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PHOENIX, ARIZONA

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June 7, 1973

DEPARTMENT OF LAW OPINION NO. 73-12 (R-35)

REQUESTED BY: JAMES J. HEGARTY
Director
Department of Public Safety

QUESTION: May the Department of Public Safety or any other agency, upon request of an individual, expunge the arrest records of such an individual who is arrested or charged with crimes and either acquitted of such crimes or never tried?

ANSWER: No.

There is no provision allowing the Department of Public Safety to expunge or destroy any records upon request of the individual involved. Attorney General Opinion No. 73-3-L considered the problem of Department of Public Safety records of conviction and held that, except under limited circumstances, and upon court order, such records could not be expunged.

The question presented here differs in that our prior opinion dealt with notations of convictions; whereas, here we are dealing with arrest records. However, under neither circumstance does the Department of Public Safety have the independent authority to remove or expunge its records.

In the case of arrest records, the Legislature has provided for the withholding of such records upon court order. Chapter 126 of the Laws of 1973, First Regular Session of the 30th Legislature (Senate Bill 1201), A.R.S. § 13-1761, provides that the court may, upon petition of a person wrongfully arrested, indicted or charged, order that such records recite that the person was cleared of all charges, and that no law enforcement agency shall release copies of the records except upon further order of the court. This is not an order of destruction of such records, but is an order to refrain from releasing the records unless the court so orders. Thus, the Legislature has provided a method to preserve the individual's constitutionally protected right of privacy while retaining the requirement that public agencies preserve their records.

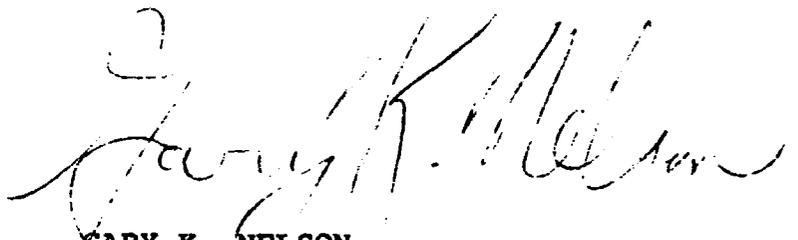
Neither the court nor an agency is empowered to destroy or remove such records. The court is empowered to deny the normal public or inter-agency access to a person's arrest record only upon a finding of wrongful arrest.

We examined the cases of Eddy v. Moore, 487 P.2d 211 (1971), and Davidson v. Dill, 503 P.2d 157 (1972), and do not believe that these cases are applicable in this state. The statutes with which these cases dealt provided no method of protecting the privacy of a person who is wrongfully arrested. In this state the individual's right of privacy is protected by a clearly defined method which requires a hearing by and an order of the superior court.

There is neither statutory nor case authority which provides for record destruction by the individual law enforcement agencies. We are therefore of the opinion that the Department of Public Safety may not expunge records of arrest upon request of the arrested individual.

We do not consider the question of retroactivity, because this is a matter which should be left to the sound judgment of the courts as they hold hearings on applications pursuant to the above cited statute.

Respectfully submitted,



GARY K. NELSON
The Attorney General