advice of the judge who issued the expungement order. Upon receipt of a judicial order by a ministerial officer, that officer may seek clarification from the issuing judge. See, State v. Bevilacqua, 447 S.E.2d 213, 216 (1994) ["(i)f the Department believed there was a problem with the instant order, wise counsel would have dictated it should, through appropriate intervention, sought relief from the family or an appellate court. Courts have no more important function to perform in the administration of justice than to ensure their orders are obeyed."]

Secondly, I would suggest you contact the South Carolina Department of Archives and History. That agency possesses expertise in the control and management of records, assists state and local agencies in records management and is responsible for the enforcement of the Public Records Act. The Archives' telephone number is (803) 734-7914 and their address is P.O. Box 11669, Columbia, South Carolina, 29211. I am

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informed that a person with considerable expertise in this area is Mr. Roy Tryon, Deputy Director for the Archives and Records Management.

Finally, you may wish to seek legislation addressing this problem. As the Court in Com. v. D.M. stated, "[t]hese are issues best considered by our legislature"

With respect to your question regarding physical evidence, again, there is no answer provided by the expungement statutes. It is well recognized that


[g]enerally, the trial court is vested with considerable legal discretion in disposing of property claimed as evidence, and this extends even to the manner of proceeding in the event the accused claims it was wrongfully taken from him Property used as evidence must be returned once the criminal proceedings to which it relates have terminated, unless it is then subject to forfeiture or other proceedings.

24 C.J.S., Criminal Law, § 1733. It is my understanding that a few states may have enacted specific statutes expunging physical evidence. See, e.g. W. Va. Stat. § 49-5-17 (a) ("the records of a juvenile proceeding conducted under this chapter, including law enforcement files and records, fingerprints, physical evidence and all other records pertaining to said proceedings shall be expunged by operation of law."). Again, this is an issue which must either be addressed by a court or the General Assembly.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/ph