1051 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

December 13, 2000

James A. Quinn, Assistant Chief Counsel
SC Department of Natural Resources
Post Office Box 12559
Charleston, South Carolina 29422

Re: Your letter of December 1, 2000
§17-22-150 - Expungement

Dear Mr. Quinn:

In your letter, you "request an opinion on the proper interpretation of S.C. Code Ann. §17-22-150 (1976)." By way of background, you indicate that a "DNR enforcement officer was charged with trespass to hunt." The enforcement officer was eventually accepted into the Pretrial Intervention Program, completed the program, and had an "Order for Destruction of Arrest Records" (Expungement Order) issued upon the dismissal of his charges. You also indicate that DNR conducted its own internal investigation and imposed appropriate sanctions on the officer.

Further by way of background, you write that, prior to being served with the Expungement Order, DNR received an FOIA request related to this matter. You indicate that, pursuant to the Expungement Order, "[DNR has] destroyed the records directly dealing with the arrest, i.e., copies of the warrant. [b]ut we are in doubt as to whether we have to destroy the personnel records pertaining to the incident including our internal investigation."

Specifically, you seek an opinion on whether the expungement provision of §17-22-150 would require that you destroy your personnel file created as the result of the above scenario.

S.C. Code Ann. §17-22-150 provides, in pertinent part, as follows:

> In the event an offender successfully completes a pretrial intervention program, the solicitor shall effect a noncriminal disposition of the charge or charges pending against the offender. Upon such disposition, 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 in > Section 17-22-130. The effect of the order is to restore the person, in the contemplation of the law, to the status he occupied before the arrest.

Request Letter

> 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.

When interpreting the meaning of a statute, a few basic principles must be observed. The primary goal is to ascertain the intent the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The statute's words must be given their plain and ordinary meaning without resort to a forced or subtle construction which would work to limit or to expand the statutes operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). The clear and unambiguous terms of a statute must be applied according to their literal meaning. State v. Blackmon, supra.

Unfortunately, neither the Courts of this State nor this Office have previously addressed specifically the expungement requirements of §17-22-150. This Office, however, has provided an opinion as to what records are required to be destroyed pursuant to other sections of our Code, such as section 17-1-40 and section 44-53-450. In Op. Atty. Gen. dated July 8, 1996, we reaffirmed Op. Atty. Gen., 79-33 which interpreted "what must be destroyed when an expungement is ordered pursuant to those statutes" and cited the following:

> [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.

There are differences in the terms used in these sections and the section in question, however, the documents ultimately subject to destruction pursuant to each section are likely to be the same.[1]

---

[1] The same form "Order For Destruction of Arrest Records" is used for the expungement of records under all of the referenced stautes.

Further, the South Carolina Court of Appeals discussed the scope of the expungement provisions of §17-22-150 in State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (S.C.App. 1997). While the court in Joseph was questioning whether the conduct giving rise to an incident which ultimately lead to an offender going through pretrial intervention could be used to impeach in a later, unrelated trial, their discussion is quite relevant to your situation. The Joseph court notes the "fresh start" intentions of the legislature in enacting §17-22-150, but states:

> The 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.
>
> 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.

Given our previous opinions and the discussion by the Court of Appeals above, 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 DNR as an employer. It is understood that the statements of the Joseph court are merely dicta, however, they do provide a judicial interpretation of the scope of §17-22-150. To provide for a more expansive reading would appear to violate the tenants of statutory interpretation expressed in State v. Blackmon,supra.

Courts in other states have issued opinions supporting the above conclusion. For example, the Supreme Court of Tennessee recently considered a terminated school teacher's complaint that the school board had used inadmissible evidence of an expunged conviction in terminating his employment. In Canipe v. Memphis City Schools Board of Education, 27 S.W.3d 919 (2000), the court noted that Canipe's criminal conviction was subject to an order expunging "all recordation relating to [his] arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge." Citing §Tenn.Code Ann. 40-35-313. In upholding the action of the school board, however, the court noted that the evidence used concerning Canipe's conviction "had been developed well in advance of the entry of the expungement order..." and stated: " Moreover, neither of these sources constitutes an 'official record' within the definition of §Tenn.Code Ann. 40-35-313."

The Superior Court of New Jersey has addressed a similar issue regarding that state's expungement law as well. In State v. Zemak, 304 N.J. Super. 381, 700 A.2d 1237 (1997), the court examined the scope of the state's expungement laws with reference to a police officer's

personnel file as opposed to his criminal record. The statute in question [N.J.S.A. 2C:52-1] provides that "[e]xpunged records shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, rap sheets, and judicial docket records...[and] refers to all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system." The court, citing Matter of M.D.Z., 286 N.J. Super. 82, 668 A.2d 423 (App.Div.1995), refused to "expand the coverage promulgated by the Legislature" and held that the above expungement statute "does not...call for the removal of personnel records from any employment files." In so holding, the Zemak court stated that "[t]he statute governing the expungement of records does not subject the Police Department as employer to the same restrictions as it does the Police Department as law enforcement entity."supra, at 700 A.2d 1238.

Based on the foregoing, it is my opinion that, given the facts outlined in your request, the expungement order in question would not require the Department of Natural Resources "to destroy the personnel records pertaining to the incident including our internal investigation."[2]

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

DKA/an

---

[2] Whether the documents contained in DNR's file are subject to disclosure pursuant to South Carolina FOIA would depend on the information contained in the specific document. Such internal investigations are not subject to a *per se* exclusion, See City of Columbia v. American Civil Liberties Union of South Carolina, 323 S.C. 384, 475 S.E.2d 747 (1996), but, specific items may qualify for an exemption pursuant to SC Code Ann. §30-4-40. See, Beattie v. Aiken County Dept. of Social Services, 319 S.C. 449, 462 S.E.2d 276 (1995).