

1980 WL 121021 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 22, 1980

***1 Subject: Criminal Law, State Agencies, Motor Vehicles**

Department of Highways and Public Transportation must destroy all records of arrest for traffic offenses when charges are dismissed or discharged or defendant is found to be innocent.

Paul W. Cobb
Chief Commissioner
S. C. Department of Highways and Public Transportation

QUESTION:

Is the South Carolina Department of Highways and Public Transportation subject to [S. C. Code § 17-1-40 \(1976\)](#) which requires law enforcement agencies to expunge certain records concerning persons charged with crimes after those charges have been dismissed or discharged or the person has been found innocent?

STATUTES AND CASES:

South Carolina Code of Laws §§ [17-1-40](#), [23-5-40](#), [23-23-10](#), [57-3-10](#), [57-3-30](#), [57-3-610](#) (1976)

24A [Words and Phrases](#) 38

[46 A.L.R.3rd 900 \(1972\)](#)

1975-76 Op. Atty. Gen., No. 4504, p. 361

DISCUSSION:

Absent statutory provision, the authority for expungement orders is found in the Constitutional right of privacy which allows an accused to have his record destroyed if he is found innocent. However, the State has a countervailing interest in retaining such records for law enforcement purposes. Some jurisdictions have held that records of criminal charges which did not result in conviction may be retained so long as they are not available for public inspection. [46 A.L.R.3rd 900 \(1972\)](#).

South Carolina however, has a statute requiring the destruction of criminal records after discharge, dismissal or a finding of innocence. [South Carolina Code § 17-1-40 \(1976\)](#) states:

Any 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. (emphasis added).

That section limits its applicability to law-enforcement agencies but makes it clear that no records of criminal charges which do not result in conviction shall be retained by them, whether as part of the public record or merely for law-enforcement purposes. Thus the resolution of the present issues turns on two points: (1) whether the definition of 'law-enforcement agency' is applicable to the Department of Highways and Public Transportation Department and (2) whether or not traffic violations are criminal offenses.

While there is no definition of 'law-enforcement agency' found in the Code, there is one for 'law-enforcement officer.' [Section 23-23-10](#), which establishes training requirements for law-enforcement officers, defines a law-enforcement officer as a state, county, or municipal employee granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State. A law-enforcement agency would therefore logically seem to be an agency given the statutory authority to enforce all or some of the criminal, traffic and penal laws of the State.

*2 Following this reasoning, the Attorney General has previously opined that the Bureau of Narcotic and Drug Control, a subdivision of the South Carolina Department of Health and Environmental Control (DHEC), is a law-enforcement agency within the meaning of [§ 17-1-40](#). ,1976 Op. Atty. Gen., No. 4504 p. 361. That opinion noted that drug inspectors assigned to DHEC were granted certain powers 'of the sort commonly associated with law enforcement agencies.' *Id.* at 363. The question was not asked nor answered as to whether or not DHEC as a whole was subject to [§ 17-1-40](#).

[S. C. Code §§ 57-3-10 and 57-3-610 Cum. Supp. 1979](#)), which set forth the functions, purposes, and general powers of the Department, specifically grant to the Department the authority to enforce traffic, motor vehicle and related laws. Furthermore, the law-enforcement division of the Department, commonly referred to as the Highway Patrol, is even more intimately associated with law-enforcement than the Bureau of Narcotics and Drug Control since its officers are expressly granted the same authority authority as deputy sheriffs to enforce the criminal laws of the State in addition to their power to enforce the laws of the State relative to highway traffic and motor vehicles. [S. C. Code § 23-5-40 \(1976\)](#). The Department, therefore, is expressly vested with powers and responsibilities of enforcing the criminal, traffic and penal laws of the State.

An argument may be made that [§ 17-1-40](#) applies only to the Highway Patrol and not to the rest of the Department. This argument would be predicated on the division of responsibility within the Department established by [§ 57-3-30](#) which allows the establishment of a separate law-enforcement division within the Department. However, [§ 57-3-30](#) does not require a separate law-enforcement division and, in fact, allows the law-enforcement and motor vehicle responsibilities of the Department to be carried out by one division. Although these two responsibilities are currently carried out by separate divisions, they could be combined in the future. Furthermore, as a practical matter, the Highway. Patrol has virtually unlimited access to Motor Vehicle Division records, so the destruction of only the records actually kept by the Highway Patrol would not end their availability to the Highway Patrol. Such a situation would obviously defeat the intention of [§ 17-1-40](#).

The second question is whether or not traffic violations are criminal offenses under [§ 17-1-40](#). [Section 23-5-40](#), which describes the duties and powers of Highway Patrolmen, seems to draw a distinction between laws 'relative to highway traffic and motor vehicles' and 'criminal laws'. So does [§ 23-23-10](#). Nevertheless, violations of virtually all of the laws of Title 56 of the South Carolina Code are classified as misdemeanors, with many offenses being triable in the Court of General Sessions. It therefore seems clear that traffic violations are criminal offenses within the meaning of [§ 17-1-40](#).

CONCLUSION

*3 It is the opinion of this office that the Department of Highways and Public Transportation must destroy all records pertaining to traffic law violations charged to persons when such charge is discharged or dismissed or when such persons are found innocent of the charge.

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