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Robert R. Corbin

September 18, 1989

Mr. Charles Miller, Director
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, Arizona 85007

Re: I89-082 (R89-005)

Dear Mr. Miller:

You have asked a series of questions concerning whether court orders issued pursuant to A.R.S. § 13-907 to set aside or "expunge" convictions require removal of the conviction from the driver records of the Motor Vehicle Division (MVD), and, if so, whether records of the set-aside convictions should be kept in a separate, non-public record for use for law enforcement purposes. For the reasons discussed below, we conclude that orders to set aside or "expunge" convictions issued pursuant to A.R.S. § 13-907 do not require removal of the fact of conviction from the driver records of MVD, but only require entry of the fact in the public record that the conviction has been set aside. Separate non-public records of the convictions that have been set aside need not be maintained. Finally, you asked whether rules are "necessary for expungement of civil or administrative actions." We conclude that they are not.

In reaching our conclusion, we begin with your specific inquiry regarding what records of the Motor Vehicle Division are "public records." A.R.S. § 39-121.01(B) provides:

All officers and public bodies shall maintain all records reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by funds from the state or any political subdivision thereof.

Generally, all records maintained pursuant to this statute are "public records." Carlson v. Pima County, 141 Ariz. 487, 491, 687 p.2d 1242, 1246 (1984). ("In light of our statutory policy favoring disclosure, we think that the best procedure is that

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all records required to be kept under A.R.S. § 39-121.01(B), are presumed open to the public for inspection as public records.") More specific to your inquiry regarding driver records, including records of convictions, A.R.S. § 28-428 states:

A. The department shall file every application for a license received by it and shall maintain suitable indexes containing, in alphabetical order:

1. All applications denied and on each application a note of the reasons for the denial.

2. All applications granted.

3. The name of every licensee whose license has been suspended or revoked by the department and after each name a note of the reasons for the action.

B. The department shall also file all abstracts of court records of convictions received by it under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of the licensee and the traffic accidents in which he has been involved is readily ascertainable and available for the consideration of the department upon an application for renewal of license and at other suitable times.

C. The department shall maintain all such records for a period of five years after the application, suspension, revocation or abstract of a court record of conviction has become inactive.

Under A.R.S. § 28-210, records kept by MVD, including driver record information, are public records. Pertinent portions of that statute provide:

A. Any application for a license, permit, title or registration made to the motor vehicle division, along with any document

required by law or by the motor vehicle division to accompany such application, except for medical reports, shall be a public record.

B. If the motor vehicle division or department is required or authorized to revoke, suspend or cancel any operator's or chauffeur's license [A.R.S. § § 28-441 to -454, cancellation, suspension or revocation of licenses] or to suspend vehicle registrations pursuant to chapter 7 of this title, [A.R.S. § § 28-1101 to 1261] it shall notify the holder by a notice in writing which shall include a citation to the statute, rule or regulation under which such action is authorized or required. A copy of such notice shall be retained by the motor vehicle division or department and such copy shall be public record. . . .

C. The motor vehicle division may place such notes, date stamps, identifying numbers or other information on any application, record of conviction or other record as is necessary to insure the accuracy of such record and to expedite its handling. Such information shall not affect the validity of any record, except such markings shall not be considered a part of the record for evidentiary purposes unless proven accurate by other records of the department or other competent evidence.

D. Certified copies of public records designated in this section shall be furnished to any person upon payment of a fee of five dollars. . . .

While recognizing that information concerning a person's driving record is accessible to the public, A.R.S. § 28-210(F) establishes certain prerequisites to the release of that information and provides:

Notwithstanding subsection A of this section, the motor vehicle division shall not:

. . . .

2. Release a copy of a record or divulge information concerning a person's driving record unless the person requesting the driving record provides to the division all of the following:

- (a) The name of the licensee.
- (b) The operator's or chauffeur's license number of the licensee or a statement that the license has been suspended or revoked.
- (c) The date of birth of the licensee or the expiration date of the operator's or chauffeur's license of the licensee.

A.R.S. § 28-210(G) provides that the above showing need not be made prior to release of information to certain entities such as courts, law enforcement officers and others specified in the paragraph.

Under the statutes set out above, driver records are required to be kept by MVD and notations of convictions are part of such records. As such they are presumed available to the public under A.R.S. § 39-121.01(B). A.R.S. § 28-210 specifically provides for public access to these driver records under prescribed conditions. We conclude that driver records containing records of convictions are public records.

We turn, then, to your question of whether a court order entered pursuant to A.R.S. § 13-907, that a conviction be set aside or "expunged," requires the actual removal of all information concerning the conviction from MVD's public records.

A.R.S. § 13-907(A) provides:

A. Except as provided in subsection B of this section, every person convicted of a criminal offense may, upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation or such judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted

person shall be informed of this right at the time of discharge. The application to set aside the judgment may be made by the convicted person or by his attorney or probation officer authorized in writing. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the peace or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction other than those imposed by the department of transportation pursuant to § 28-445 or 28-446, and except that the conviction may be used as a conviction if such conviction would be admissible had it not been set aside and may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense or used by the department of transportation in enforcing the provisions of § 28-445 or 28-446 as if the judgment of guilt had not been set aside.

Your opinion request does not clearly indicate whether the court orders in question have explicitly required the actual destruction or segregation of records of convictions that have been set aside. A.R.S. § 13-907 does not use the term "expunge" and although Webster's Third New International Dictionary defines the term "expunge" to mean to strike out or obliterate, the term does not necessarily imply actual destruction of the records under Arizona law. For example, in In re Courser, 122 Ariz. 500, 596 P.2d 26 (1979), the court, in its opinion finding that "expunged" convictions are admissible in State Bar Disciplinary proceedings, uses the term "expunge" interchangeably with the term "set aside." Moreover, the court's holding that such information, even though "expunged," can be used in certain subsequent proceedings, necessarily implies that no physical destruction of the fact of conviction is contemplated by the court's use of the term "expunge." Additionally, this office has previously opined that the term "expungement" in Arizona does not mean the physical destruction of records. See, e.g., Ariz. Atty Gen. Ops. 183-042, 73-3-L. Therefore, you should assume that a court order using either the term "expunge" or the term "set aside" does not require the actual obliteration of the fact of conviction from your public driver records.

Should the orders in question contain explicit instructions that the fact of conviction actually be destroyed, such orders would be subject to court challenge under Beasley v. Glenn, 110 Ariz. 438, 520 P.2d 310 (1974). In the case, a court ordered destruction of arrest records held by the Maricopa County Sheriff. The Court held that unless the statute requiring the records to be kept specifically provided that they could be destroyed, the lower court was without authority to order such destruction. The Court stated:

Public records, since they are required to be kept by law, can only be destroyed pursuant to law, and, hence, the destruction of public records is a matter to be regulated by statute.

110 Ariz. at 440, 520 P.2d at 312. Noting that the arrest record statute^{1/} contained no provision for destruction of such records, the Court vacated the lower court's order requiring the records to be destroyed. Similarly, nothing in A.R.S. § 13-907 permits destruction of the record of conviction or requires that such conviction be confidential.

^{1/}A.R.S. § 13-4051, renumbered from
§ 13-1761, states:

- A. Any person who is wrongfully arrested, indicted or otherwise charged for any crime may petition the superior court for entry upon all court records, police records and any other records of any other agency relating to such arrest or indictment a notation that the person has been cleared.
- B. After a hearing on the petition, if the judge believes that justice will be served by such entry, the judge shall issue the order requiring the entry that the person has been cleared on such records, with accompanying justification therefor, and shall cause a copy of such order to be delivered to all law enforcement agencies and courts. The order shall further require that all law enforcement agencies and courts shall not release copies of such records to any person except upon order of the court.
- C. Any person who has notice of such order and fails to comply with the court order issued pursuant to this section shall be liable to the person for damages from such failure.

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We conclude that court orders issued pursuant to A.R.S. § 13-907 to set aside a conviction do not require maintenance of records apart from the files available to the public. Rather, the orders require only that the fact that the conviction has been set aside be entered into the MVD's public driver records pursuant to A.R.S. § 28-210(C), which permits MVD to place "such notes, date stamps, identifying numbers or other information on any application, record of conviction or other record as is necessary to insure the accuracy of such record and to expedite its handling"

In answer to your remaining questions pertaining to handling orders to set aside criminal convictions, it would appear that any policy of removing conviction records from the public records and keeping such information in separate files available only to law enforcement officers would not be appropriate.

Finally, you ask whether "rules are necessary for expungement of civil or administrative actions." Assuming that your reference is to administrative rules necessary to implement expungement orders issued pursuant to A.R.S. § 13-907, the answer is no. The statutes describe in detail the duties of the MVD with respect to set aside orders and public records in MVD's custody. Court orders pertaining to civil or administrative actions may be noted in public records of such actions under A.R.S. § 28-210(C). Consequently, rules are not necessary for MVD to comply with its duties under the statutes. Boyce v. City of Scottsdale, 157 Ariz. 265, 267-268, 756 P.2d 934, 936-937 (1988); Magma Copper Co. v. Arizona State Tax Commission, 67 Ariz. 77, 85, 191 P.2d 169, 174 (1948). However, MVD may, when authorized by law, adopt regulations for the complete operation and enforcement of the statutes. Boyce v. City of Scottsdale, 157 Ariz. at 268, 756 P.2d at 937. Such regulations may not, however, conflict with the statutes. Id., 157 Ariz. at 267, 756 P.2d at 936.

Sincerely,



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Attorney General

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