

September 27, 2007

Donald Wilcox, Chief of Police
City of Hanahan Police Department
1255 Yeamans Hall Road
Hanahan, South Carolina 29410-2744

Dear Chief Wilcox:

In a letter to this office you referenced a situation pertaining to a 1996 incident involving a student and former students who damaged a football field. The individuals were charged as adults with damaging school property. Some, but not all, of the students' criminal records were expunged. You indicated that in 2007 someone accessed your police department website through a "google" search using the name of one of the students and found an article pertaining to the incident. You stated that as to that individual, an expungement had been received and the record was expunged. You indicated that the article was not part of the official record at any time but question whether if it remains on the website of the police department, does it become an official record that should be expunged.

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.

S.C. Code Ann. Section 22-5-910 states:

(A) [f]ollowing a first offense conviction in a magistrate's court or a municipal court, the defendant after three years 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 (1) an offense involving the operation of a motor vehicle; (2) a violation of Title 50 or the

regulations promulgated pursuant to Title 50 for which points are assessed, suspension provided for, or enhanced penalties for subsequent offenses are authorized; or (3) an offense contained in Chapter 25 of Title 16, except first offense criminal domestic violence as contained in Section 16-25-20, which may be expunged five years from the date of the conviction.

(B) If the defendant has had no other conviction during the three year period, or during the five year period as provided in subsection (A)(3), following the first offense conviction in a magistrates court or a municipal court, 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 prior to June 1, 1992.

(C) 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...

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

As set forth in an opinion dated July 8, 1996, in an opinion dated February 26, 1979, this Office interpreted Section 17-1-40 and 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...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.

An opinion of this office dated December 13, 2000 dealt with the question of whether records contained in a personnel file would have to be expunged when those records were compiled as part of an internal investigation which resulted from an incident in which an individual was eventually accepted into a pretrial intervention program and then had an expungement order issued upon the dismissal of the charges. S.C. Code Ann. § 17-22-150 provides for the destruction of records following successful completion of a pretrial intervention program. The statute provides that

Chief Wilcox
Page 3
September 27, 2007

...the offender may apply to the court for an order to destroy all official records relating to his arrest and no evidence of the 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.

However, the opinion concluded that

...it does not appear that the provision in Section 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.

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.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General