



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

October 7, 1993

Janice M. Caldwell, Dr. P.H.
Executive Director
Texas Department of Protective
and Regulatory Services
P.O. Box 149030
Austin, Texas 78714-9030

Letter Opinion No. 93-88

Re: Removal of criminal record
subject to expunction order from agency
files (ID# 18550)

Dear Dr. Caldwell:

On behalf of the Texas Department of Protective and Regulatory Services, you ask whether the department may remove from its files an arrest record subject to an expunction order issued under chapter 55 of the Code of Criminal Procedure. You state that a caseworker who investigated allegations of child abuse was given a copy of a police report concerning the arrest of the alleged perpetrator, and the arrest report is now part of the Child Protective Services Record of the investigation. The department has been given a copy of a Petition to Expunge Criminal Record and the signed Order of Expunction, and the alleged perpetrator has requested that the arrest record be removed from all department records. You ask whether the department may remove the arrest record from the file under the authority of articles 55.03 and 55.04 of the Code of Criminal Procedure without violating section 12 of the Open Records Act, which provides as follows:

Any person who wilfully destroys, mutilates, removes without permission as provided herein, or alters public records shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$25 nor more than \$4,000, or confined in the county jail not less than three days nor more than three months, or both such fine and confinement.

V.T.C.S. art. 6252-17a, § 12.

A person who has been arrested for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if the conditions stated in article 55.01 of the Code of Criminal Procedure are met. The person who is entitled to expunction of records may file an *ex parte* petition for expunction in a district court for the county in which he was arrested. Code Crim. Proc. art. 55.02, § 1. If the court finds that the petitioner is entitled to expunction of any records and files that are the

subject of the petition, it shall enter an order directing expunction. *Id.* § 3. On receipt of the order, each official or agency named in the order shall:

(1) return all records and files that are subject to the expunction order to the court, or, if removal is impracticable, obliterate all portions of the record or file that identify the petitioner and notify the court of its action; and

(2) delete from its public records all index references to the records and files that are subject to the expunction order.

Id. § 5.

Article 55.03 states another consequence of expunction:

After entry of an expunction order:

(1) the release, dissemination, or use of the expunged records and files for any purpose is prohibited.

Id. art. 55.03(1).

Article 55.04 provides for violations of an expunction order:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Sec. 2. A person who knowingly fails to return or to obliterate identifying portions of a record or file ordered expunged under this chapter commits an offense.

Sec. 3. A offense under this article is a Class B misdemeanor.

Id. art. 55.04.

Section 12 of the Open Records Act forbids the willful destruction, mutilation, removal or alteration of public records, while chapter 55 of the Code of Criminal Procedure provides that officials and agencies named in an expunction order must remove or obliterate the arrest records subject to the order. Chapter 55 is a special provision, applicable only to arrest records and files that are subject to an expunction order, while the Open Records Act is a general provision, applicable to a broad category of "public records." If a general provision and a special provision are in irreconcilable conflict, the special provision prevails as an exception to the general provision, unless the general

provision is the later enactment and the manifest intent is that the general provision prevail. Gov't Code § 311.026; *see also Sam Bassett Lumber Co. v. City of Houston*, 198 S.W.2d 879 (Tex. 1947) (legislative intent is more clearly reflected by a particular than by a general statute). The Open Records Act was enacted before the expunction provisions, and section 12 has never been amended. *See* Acts 1973, 63d Leg., ch. 424, at 1112 (adopting V.T.C.S. article 6252-17a); Acts 1977, 65th Leg., ch. 747, at 1880 (adopting articles 55.01 - 55.05, Texas Code of Criminal Procedure).

This office has previously determined that the expunction statute prevails over the Open Records Act. Open Records Decision No. 457 (1987) arose from a request to a governmental body for an arrest record that had been expunged pursuant to court order. The governmental body managed to secure a copy and forwarded it to this office for a ruling under section 7 of the Open Records Act. The decision stated that article 55.03 prohibited a governmental body from releasing or disseminating arrest records subject to an expunction order, and that "those records are not subject to public disclosure under the Texas Open Records Act." Open Records Decision No. 457 at 2.

Accordingly, you must comply with the requirements of chapter 55 of the Code of Criminal Procedure and the court order issued under it. The actions required by chapter 55 and the court order will be excepted from section 12 of the Open Records Act and will not be subject to that penalty.

The expungement order does not name the Department of Protective and Regulatory Services or the Department of Human Services, which was formerly responsible for child protective services. *See* Acts 1991, 72d Leg., 1st C.S., ch. 15, § 1.06. The Department of Protective and Regulatory Services is therefore not required to comply with the article 55.02 requirement that officials and agencies named in the order return records subject to the order to the court or obliterate identifying information if it is impractical to return them. Accordingly, articles 55.03 and 55.04 of the Code of Criminal Procedure do not authorize the department to remove the arrest record from its files. However, the department must refrain from releasing, disseminating, or using the expunged record for any purpose. Code Crim Proc. art. 55.03(1).

The department may wish to take measures to keep the expunged arrest record from being released, such as placing it in a sealed envelope or marking it as expunged. The department might also wish to contact the Records Management Division of the Texas State Library and Archives Commission about the following procedure for destroying certain state records:

With the approval of the director and librarian [of the Texas State Library and Archives Commission], . . . the head of any department or institution may destroy any state record in the custody of the head of the department or institution that, in the opinion of the

head of the department or institution, does not have any further legal, administrative, or historical value. Before destroying the state record, the head of the department or institution must file an application to do so with the director and library that describes the original purpose and the contents of the state record. . . .

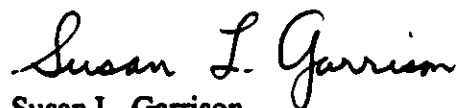
Gov't Code § 441.035(e). *See also* Gov't Code § 441.037 (development of record retention schedules). We suggest that you describe the contents of the arrest record in general terms, to avoid disseminating the information contained in it.

S U M M A R Y

The provisions of chapter 55 of the Code of Criminal Procedure, authorizing the expunction of certain arrest records, control over the provisions of the Open Records Act, V.T.C.S. article 6252-17a, to the extent of conflict. After entry of an expunction order, the release, dissemination, or use of the expunged records and files for any purpose is prohibited. On receipt of an expunction order, an official or agency named in the order must return all records and files subject to the order to the court, or, if removal is impracticable, obliterate all portions of the records or file that identify the petitioner.

Since the Texas Department of Protective and Regulatory Services is not named in an expunction order applicable to an arrest record in its files, it is not required or authorized by chapter 55 of the Code of Criminal Procedure to remove the arrest record from its files. It may, however, be able to arrange for its destruction pursuant to section 441.035(e) of the Government Code.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee