

OPINIONS OF THE ATTORNEY GENERAL

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OPINION NO. 100

COURTS - Destruction of records following court-ordered expungement;
CRIMINAL INFORMATION DISSEMINATION - Records subject to expungement;
CRIMINAL LAW AND PROCEDURE - Expungement of criminal records following a deferred imposition of sentence;
SENTENCE - Requirements of expungement following a deferred imposition of sentence;
MONTANA CODE ANNOTATED - Section 46-18-204.

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HELD: When a deferred imposition of sentence results in a dismissal of charges the expungement of the defendant's record mandated by section 46-18-204, MCA, requires that all documentation and physical or automated entries concerning the expunged offense be physically destroyed or obliterated.

20 July 1988

Mike Salvagni
Gallatin County Attorney
Law and Justice Center
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Dear Mr. Salvagni:

You have requested my opinion of the meaning of the words "expunge" and "record" in the deferred imposition of sentence statute, § 46-18-204, MCA. That statute in its entirety reads as follows:

Whenever the court has deferred the imposition of sentence and after termination of the time period during which imposition of sentence has been deferred, upon motion of the court, the defendant, or the defendant's attorney, the court may allow the defendant to withdraw his plea of guilty or may strike the verdict of guilty from the record and order that the charge or charges against him be dismissed. Upon dismissal of the charges, the court shall send an order directing the department of justice to expunge the defendant's record. The order must adequately identify the defendant, such as by sex, race, date of birth, and the current status of the charges to be expunged. [Emphasis supplied.]

The statutory terms at question are not independently defined within the code, and record clerks are often faced with the problem of not knowing whether to seal or destroy records and wondering what documents are affected.

Your question may be answered by referring to the definitions of the relevant words. Black's Law Dictionary (5th ed. 1979), at page 522, defines "expunge" as follows: "To destroy; blot out; obliterate; erase; efface designedly; strike out wholly.

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The act of physically destroying information - including criminal records - in files, computers, or other depositories." Webster's Third New International Dictionary, at page 803, similarly defines expunge: "to strike out...obliterate...to cause to be effaced...to cause the physical destruction of." Case law of other jurisdictions concludes that an expungement order necessitates destruction of the record. See Police Commissioner of Boston v. Municipal Court of Dorchester District, 374 N.E.2d 272 (Mass. 1978); Bergel v. Kassebaum, 577 S.W.2d 863 (Mo. Ct. App. 1978).

What is often repeated in the case law is the principle that "expunge" means not a legal act but a physical annihilation. For example, in K. v. K., 483 N.Y.S.2d 602, 604 (N.Y. Sup. Ct. 1984) the court noted:

Significantly, the Legislature provided that unfounded reports of child abuse be expunged, not sealed. The two words are not synonymous. "The word 'expunge' is described as a term expressive of cancelation or deletion, implying not a legal act, but a physical annihilation." [Citation omitted.] On the other hand, when a record is sealed it is merely segregated to ensure its confidentiality to the extent specified in the controlling statute. [Emphasis in original.]

As to the meaning of the word "record," I note that the purpose of an expungement statute is to remove records so that all evidence of the underlying arrest, conviction, or other disposition is eliminated. Thus, the statute would have little effect unless the record expunged included all documents that identified the subject or connected him to the underlying offense. As the Supreme Court of Massachusetts noted in Dorchester, supra:

First, the distinction between expungement of a record and sealing of a record is important. The former term refers to the type of order issued by the defendant judgment in the instant case--an order to remove and destroy records "so that no trace of the information remains." [Emphasis supplied.]

Records are therefore not destroyed until all documents, information, and identifiable descriptors are eliminated. The term "record" in the statute must be interpreted to give effect to the statute.

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Implicit in the statutory provision is the understanding that the court order must be directed at the particular offense for which the deferred imposition of sentence was granted. The order must specify the offense with sufficient particularity to allow Montana Department of Justice personnel to accurately remove and destroy records. For instance, the subject of an expungement record may have multiple offenses on his record. The order must allow record clerks to remove all information pertaining to the expunged offense without deleting other record information.

Section 46-18-204, MCA, provides that upon dismissal of the charges, the court sends an order to the Department of Justice (the Department) directing that agency to expunge the subject's record. As a practical matter the Department will be unable to accomplish the task single-handedly because the great balance of a defendant's criminal record resides with the local law enforcement agency responsible for initiating the arrest and prosecution. The Department is nonetheless directly responsible for four tasks in effectuating the expungement. First, the Department must authenticate the expungement order and determine that sufficient information is provided to identify the defendant and the expunged offense. Second, the Department must remove that part of the defendant's record within its control, namely the offense entry within the Montana automated criminal history file and the fingerprint cards. The Department maintains an inquiry log that identifies all parties who have requested and received information upon the subject. Those parties must be notified by the Department of the expungement order and the fact that the prior information has become outdated. Following notification the inquiry log itself must be destroyed. Third, the Department must notify the National Crime Information Center (NCIC) within the Federal Bureau of Investigation and request that notation of the defendant's offense record at the federal level be expunged. Finally, the Department must direct the originating local law enforcement agency to expunge their offense records.

Records held at the local level may be difficult to comprehensively expunge. The paper record accompanying an arrest, detention, and judicial proceeding is voluminous and often distributed throughout several local agencies. Nonetheless, in keeping with the clear intent of the Legislature, local record clerks who are most familiar with what information exists and where it may be located, must make a good faith effort to completely expunge the defendant's record. This record within a law enforcement agency will include entries on

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index files, booking sheets, jail records, offense reports, computer files, microfilm, as well as all mugshots and fingerprint cards. The judicial record will include entries on the court's docket sheet as well as the judicial file itself. While sound policy reasons may exist for sealing rather than destroying these records, the Legislature has deliberately chosen to have the records expunged, and I am constrained to so interpret the statute.

THEREFORE, IT IS MY OPINION:

When a deferred imposition of sentence results in a dismissal of charges, the expungement of the defendant's record mandated by section 46-18-204, MCA, requires that all documentation and physical or automated entries concerning the expunged offense be physically destroyed or obliterated.

Very truly yours,

MIKE GREELY
Attorney General