

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

September 30, 2005

Opinion No. 05-150

Retention of Expungement Order

QUESTION

Is it proper for the Circuit Court Clerk to retain a copy of the expungement order for the sole purpose of protecting the Clerk from being accused of expunging a case without an order to do so?

OPINION

No. Tenn. Code Ann. § 40-32-101 provides for the expungement of certain “public records” and, the term “public record” refers to all records maintained by a public official regardless of whether such records be for public inspection or for internal use. The expungement order is a public record; the statute does not expressly authorize the Court Clerk to retain a copy of the order. However, Tenn. Code Ann. § 40-32-101(b)(1) provides that a copy of the expungement order be sent to the Tennessee Bureau of Investigation for entry into its expunged offender and pretrial diversion database. The record of the expungement order kept in the expunged offender and pretrial diversion database by the Tennessee Bureau of Investigation provides the circuit court clerk with protection against being accused of expunging a case without an order to do so.

ANALYSIS

Tenn. Code. Ann. § 40-32-101 provides for expungement of records. The statute states:

all public records of a person who has been charged with a misdemeanor or a felony, in which charge has been dismissed, or a no true bill returned by a grand jury, or a verdict of not guilty returned by a jury, and all public records of a person who was arrested and released without being charged, shall, upon petition by that person to the court having jurisdiction in such previous action, be removed and destroyed without cost to such person . . . Tenn. Code. Ann. § 40-32-101(a)(1).

The statute also provides that if a defendant petitions a court after a court has entered a nolle prosequi in the defendant’s case, the court shall order the public records expunged. Tenn. Code Ann. § 40-32-101(a)(3). Thus, the statute provides for the expungement of criminal records in four specific situations: (1) upon dismissal of the charge; (2) upon a return of no true bill; (3) upon a verdict of not guilty; and (4) upon the reversal of conviction on appeal.

Tenn. Code. Ann. § 40-32-101 sets forth the circumstances in which certain public records may be removed and destroyed. Tenn. Code Ann. § 40-32-101(b)(1) defines a public record for purposes of expungement as follows:

Public records, for purposes of expunction only, does not include arrest histories, investigative reports, intelligence information of law enforcement agencies, or files of district attorney generals that are maintained as confidential records for law enforcement purposes and are not open for inspection by members of the public and shall not include records of the Department of Children Services or Department of Human Services which are confidential under state or federal law and which are required to be maintained by state or federal law for audit or other purposes.

The term “public record” as used in this section refers to all records maintained by a public official regardless of whether such records be for public inspection or for internal use. *State v. Doe*, 588 S.W.2d 549 (Tenn. 1979). The expungement order itself is a public record, and the statute does not authorize circuit court clerks to retain any public record. It is the opinion of this office, therefore, that the circuit court clerk cannot retain a copy of the expungement order for internal use. However, under Tenn. Code Ann. § 40-32-101(d)(1) any court ordering the expungement of a person’s public records of a criminal offense, including orders issued as a result of the successful completion of a diversion program pursuant to sections 40-15-105 and 106 or judicial diversion program, shall send or cause to be sent a copy of such expungement order to the Tennessee Bureau of Investigation for entry into its expunged offender and pretrial diversion database. *Id.* The order shall contain the name of the person seeking expungement, the person’s date of birth, and social security number, the offense that was dismissed, the date and cause of such dismissal, and the date the order of expungement was entered. *Id.* This provision should protect the circuit court clerk from an unjust accusation that the clerk has expunged the records of a case without an order to do so.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

SETH P. KESTNER
Assistant Attorney General

Requested by:

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Jim T. Hamilton, Circuit Judge
22nd Judicial District, Division I
P.O. Box 413
Columbia, TN 38402-0413