



ALAN WILSON  
ATTORNEY GENERAL

March 30, 2018

The Hon. C. Ryan Johnson  
Chief Magistrate Judge, Greenwood County  
Greenwood County Courthouse, Suite 100  
528 Monument Street  
Greenwood, SC 29646

Dear Judge Johnson:

We received your opinion request dated October 25, 2017 seeking an opinion on application of an expungement order issued pursuant to Sections 17-22-950 and 17-1-40 of the South Carolina Code to records of criminal charges in the possession of the South Carolina Department of Motor Vehicles. The following opinion sets out our understanding of your question and our response.

**Issue (as quoted from your letter):**

Person X is arrested for Driving under Suspension, Not Suspended for DUI, 1<sup>st</sup> Offense. The charge is made on a Uniform Traffic Ticket. Person X is taken into custody, fingerprinted, booked into the detention center, and has bond set by a summary court judge. A week later, the charge is *nolle prossed*<sup>1</sup> by the arresting officer. As required by Code § 17-22-950, the summary court judge issues an expungement order and delivers it to the DMV as a governmental agency required to receive the order.

In the above scenario, is the DMV required to abide by the expungement order and destroy or seal all records pertaining to the charge? If so, would the DMV also be required to remove the charge from Person X's driver's record? If not, is the summary court required to send copies of expungement orders to the DMV?

**Law/Analysis:**

It is the opinion of this Office that a court faced with the questions presented in your letter most likely would conclude that the South Carolina Department of Motor Vehicles (hereinafter the "Department" or "DMV") must comply with orders issued pursuant to Section 17-22-950 as appropriate under the circumstances of a particular case. *See* S.C. Code Ann. § 17-

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<sup>1</sup> Black's Law Dictionary, 10<sup>th</sup> Edition (2014), defines "nolle prosequi" as " 1. A legal notice that a lawsuit or prosecution has been abandoned. 2. A docket entry showing that the plaintiff or the prosecution has abandoned the action. — Often shortened to nolle."

22-950. Accordingly, the Department may be one of the state agencies which are required to receive a copy of the expungement order in certain nolle prossed cases. *See* S.C. Code Ann. § 17-22-950(A).

Our Office previously has opined that expungements exist only when a statute demonstrates a legislative intent for that remedy to apply. *See Op. S.C. Att'y Gen.*, 1996 WL 82897 (January 22, 1996). We quote here from a 1996 opinion discussing expungements under Section 56-5-750 of the South Carolina Code:

The expungement of a record is not a remedy frequently granted. *U.S. v. Friesen*, 853 F.2d 816 (10th Cir. 1988). Where the right to expungement is not specifically granted by the relevant statute, no expunction may occur. *State v. Salmon*, 279 S.C. 344, 306 S.E.2d 620 (1983). Only where the statutory conditions are met, may expungement be granted. *State v. Millsap*, 702 S.W.2d 741 (Tex. 1985). Expungement of a criminal record is a privilege, not a right and the requirements of the expungement statute must be strictly adhered to. *State v. Thomas*, 64 Ohio App.2d 141, 411 N.E.2d 845 (1979).

*Id.* Turning to the code sections cited in your letter, we note that Section 17-1-40 describes expungements in general terms, and those expungements might occur under a number of different circumstances:

(B)(1) If a person's record is expunged pursuant to Article 9, Title 17, Chapter 22 [which includes Section 17-22-950], because the person was charged with a criminal offense, or was issued a courtesy summons pursuant to Section 22-3-330 or another provision of law, and the charge was discharged, proceedings against the person were dismissed, or the person was found not guilty of the charge, then the arrest and booking record, associated bench warrants, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge or associated bench warrants may be retained by any municipal, county, or state agency. Provided, however, that:

(a) Law 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. A law enforcement or prosecution agency may retain the information indefinitely for purposes of ongoing or future investigations and prosecution of the offense, administrative hearings, and to defend the agency and the agency's employees during litigation proceedings. The information must remain under seal. The information is not a public document and is exempt from disclosure, except by court order.

S.C. Code Ann. § 17-1-40(B)(1)-(B)(1)(a). Subsection 17-1-40(C) contains similarly-worded provisions which expand on the retention of unredacted records by a law enforcement or prosecution agency with an express provision that "[t]he information is not a public document, is

exempt from disclosure, except by court order, and is not subject to an order for destruction for arrest records." S.C. Code Ann. § 17-1-40(C)(1).

While Section 17-1-40 describes expungements generally, Section 17-22-950(A) sets out one of the circumstances in which the General Assembly has provided that such an expungement should occur, and this subsection appears to be the portion of Section 17-22-950 which is most relevant to your inquiry:

If criminal charges are brought in a summary court, the accused person is found not guilty or the charges are dismissed or nolle prossed, and the accused person was fingerprinted for the charges, the summary court, at no cost to the accused person, immediately shall issue an order to expunge the criminal records, including any associated bench warrants, of the accused person unless the dismissal of the charges occurs at a preliminary hearing or the accused person has charges pending in summary court and a court of general sessions and the charges arise out of the same course of events. Upon issuance of the order, the summary court shall obtain and verify the presence of all necessary signatures and 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 clerk of court, but only in cases in which the charges were appealed to the circuit court or remanded to the summary court from general sessions court; the summary court where the arrest or bench warrants originated; the summary court that was involved in any way in the criminal process of the charges or bench warrants; and SLED.

S.C. Code Ann. § 17-22-950(A) (Supp. 2017). Such an expungement "must occur no sooner than the appeal expiration date and no later than thirty days after the appeal expiration date." S.C. Code Ann. § 17-22-950(C). Subsection 17-22-950(E) also expressly mandates the removal of all charges from "all Internet-based public records":

Criminal charges must be removed pursuant to this section from all Internet-based public records no later than thirty days from the disposition date, regardless of whether the accused person applies to the summary court for expungement pursuant to subsection (B). All other criminal records must be destroyed or retained pursuant to the provisions of Section 17-1-40.

S.C. Code Ann. § 17-22-950(E).

Our Office has opined in the past on related question of whether records charges of motor vehicle offenses should be expunged under prior versions of Title 17. *See, e.g., Op. S.C. Att'y Gen.*, 2009 WL 2844882 (August 12, 2009). In 2009, one such opinion concluded that "newly-enacted Section 17-22-950(A) and amended Section 17-1-40 require summary court judges to expunge criminal records that arise out of cases involving Title 56 dealing with motor vehicle violations" where the code sections did not expressly exclude such violations. *Id.* Thereafter,

those expungement sections were amended to expressly exclude such violations from eligibility, as noted in a 2015 opinion. *Op. S.C. Att'y Gen.*, 2015 WL 731709 (February 4, 2015). There we opined:

While S.C. Code Ann. § 17-1-40(B)(1) sets forth the general rule, § 17-1-40(E)(1) (Supp. 2014) clarifies that "[t]his section does not apply to a person who is charged with a violation of Title 50, Title 56, or an enactment pursuant to the authority of counties and municipalities provided in Titles 4 and 5." As driving under the influence is a violation appearing in Title 56 of the South Carolina Code of Laws, it follows that a Defendant would not be entitled to expungement of a non-conviction DUI pursuant to S.C. Code Ann. § 17-1-40 under the current posture of the law.

*Id.*

We believe that these opinions cited above accurately reflect the law as current when they were issued, but since they were issued the General Assembly has amended Sections 17-1-40 and 17-22-950 once again in Act 132 of 2016. Act No. 132, 2016 S.C. Acts 1184. That Act of the General Assembly amended the expungement code sections to omit the prior exclusion of motor vehicle violations found in Title 56, as the exclusion also was omitted from the statute at the time of our 2009 opinion. *See id.*, *cf. Op. S.C. Att'y Gen.*, 2009 WL 2844882 (August 12, 2009). Moreover, Act 132 was titled in relevant part "AN ACT TO AMEND SECTION 17-1-40 . . . TO DELETE PROVISIONS WHICH EXCLUDE EXPUNGEMENT FOR CERTAIN . . . DRIVING OFFENSES . . ." *Id.*; *cf. Op. S.C. Att'y Gen.*, 1990 WL 599194 (May 30, 1990) ("It is also generally recognized that the title of an act may be used in aid of construction to show legislative intent.") (citing *University of South Carolina v. Elliott*, 248 S.C. 218, 149 S.E.2d 433 (1966)).

Taken together, the most recent statutory amendments demonstrate a legislative intent that Sections 17-1-40 and 17-22-950 result in expungement of nolle prossed DUI offenses found in Title 56. *See* S.C. Code Ann. § 17-22-950 & Act No. 132, 2016 S.C. Acts 1184. Also, the plain meaning of the term "state agency" as contemplated under the language of Section 17-1-40 and Section 17-22-950 would reasonably include the South Carolina Department of Motor Vehicles. *See id.*; *see also* S.C. Code Ann. § 56-1-5(A) (2018) ("The South Carolina Department of Motor Vehicles is hereby established as an administrative agency of the state government."). Therefore, a court most likely would conclude that the South Carolina Department of Motor Vehicles generally must comply with a Section 17-22-950 expungement order as described in that Section and Section 17-1-40, and accordingly might be one of the state agencies which are required to receive a copy of such an expungement order. *See id.*; *see also* S.C. Code Ann. § 17-22-950(A).

In response to your specific question regarding application of such an expungement order to a driver's record, we note that the plain reading of the term "all Internet-based public records" set out in Section 17-22-950 appears to include a driver's public-facing record, which is available

via the internet.<sup>2</sup> See S.C. Code Ann. § 17-22-950(E). Therefore, to the extent that a charge which is dismissed and is properly subject to expungement might appear on such a record, we believe that a court would conclude that Section 17-22-950(E) mandates its removal. *Id.*

We render this opinion with the caveat that while Section 17-1-40 mandates the expungement of certain records and evidence, this does not preclude the proper use of other evidence for the purposes of administrative proceedings which are proper even in the absence of a criminal conviction, such as a license suspension proceeding for refusal to submit to an alcohol test. See S.C. Code Ann. §§ 56-5-2950 (Implied Consent to Testing for Alcohol) & 56-5-5951 ("The Department of Motor Vehicles shall suspend the driver's license [of] a person who drives a motor vehicle and refuses to submit to a test provided for in Section 56-5-2950"). As our Office has previously opined,

Both [Sections 17-1-40 and 17-22-950] clearly provide for the expungement of records concerning a criminal charge brought against a person and the arrest of that person for such charge; they do not provide for the expungement of records concerning the fact that a person was investigated for a crime for which they were not subsequently arrested and charged.

*Op. S.C. Att'y Gen.*, 2014 WL 1511517 (April 10, 2014).

Finally, we note that this opinion also should be read in the context of the question presented, wherein the Department was not a "prosecuting agency" as contemplated by Section 17-1-40. Cf. S.C. Code Ann. § 17-1-40(C) (providing that a law enforcement or prosecution agency shall or may retain unredacted information under certain circumstances and use such information in certain limited ways). We understand the question presented in your letter to describe a situation similar to that set out in *South Carolina Dep't of Motor Vehicles v. Holtzclaw* where the DMV was notified of a driver's conviction in municipal court, presumably following a trial prosecuted by an attorney on behalf of the city. *South Carolina Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 346-47, 675 S.E.2d 756, 757 (2009). The DMV suspended the driver's license under South Carolina's Habitual Offender statute; the prosecuting attorney subsequently agreed to reopen the conviction that triggered the suspension; and thereafter "the DMVH Hearing Officer rescinded [the driver's] suspension." *Id.* The South Carolina Court of Appeals affirmed the rescission of the license suspension and opined:

DMV correctly points out that it was not a party to the underlying traffic violation or the motion to reopen and that therefore, only the prosecuting body, which actually signed off on the municipal court's motion to reopen at the time, would have been able to appeal the decision. We believe this is the proper policy to follow, as the DMV appears to be a record keeping agency in this instance. It is solely within the court's province to decide the guilt or innocence on a particular charge, before the result is reported to the DMV.

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<sup>2</sup> See, e.g., [www.scdmvonline.com/Driver-Services/Drivers-License/Driving-Record](http://www.scdmvonline.com/Driver-Services/Drivers-License/Driving-Record).

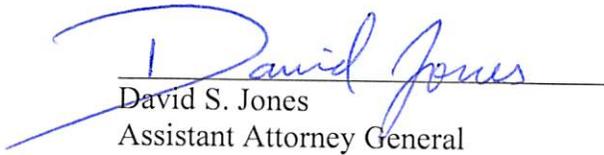
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*Id.* at 351-52, 675 S.E.2d at 760.

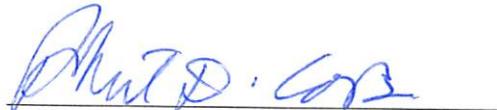
**Conclusion:**

In conclusion, for the reasons set forth above, it is the opinion of this Office that a court faced with the questions presented in your letter most likely would conclude that the South Carolina Department of Motor Vehicles is required to comply with expungement orders issued pursuant to Section 17-22-950 as appropriate under the circumstances of a particular case. *See* S.C. Code Ann. § 17-22-950. This would include removing charges from "all Internet-based public records," which appears to include a driver's public-facing record to the extent that such charges would appear on that record. *See* S.C. Code Ann. § 17-22-950(E). Accordingly, the Department may be one of the state agencies which are required to receive a copy of the expungement order in certain nolle prossed cases. *See* S.C. Code Ann. § 17-22-950(A).

Sincerely,

  
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David S. Jones  
Assistant Attorney General

REVIEWED AND APPROVED BY:

  
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