ALAN WILSON
ATTORNEY GENERAL

April 10, 2014

The Honorable Steve Loftis
Sheriff, Greenville County
4 McGee St.
Greenville, S.C. 29601

Dear Sheriff Loftis,

You seek an opinion on several issues related to the expungement of criminal records. This opinion will address each of your specific questions in the order they were presented.

Law/Analysis

(1) Does the expungement of records include a purging of news reports of the investigations and arrests that are posted on the agency's website prior to the issuance of the expungement order along with any press release or other notices to the media that may or may not have also been issued in compliance with the Freedom of Information Act or otherwise in the public interest?

We were asked to address a nearly identical issue in a 2007 opinion. See Op. S.C. Att'y Gen., 2007 WL 4284646 (Sept. 27, 2007). In that opinion, the facts presented indicated a city police department had destroyed all official records pertaining to a particular individual's charge in response to an expungement order. However, the police department's website still contained a news article about the incident leading up to the expunged charge. In concluding that the news article did not have to be removed or expunged from the police department's website, we stated as follows:

> Therefore, 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. As set forth in the February, 1979 opinion, there is a distinction between "bookkeeping entries" and a law enforcement agency's "work product." While the arrest and booking record, files, mug shots and fingerprints pertaining to the charge in question may be obliterated or purged under an expungement statute, 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. Consistent with such, in the opinion of this office, a newspaper article that appeared on the website of a police department would not be included in materials subject to being expunged. Even if it were to be expunged from the police department website, arguably, it may be

> accessible through some other search of newspaper files generally such as can be accomplished by a "google" search.

Id.

In accordance with the preceding 2007 opinion, a law enforcement agency is not required to remove or delete news reports posted on, or otherwise accessible from, the agency's website simply because any such news reports concern a charge for which an expungement order has been issued. Any such news reports are not official records of a law enforcement agency, nor are they entries made in the usual course of business for recording an arrest and the ensuing charge. In any event, as noted in the 2007 opinion above any such news reports generated by the media would still be accessible or obtainable through another source.

However, we find more cause for concern with a law enforcement agency keeping its own statements or press releases on its website concerning a charge that has been expunged. Unlike news reports generated by the media, any such statements or press releases are generated by the law enforcement agency itself. One can foresee how such statements and press releases could be used to circumvent or frustrate the intent of our many expungement laws.[1] As an extreme example, a law enforcement agency could decide to post a statement or press release on its website concerning every person its officers arrest and charge with a crime, in effect creating its own Internet-based public record of criminal charges. Permitting the law enforcement agency to maintain such statements or press releases concerning charges that have been expunged would render the expungements inconsequential. Such an absurd result, we think, could have not have been intended by the Legislature. See State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011) ("[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention"). Unless and until a court ruling or new legislation expressly provides otherwise, we would advise out of an abundance of caution that law enforcement agencies remove from their websites agency-generated statements or press releases concerning criminal charges for which an expungement order has been issued.

> **(2) As an example, an individual is arrested for an incident of Criminal Domestic Violence, and also accused of Criminal Sexual Conduct in the same incident, but that allegation is turned over to an investigate unit for further follow-up. Ultimately, the CSC allegation is not prosecuted due to lack of cooperation of the victim and the CDV charge is ultimately dismissed. Must the expungement include the reference to the CSC allegation as well as the arrest for CDV?**

There are two statutes governing the expungement of criminal charges which are dismissed or for which the defendant is acquitted. The first is § 17-1-40 which states, in part:

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[1] See, e.g., § 17-22-150(a) ("The effect of the [expungement] order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest. No person as to whom the order has been entered may be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest in response to any inquiry made of him for any purpose."). Similar language is also found in both § 44-53-450(B) and § 63-19-2050(C).

> (A)(1) 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....

§ 17-1-40(A)(1).

The other, § 17-22-950, concerns the expungement of charges brought in summary court which are dismissed or for which the defendant is found not guilty and states, in part:

> (A) When **criminal charges** are brought in a summary court and the accused person is found not guilty or if the charges are dismissed or nolle prossed, pursuant to Section 17-1-40, the presiding judge of the summary court, at no cost to the accused person, immediately shall issue an order to expunge the **criminal records** of the accused person unless the dismissal of the charges occurs at a preliminary hearing or unless the accused person has charges pending in summary court and a court of general sessions and such charges arise out of the same course of events....

§ 17-22-950(A).

Both statutes clearly provide for the expungement of records concerning a criminal charge brought against a person and the arrest of that person for such charge; they do not provide for the expungement of records concerning the fact that a person was investigated for a crime for which they were not subsequently arrested and charged. In any event, we have repeatedly advised that incident reports and other investigative records or evidence are generally not subject to expungement. See, e.g., Op. S.C. Att'y Gen., 2013 WL 5955672 (Oct. 24, 2013).[2] Accordingly, the fact that a person obtains an expungement for one charge does not require the destruction of records indicating that person was also accused of and investigated for allegedly committing another crime.

> **(3) If a defendant charged with a traffic offense is found not guilty or the case is dismissed, and part of the evidence of that charge includes a video of the traffic stop recorded on VHS video tape along with videos of other pending charges, particularly DUI cases, must the video of that dismissed charge be erased from the evidentiary tape, and if so, is the originality and admissibility of the remaining video recordings affected due to the alteration of the original video tape?**

As previously mentioned, the destruction of records concerning a charge that is dismissed is governed by § 17-1-40(A). However, subsection (C) of § 17-1-40 expressly states that "[t]his section does not apply to a person who is charged with a violation of ... Title 56 ...." § 17-1-40(C) (Supp. 2010). Therefore, a person charged with a traffic violation is not entitled to an expungement under § 17-1-40(A)

[2] A copy of this opinion is attached for your review.

if the charge is subsequently dismissed or if the person is found not guilty.[3] Even assuming the charge was subject to expungement, several court decisions and numerous prior opinions of this Office have concluded that § 17-1-40 and other expungement statutes do not apply to evidence of conduct leading to an arrest,[4] the recordation of historical events or facts precipitating a charge,[5] or evidence of criminal activity obtained by law enforcement.[6] For these reasons, it is our opinion that video evidence of a traffic stop obtained by law enforcement is not subject to destruction or erasure if the ensuing charge for a traffic violation is dismissed or the defendant is found not guilty.

(4) If the agency wishes to protest a pending expungement as provided by statute, must the protest be made by the arresting officer or the solicitor's office, or can the agency appoint an officer to coordinate all expungements and submit the protest on behalf of the agency?

In responding to your question, we presume the statute you are referring to is § 17-22-950 which states, in part:

> (A) When criminal charges are brought in a summary court and the accused person is found not guilty or if the charges are dismissed or nolle prossed, pursuant to Section 17-1-40, the presiding judge of the summary court, at no cost to the accused person, immediately shall issue an order to expunge the criminal records of the accused person unless the dismissal of the charges occurs at a preliminary hearing or unless the accused person has charges pending in summary court and a court of general sessions and such charges arise out of the same course of events. This expungement must occur no sooner than the appeal expiration date and no later than thirty days after the appeal expiration date.... **The prosecuting agency or appropriate law enforcement agency may file an objection to a summary court expungement. If an objection is filed by the**

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[3] A person would, however, be entitled to have the record of the traffic offense removed from the online public index. See § 17-1-40(D) (Supp. 2013) ("If a charge enumerated in subsection (C) is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the charge must be removed from any Internet-based public record no later than thirty days from the disposition date").

[4] See State v. Joseph, 328 S.C. 352, 359-60, 491 S.E.2d 275, 278-79 (Ct. App. 1997) (stating that the protection granted an offender who successfully completes a PTI program and obtains an expungement under § 17-22-150(a) "does not extend ... to the *conduct* giving rise to the arrest," and that the statute "specifically protects only the arrest, and makes no mention of the underlying conduct") (emphasis in original).

[5] See Compton v. S.C. Dep't of Corrections, 392 S.C. 361, 709 S.E.2d 639 (2011) ("Section 17–1–40(A) applies only to 'evidence of the record pertaining to the *charge*,' including but not limited to the arrest and booking records, files, mug shots, and fingerprints. It therefore does not apply to any recordation of historical events beyond the charge itself. 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.") (emphasis in original).

[6] See, e.g., Op. S.C. Att'y Gen., 1979 WL 29039 (Feb. 26, 1979) ("[I]t 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 [§ 17-1-40 or § 44-53-450(B)]").

> **prosecuting agency or law enforcement agency, that expungement then must be heard by the judge of a general sessions court. The prosecuting agency's or the appropriate law enforcement agency's reason for objecting must be that the:**
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> **(1) accused person has other charges pending;**
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> **(2) prosecuting agency or the appropriate law enforcement agency believes that the evidence in the case needs to be preserved; or**
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> **(3) accused person's charges were dismissed as a part of a plea agreement.**
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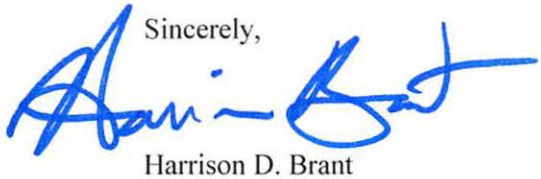
> (B) If the prosecuting agency or the appropriate law enforcement agency objects to an expungement order being issued pursuant to subsection (A)(2), the prosecuting agency or appropriate law enforcement agency must notify the accused person of the objection. This notice must be given in writing at the address listed on the accused person's bond form, or through his attorney, no later than thirty days after the person is found not guilty or his charges are dismissed or nolle prossed.

§ 17-22-950 (Supp. 2009) (emphasis added).

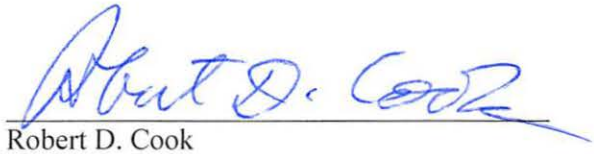
The statute makes it clear that either the "prosecuting agency *or* appropriate law enforcement agency" may object to the expungement. Id. (emphasis added). No reference is made to there being an appropriate person or officer from either agency for the purpose of objecting to an expungement. Accordingly, we believe an objection to an expungement can be filed by the arresting officer or the prosecutor responsible for that particular charge, or some other officer or prosecutor appointed by the respective law enforcement agency or prosecuting agency to, as you state, "coordinate all expungements and submit the protest on behalf of the agency."

Sincerely,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General