9274-9824

ALAN WILSON
ATTORNEY GENERAL

February 19, 2015

Sheriff Steve Loftis
Greenville County Sheriff's Office
4 McGee St.
Greenville, SC 29601

Dear Sheriff Loftis:

We are in receipt of your opinion request regarding the interpretation of certain aspects of House Bill 4560 ("Act 276") which, as mentioned in your letter, was signed into law on June 9th of 2014. Specifically, your opinion request focuses on Act 276's amendments to Section 17-1-40 of the South Carolina Code dealing with the retention, by law enforcement and prosecution agencies, of certain information following an expungement of an individual's record pursuant to Article Nine, Title 17, Chapter 22 of the Code. Our response follows.

I. Law/Analysis

As mentioned in the legislative title to Act 276, the portion of Section 17-1-40 "relating to destruction or expungement of certain arrest and booking records" was amended to, among other things, "provide . . . for the retention by law enforcement and prosecution agencies of arrest and booking records, associated bench warrants, incident reports, and other information." Legis. Title, Act No. 276, 2014 S.C. Acts 120th Gen. Ass. Reg. Sess. (S.C. 2014). In keeping with this, Section 17-1-40(B)(1)(a) explains, "[l]aw enforcement and prosecution agencies *shall retain* the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person under seal for three years and one hundred twenty days." S.C. Code Ann. § 17-1-40(B)(1)(a) (Supp. 2014) (emphasis added). As we understand it, it is this language which is the subject of your opinion request. Specifically, whether Section 17-1-40(B)(1)(a)'s "three year/120 day time period" language regarding post-expungement retention of information applies to "alternative to prosecution programs administered by the Solicitor's Office." We believe that it does.

A. Interpreting Section 17-1-40(B)(1)(a) of the South Carolina Code

As touched on above, the three year, one-hundred twenty day time period mentioned in Section 17-1-40(B)(1)(a) of the Code *requires* "law enforcement" and "prosecution agencies" to keep "arrest and booking record[s], associated bench warrants, mug shots, and fingerprints" of an individual whose "record is expunged pursuant to Article Nine, Title 17, Chapter 22 . . . 'under

seal'" for a period of three years and one-hundred twenty days.[1] S.C. Code Ann. § 17-1-40(B)(1)(a). Understanding this, the answer to your question depends on whether "alternative to prosecution programs administered by the Solicitor's Office" qualify as either a "law enforcement" or "prosecution agency" for purposes of Section 17-1-40(B)(1)(a).

In order to determine whether Section 17-1-40(B)(1)(a)'s "law enforcement" or "prosecution agency" language applies to "alternative to prosecution programs administered by the Solicitor's Office," we must first look to the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible."). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will" and "courts are bound to give effect to the expressed intent of the legislature." Media General Communications, Inc. v. South Carolina Dept. of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). When determining the effect of words utilized in a statute, a court looks to the "plain meaning" of the words. City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). However, courts will reject the plain and ordinary meaning of the words used in a statute when doing so would defeat the intent of the legislature. Greenville Baseball v. Bearden, 200 S.C. 363, 368, 20 S.E.2d 813, 815 (1942).

Utilizing these principles, we believe the Legislature intended Section 17-1-40(B)(1)(a)'s three year, one-hundred twenty day retention language to apply to "alternative to prosecution programs administered by the Solicitor's Office." Specifically, the plain and ordinary meaning of the phrase "prosecution agency" in Section 17-1-40(B)(1)(a) clearly evidences the Legislature's intent to apply the statute's three year, one-hundred twenty day retention requirement to the Solicitor's Office and therefore, by extension, programs directed by a circuit solicitor. Indeed, even when a Solicitor elects to "contract for services" related to an alternative to prosecution program, such programs continue to be under a Solicitor's "direct supervision" and therefore remain a part of a prosecution agency pursuant to state law. See S.C. Code Ann. § 17-22-30(C) (2014) ("A pretrial intervention program shall be under the direct supervision and control of the circuit solicitor; however, he may contract for services with any agency desired."); S.C. Code Ann. § 17-22-310(C) (2014) ("A traffic education program must be under the direct supervision and control of the circuit solicitor; however, the solicitor may contract for services with a county or municipality in the circuit."); S.C. Code Ann. § 17-22-510(C) (2014) ("An alcohol education program must be under the direct supervision and control of the circuit solicitor; however, the solicitor may contract for education and supervision services.").

[1] Notably, Section 17-1-40(B)(1)(a) further *permits* law enforcement and prosecution agencies to retain such information "indefinitely for purposes of ongoing or future investigations and prosecution of the offense, and to defend the agency and the agency's employees during litigation proceedings." Id. The statute also explains the information "must remain under seal" and is not a public document, but is instead "exempt from disclosure, except by court order." Id.

Moreover, had the Legislature wished to exempt the circuit solicitors' alternative to prosecution programs from the phrase "prosecution agency" contained in Section 17-1-40(B)(1)(a)'s three year, one-hundred twenty day retention language, it could have done so by either providing a specific definition of the phrase in the statute, or by excluding alternative to prosecution programs from the phrase "prosecution agency." However, it did not, and with this in mind, we believe the cannon of construction known "*expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*" meaning "to express or include one thing implies the exclusion of another or the alternative," applies in the present situation. E.g. Rainey, 341 S.C. at 86-87, 533 S.E.2d at 582 (relying on the cannon of *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius* to conclude the General Assembly did not intend to limit the Governor's discretionary power of removal over the Board of Santee Cooper because it failed to include the Board of Santee Cooper in a statute with other specifically designated governmental bodies limiting the Governor's exercise of such power). As a result, we believe the Legislature's use of the phrase "prosecution agency" clearly extends to alternative to prosecution programs directed by a Solicitor's Office. Understanding this, it follows that Section 17-1-40(B)(1)(a)'s use of the phrase "prosecution agencies" includes alternative to prosecution programs administered and directed by a Solicitor's Office, and accordingly, either the programs themselves or the Solicitor's Office, as the agency in charge of each of the programs, must retain the information contained in Section 17-1-40(B)(1)(a) for a period of three years, one-hundred twenty days.

II. Conclusion

In conclusion, it is the opinion of this Office that Act 276's amendment of Section 17-1-40 of the Code relating to post-expungement retention of information by law enforcement and prosecution agencies applies to alternative to prosecution programs. This is so because the Legislature, by using the phrase "prosecution agency" clearly intended the newly-crafted post-expungement retention provisions of Section 17-1-40(B)(1)(a) to apply to a Solicitor's Office and by extension, those programs supervised by the circuit solicitors; this includes alternative to prosecution programs. Indeed, had the Legislature intended otherwise, it could have defined the phrase "prosecution agency" to limit such an extension, especially in light of the circuit solicitors' already-existent supervisory role over alternative to prosecution programs. However, it did not. Accordingly, we believe Section 17-1-40(B)(1)(a)'s mandatory three year, one-hundred twenty day retention language includes alternative to prosecution programs administered and directed by a Solicitor's Office, and as a result, either the programs themselves or the Solicitor's Office, as the agency in charge of each of the programs, must retain the information mentioned in Section 17-1-40(B)(1)(a) for the duration of the mandatory three year, one-hundred twenty day period.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General