ALAN WILSON
ATTORNEY GENERAL

October 24, 2013

Gregory C. Mullen, Chief
City of Charleston Police Department
180 Lockwood Blvd.
Charleston, S.C. 29403

Dear Chief Mullen,

You seek an opinion of this Office concerning the release of "dual arrest" incident reports under the Freedom of Information Act (FOIA) where one arrestee has had the records pertaining to his or her charge expunged but the other has not. By way of background, you provide the following information:

> S.C. Code § 17-1-40(A) provides in part that if a charge against a person is dismissed or the person is found not guilty, the arrest and booking record, files, mug shot and fingerprints must be destroyed. That code section further states that no evidence of the record pertaining to the charge may be retained.
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> In some cases, if a person is found not guilty or the charge is dismissed or nolle prossed, S.C. Code § 17-1-40 requires the presiding judge of a summary court, with certain exceptions, to issue an order to expunge the criminal record.
>
> If the case is one in which only one person was charged, then the expungement does not usually present a problem. However, when there has been a "dual arrest," such as in some criminal domestic violence cases, the question arises as to the proper steps that need to be taken if one person had the charge expunged, but the other has not.
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> The problem arises because, in the case of a "dual arrest," there is generally only one Incident Report for that incident. That being the case, both parties would be "defendant/victim" for purposes of the report.
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> If Subject A and Subject B have both been arrested for criminal domestic violence from the same incident and Subject A has had the charge expunged, but Subject B has not, then that could create a problem in terms of releasing information.
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> Since Subject B has not had the record expunged, can that information be released? The concern I have is that releasing information regarding Subject B might lead to the identity of Subject A, despite the fact that Subject A's record was expunged.

With this information in mind, you specifically ask whether, "in a case involving a 'dual arrest,' where Subject A has had the record expunged, but Subject B has not, can information related to Subject A be redacted and the rest of the information be released or is it proper to not release any information regarding either Subject?"

Law/Analysis

Your question generally concerns the interplay between FOIA and expungement statutes. Under FOIA, incident reports generated by law enforcement agencies are expressly declared to be public information to the extent information in the report is not otherwise exempt from disclosure by law:

> (A) Without limiting the meaning of other sections of this chapter, the following categories of information are specifically made public information subject to the restrictions and limitations of Sections 30-4-20, 30-4-40, and 30-4-70 of this chapter:
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> ....
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> (8) reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed. **Where a report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the report.**

S.C. Code Ann. § 30-4-50(A)(8) (emphasis added); see also § 30-4-30(d)(2) (providing that "all reports identified in Section 30-4-50(A)(8) for at least the fourteen-day period before the current day" must be made available for inspection during hours of operation of public body when requestor appears in person).

In addition, FOIA grants public bodies the discretion to withhold from disclosure certain exempt information pursuant to § 30-4-40(a), including:

> (3) Records of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by:
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> (A) disclosing identity of informants not otherwise known;
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> (B) the premature release of information to be used in a prospective law enforcement action;
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> (C) disclosing investigatory techniques not otherwise known outside the government;
>
> (D) by endangering the life, health, or property of any person; or

> (E) disclosing any contents of intercepted wire, oral, or electronic communications not otherwise disclosed during a trial.
>
> (4) Matters specifically exempted from disclosure by statute or law.
>
> ....

§ 30-4-40(a)(3), (4). Specific information in a public record which is otherwise exempt from disclosure may be redacted. See § 30-4-40(b) ("If any public record contains material which is not exempt ... the public body shall separate the exempt and nonexempt material and make the nonexempt material available"); see also Newberry Pub. Co., Inc. v. Newberry County Comm'n on Alcohol and Drug Abuse, 308 S.C. 352, 356, 417 S.E.2d 870, 873 (1992) (recognizing that information exempt under FOIA, such as an informant's identifying information, may be redacted from public records).

Consistent with the above provisions, we have repeatedly advised that "incident reports and arrest warrants generally are disclosable unless such reports contain information otherwise exempt from disclosure by law." Op. S.C. Att'y Gen., 1989 WL 406106 (Feb. 23, 1989) (citing Op. S.C. Att'y Gen., 1983 WL 181828 (April 4, 1983) ("the presumption of disclosure follows the information [transferred from an incident report to an arrest warrant] unless that information is subject to deletion from the incident report as otherwise provided by law")). The 1983 opinion went on to state:

> All information in an incident report is public information unless it may be deleted ... as constituting an unreasonable invasion of personal privacy under [§ 30-4-40(a)(2)], or as being otherwise exempted from disclosure by statute or law under [§ 30-4-40(a)(4)], [or] as being harmful to the agency in question [under § 30-4-40(a)(3)] ....

Op. S.C. Att'y Gen., 1983 WL 181828 (April 4, 1983).

On the other hand, certain records pertaining to a charge or arrest must be destroyed when the charge is dismissed or the person is found not guilty:

> (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**. Provided, however, that local and state detention and correctional facilities may retain booking records, identifying documentation and materials, and other institutional reports and files under seal, on all persons who have been processed, detained, or incarcerated, for a period not to exceed three years from the date of the expungement order to manage their statistical and professional information needs and, where necessary, to defend such facilities during litigation proceedings except when an action, complaint, or inquiry has been initiated. Information retained by a local or state detention or correctional facility as permitted under this section after an expungement order has been issued is not a public document and is exempt from disclosure. Such

> information only may be disclosed by judicial order, pursuant to a subpoena filed in a civil action, or as needed during litigation proceedings. A person who otherwise intentionally retains the arrest and booking record, files, mug shots, fingerprints, or any evidence of the record pertaining to a charge discharged or dismissed pursuant to this section is guilty of contempt of court.
>
> (2) If a person has been issued a courtesy summons pursuant to Section 22–3–330 or another provision of law and the charge for which the courtesy summons was issued 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 in accordance with the provisions of item (1).
>
> In addition, a person who violates the provisions of this item is subject to the same penalty as provided in item (1).
>
> (B) A municipal, county, or state agency may not collect a fee for the destruction of records pursuant to the provisions of this section.
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> (C) This section does not apply to a person who is charged with a violation of Title 50, Title 56, an enactment pursuant to the authority of counties and municipalities provided in Titles 4 and 5, or any other state criminal offense if the person is not fingerprinted for the violation.
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> (D) 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.
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> (E) The State Law Enforcement Division is authorized to promulgate regulations that allow for the electronic transmission of information pursuant to this section.

§ 17-1-40 (Supp. 2013) (emphasis added).

Where the charges that were dismissed or adjudicated in favor of the defendant were brought in summary court, § 17-22-950 provides:

> (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. Upon issuance of the order, the judge of the summary court or a member of the summary court staff must coordinate with SLED to confirm that the criminal charge is statutorily appropriate for expungement; obtain and verify the presence of all necessary signatures; file the completed expungement order with the clerk of court; provide copies of the completed expungement order to all governmental agencies which must receive the order including, but not limited to, the arresting law enforcement agency, the detention facility or jail, the solicitor's office, the magistrates or municipal court where the arrest warrant originated, the magistrates or municipal court that was involved in any way in the criminal process of the charge sought to be expunged, and SLED. The judge of the summary court or a member of the summary court staff also must provide a copy of the completed expungement order to the applicant or his retained counsel. The prosecuting agency or appropriate law enforcement agency may file an objection to a summary court expungement. If an objection is filed by the 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.

Furthermore, numerous other statutory provisions provide for the expungement of records related to a charge, arrest, or conviction. See, e.g., § 17-22-150(a) (offender who successfully completes pretrial intervention program "may apply to the circuit 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"); § 22-5-910 (providing person convicted of first offense for certain crimes carrying penalty of not more than 30 days imprisonment and/or $1,000 fine may, after 3 years, apply to circuit court "for an order expunging the records of the arrest and conviction"); § 34-11-90(e) (person convicted of first offense for fraudulent check writing may, after 1 year, apply "to the court for an order expunging the records of the arrest and conviction"); § 44-53-450(B) (person who has charge for first offense simple marijuana possession discharged under subsection (A) "may apply to the court for an order to expunge from all official records ... all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal

and discharge under this section"); § 56-5-750(F) (person convicted of failing to stop for blue lights, first offense, may apply 3 years after completion of sentence to court "for an order expunging the records"); § 63-19-2050 (permitting expungement of juvenile records in discretion of court for certain offenses if certain conditions are met). Several of these sections also indicate that the intended effect of expungement is to restore the person, in the contemplation of the law, to the status he or she occupied before the arrest, charge, or indictment. § 45-53-450(B); § 63-19-2050(C).

In discussing expungement under § 17-1-40 and § 44-53-450(B), we stated in a 1979 opinion as follows:

> It should be noted at the outset that the above expungement statutes are intended to obliterate any record of a persons arrest and the ensuing charge once the criminal proceedings pursuant to such arrest have been dismissed prior to judgment or have resulted in acquittal. It 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 § 17–1–40. In a case involving § 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.**

Op. S.C. Att'y Gen., 1979 WL 29039 (Feb. 26, 1979) (emphasis added).

Relying on the above opinion, we stated in a 1981 opinion that "[i]nasmuch as incident reports may be considered to be the work product of a law enforcement agency, as such, they are not subject to being included in material to be expunged in accordance with an Order of Expungement issued pursuant to § 17-1-40." Op. S.C. Att'y Gen., 1981 WL 158013 (Oct. 15, 1981). In 1996, we reaffirmed the preceding conclusion from the 1981 opinion, stating:

> Since the foregoing opinion was written, the General Assembly has deemed incident reports to constitute public information pursuant to Section 30-4-50 (8); however, if the incident report contains information as otherwise provided by law, the law enforcement agency may delete that information from the incident report. An incident report discloses the "nature, substance, and location of any crime of alleged crime reported as having been committed." Section 30-4-50 (8). Such reports are more in the nature of the law enforcement officer's investigation of an alleged crime than a "bookkeeping entry" regarding the individual whose records is being expunged. Thus, the October 1, 1981 Opinion, concluding that

> Incident Reports are not so-called "bookkeeping entries," remains the Opinion of this Office.

Op. S.C. Att'y Gen., 1996 WL 494722 (July 8, 1996).

Our state courts have issued two decisions, State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997) and Compton v. S.C. Dep't of Corrections, 392 S.C. 361, 709 S.E.2d 639 (2011), discussing the types of records and information which are to be destroyed when a charges or conviction is expunged which are instructive here. In Joseph, the Court of Appeals discussed the effect of an offender's completion of a pretrial intervention program under § 17-22-150(a)[1] and the extent of protection granted a person receiving an expungement order under that section:

> [U]pon successful completion of the PTI program, it is as if the arrest never occurred-the offender is not required to admit to the arrest and the offender's denial of the arrest is, by statute, deemed to be truthful....
>
> **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.

Id., 328 S.C. at 359-60, 491 S.E.2d at 278-79.

In Compton, the issue was whether SCDC could maintain and forward certain reports to another state agency which contained notations as to three separate incidents in which Compton fled the state to avoid prosecution in 1977, went AWOL from prison in 1982, and escaped or went AWOL again in 1995. Id., 392 S.C. 361, 709 S.E.2d 639. As to the 1977 incident, a fugitive from justice charge was filed against Compton but was subsequently dismissed. Charges were never filed against Compton for the 1982 incident. Although an arrest warrant and indictment were issued against Compton for Escape under § 24-13-410 for the 1995 incident when he was apprehended in 2002, the charge was ultimately dismissed and an order for the destruction of records pertaining to that arrest warrant and indictment was issued. In discussing the application of § 17-1-40 to the charges that were dismissed against Compton, the Court stated:

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[1] § 17-22-150(a) provides, in part, that the effect of an expungement order issued to an offender who completes a PTI program "is to restore the person, in the contemplation of the law, to the status he occupied before the arrest," and "[n]o person as to whom the order has been entered may be held thereafter under any provision of law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest ...."

> 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. (emphasis added). **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. As applied to the instant case, the distinction drawn under section 17–1–40(A) is the distinction between "capital-e Escape"—a criminal charge—and "lower-case-e escape"—a mere fact that a person was AWOL. Section 17–1–40(A) prohibits the retention, and by extension the dissemination, of the former; it contains no restrictions with respect to the latter.**

Id. at 369, 709 S.E.2d at 643 (emphasis added).

Joseph and Compton are supportive of our position that incident reports generally are not of the type of record which should be destroyed when the resulting charge and/or conviction is expunged. Looking back to FOIA, incident reports are generally described as "reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed." § 30-4-50(a)(8). An incident report generally consists of a responding officer's notes of his observations at the scene, statements made by witnesses or the parties involved, and any other relevant information which may assist his investigation into the incident. Incident reports will often also contain information about a person's conduct leading up to his or her arrest. As such, incident reports largely consist of information which Joseph and Compton indicate is not subject to destruction when a charge or conviction is expunged.

Further support for the proposition that incident and investigatory reports are not subject to destruction when criminal records are expunged is found in case law from other jurisdictions which have addressed the issue under similar statutes. Particularly instructive here is Ex parte S.C., 305 S.W.3d 258 (Tex. App. 2009), in which the Court of Appeals of Texas held that a person who has criminal charges against him dismissed, and thus is statutorily "entitled to have all records and files relating to the arrest expunged," is not also entitled to the expungement of all files and records relating to the *investigation* against him. In reaching this conclusion, the court first found the plain language of the expungement statute did not reach investigatory files and records:

> Article 55.01 provides only that a petitioner may obtain expunction of "files and records relating to the arrest." The Code of Criminal Procedure does not define "relating to the arrest." However, considering the plain and common meaning of this phrase, we do not construe the statute to encompass investigative files and records that existed prior to, and independent of, the ultimate arrest.
>
> It is axiomatic that an arrest may follow an investigation into possible criminal conduct .... However, article 55.01 does not also state that a person may obtain expunction of records "relating to the investigation" or "resulting in" or "contributing to" the arrest, using these or similar terms. We presume that, if the Legislature had intended to allow expunction of these investigative files and records, it would have so specified. Accordingly, we decline to expand the scope of the statute beyond the meaning expressed therein.

Id. at 263 (citations omitted).

In addition, the court in S.C. found its conclusion consistent with the legislative intent behind the expungement statute which is "to enable a person who is wrongfully arrested to expunge his arrest record.... [and] to prevent the record of a wrongful arrest from negatively impacting a person for the remainder of his life." Id. The court found "no authority indicating the legislature also intended to allow a person to eradicate any evidence he had ever been subject to a governmental investigation or was concerned that being the subject of such an investigation imposes a life-long stigma." Id. at 264. Furthermore, the court found that a construction of the statute to the contrary would lead to an illogical result:

> Only a person who was arrested may obtain expunction of his records because "[a]n arrest is a threshold requirement under the expunction statute." Therefore, under S.C.'s reasoning, a person who was eventually arrested may obtain expunction of records of the investigation whereas a person who was investigated but not arrested has no such right. We cannot conclude the legislature intended to afford greater rights to a person who was arrested than to one who was not arrested.

Id. at 265. On this same point, the court went on to state its conclusion was supported by "the fact that investigative evidence would have existed notwithstanding the criminal prosecution and should not be protected from disclosure merely because the defendant's conduct prompted an attempted prosecution." Id. at 269 (citation omitted).

Likewise, in State v. L.K., 359 N.W.2d 305, 308 (Minn. Ct. App. 1984), the Court of Appeals of Minnesota reached a similar conclusion:

> Minn. Stat. § 299C.11 requires expungement of all fingerprints, photographs, and other identification data, along with any portions of criminal history reports which list the arrest of appellant, so that his criminal history report may remain clear.... **Police reports are not subject to expungement under the statute since they merely summarize the facts surrounding an event and constitute a necessary log of police activity**.

(Emphasis added); see also State v. Jenkins, 103 So.3d 1292 (La. App. 3 Cir. 2012) (holding trial court did not err in granting motion to expunge arrest records pertaining to charges that were nolle prossed in accordance with statute where, *inter alia*, "the trial court limited the expungement to exclude investigatory reports and notes held by law enforcement").

We find the above authorities to be especially persuasive and complementary to our prior opinions previously mentioned herein. Accordingly, we continue to adhere to the view that incident and investigatory reports are generally not subject to expungement.

The question remains, however, what should be done in the situation before us where an incident report indicates two parties were arrested and charged with CDV and one of the party's subsequently has his or her charge dismissed and the record expunged. In such "dual arrest" situations, the inclusion of

information indicating both parties were arrested is statutorily mandated by § 16-25-70 which provides, in part:

> (F) A law enforcement officer who arrests two or more persons for a crime involving domestic or family violence **must include the grounds for arresting both parties in the written incident report**, and must include a statement in the report that the officer attempted to determine which party was the primary aggressor pursuant to this section and was unable to make a determination based upon the evidence available at the time of the arrest.
>
> (G) When two or more household members are charged with a crime involving domestic or family violence arising from the same incident and the court finds that one party was the primary aggressor pursuant to this section, the court, if appropriate, may dismiss charges against the other party or parties.

§ 16-25-70(F), (G) (emphasis added). Furthermore, it is our understanding a uniform traffic ticket is often used to effect an arrest for lower level CDV offenses. See § 56-7-15(B) (Supp. 2012) ("An officer who effects an arrest, by use of a uniform traffic ticket, for a violation of Chapter 25, Title 16 shall complete and file an incident report immediately following the issuance of the uniform traffic ticket").[2]

We believe the requirement in § 16-25-70 that information concerning the arrests be included in the incident report is a statutory exception to the general rule that an incident report is used by a responding officer to make notes about his observations at the scene, including the conduct of any parties involved in the incident, which ultimately may lead to the issuance of an arrest warrant for one or more of the parties involved. However, the inclusion of such information creates a predicament as an incident report is a public record under FOIA and is generally not subject to expungement, but § 17-1-40 mandates that when the record pertaining to a charge is expunged "the arrest ... record ...must be destroyed and *no evidence* of the record pertaining to the charge may be retained ...." (Emphasis added). Thus, we believe there are three possible solutions in such a situation: (1) the incident report as a whole should be destroyed; (2) the incident report as a whole should be retained; or (3) the portions of the incident report referencing the charge which has been dismissed should be redacted.

In our view, it would be inappropriate in a dual arrest CDV situation to either destroy the incident report or maintain it in its entirety when one party has the charges against him or her dismissed and the record expunged. The destruction of the entire incident report could result in a FOIA violation since incident reports are expressly made public information. Furthermore, this would destroy historical information concerning the conduct of both parties which, as previously discussed, is not subject to destruction upon the expungement of a charge, and may also destroy evidentiary information relevant to the prosecution of the other party against whom the CDV charge has not been dismissed. If, on the other hand, the incident report is maintained in its entirety, "evidence of the record pertaining to the charge" that was dismissed and expunged would be available to the public. Such a result, we believe, was not intended by the Legislature in enacting § 17-1-40 since the purpose of expungement is generally to return the person, in the contemplation of the law, to the status he or she occupied before the arrest. To conclude otherwise would, in effect, render the expungement of the record pertaining to a charge or arrest

[2] In fact, the current version of § 56-7-10 (Supp. 2013) provides that law enforcement officers must use a UTT for "Criminal Domestic Violence, First Offense and Second Offense (B)(1) and (2)" pursuant to § 16-25-20.

meaningless if the public could simply obtain a copy of an incident report which indicates the person was arrested and charged with the CDV offense that was dismissed and expunged. Thus, in such situations we believe redaction is appropriate. Accordingly, because in a CDV "dual arrest" situation law enforcement is statutorily required by § 16-25-70 to include in an incident report information concerning the arrest of both parties, it is our opinion that upon the dismissal of the CDV charge against one party the information in the incident report indicating that party was arrested and charged with a CDV offense should be redacted. The redacted incident report may then be disclosed pursuant to a FOIA request.

We note, however, that if the dual CDV charges are brought in summary court and the charges against one party are dismissed, then pursuant to § 17-22-950(A) "[t]he prosecuting agency or appropriate law enforcement agency may file an objection to ... expungement...." The reasons for such an objection may be that the:

> (1) accused person has other charges pending;
>
> (2) prosecuting agency or the appropriate law enforcement agency believes that the evidence in the case needs to be preserved; or
>
> (3) accused person's charges were dismissed as a part of a plea agreement.

§ 17-22-950(A). Thus, if the law enforcement agency in possession of a "dual arrest" CDV incident report believes no information in the incident report should be redacted for any of the above reasons, it may have its objection heard by a court.

Conclusion

We continue to adhere to the view that incident reports are generally not subject to destruction when a charge is expunged. As indicated in prior opinions, incident reports are expressly made public under FOIA and are the work product of law enforcement pertaining to the investigation of criminal activity; they are not bookkeeping entries for recording an arrest and the ensuing charge, and thus are not the type of record covered by expungement statutes. Incident reports also contain the recordation of historical events beyond the charge itself and information about the conduct of the parties involved giving rise to the arrest. Such information, our appellate courts have held, is not covered by expungement statutes. Furthermore, such a construction of our state's expungement statutes is consistent with case law from other jurisdictions indicating that, in the absence of express language manifesting a legislative intent to the contrary, the expungement of a criminal record does not extend to investigative files and information that exists independent of the arrest. To conclude otherwise would lead to the absurd result that only persons arrested may have information indicating they were the subject of a criminal investigation destroyed; individuals who were investigated but not ultimately arrested would have no such right. Such a result, we believe, could not have been intended by the Legislature.

However, we believe a limited statutory exception has been made with regards to "dual arrest" CDV incident reports pursuant to § 16-25-70. Subsection (F) of § 16-25-70 requires law enforcement officers, in CDV situations where it cannot be determined who was the primary aggressor, to "include the grounds for arresting both parties *in the written incident report.*" (Emphasis added). Since the Legislature has mandated that law enforcement officers record the arrest of each party in the incident report in such cases, we believe such information constitutes "evidence of the record pertaining to the

charge" for purposes of § 17-1-40(A) that must be destroyed. However, because the majority of the other information included in an incident report is not subject to expungement and contains information and evidence relevant to the prosecution of the other party involved, we believe the incident report should still be maintained and made available to the public upon request in the absence of any other statutory exception. Therefore, in such cases we believe redaction of the incident report is the proper method of removing information concerning the charge that was expunged. Accordingly, in situations where a single incident report documents the arrest of two parties charged with CDV as required by § 16-25-70(F), and one of the parties subsequently has the CDV charge against him or her dismissed and the record pertaining to the charge expunged, we advise law enforcement to redact from the incident report only information indicating that person was arrested and charged with CDV. Furthermore, we note that if dual CDV charges are brought in summary court and the prosecution or law enforcement believes the party who had the charge against them dismissed should not have his or record expunged, i.e., because the evidence in the case needs to be preserved, an objection on this basis may be filed pursuant to § 17-22-950(A).

If this is not the result the Legislature intended, we suggest legislation be enacted which expressly evinces an intent to the contrary. For example, if the Legislature intended for incident or investigatory reports to be destroyed entirely when the resulting charge is expunged, it could amend the expungement statutes to expressly include incident or investigatory reports among the information which should be destroyed upon expungement. In such case, § 16-27-70 may need to be amended as well to require separate incident reports with regards to each party arrested with regards to a single CDV incident so that the incident report with regards to the party who has his or her charge expunged may have the incident report arrest destroyed without also destroying information and evidence relevant to the other party's CDV charge.

Sincerely,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General