OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

March 7, 2000

FILE NO. 00-001

CRIMINAL LAW AND PROCEDURE:
Expungement of Records

The Honorable Joseph E. Birkett
State's Attorney, DuPage County
505 North County Farm Road
Wheaton, Illinois 60187

Dear Mr. Birkett:

I have your letter wherein you pose several questions regarding the proper disposition of records which have been ordered expunged pursuant to section 5 of the Criminal Identification Act (20 ILCS 2630/5 (West 1998), as amended by Public Act 91-357, effective July 29, 1999). Specifically, you have inquired: (1) whether section 5 of the Criminal Identification Act requires the State's Attorney to expunge records under his or her control; (2) whether section 5 of the Criminal Identification Act requires the State's Attorney to return all identification materials under his or her control to an arresting authority, where the arresting authority makes the request pursuant to a court order of expungement; and (3) whether an order for the

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expungement of a county sheriff's records of arrest requires the physical destruction of those records? For the reasons hereinafter stated, it is my opinion that: (1) the expungement procedure set forth in section 5 of the Criminal Identification Act is not applicable to records in the custody of the State's Attorney; (2) the provisions of section 5 of the Criminal Identification Act do not authorize the entry of an order requiring the State's Attorney to expunge or surrender identification materials under his or her control; and (3) a county sheriff's records of arrest generally are subject to physical destruction pursuant to an expungement order, except where the destruction of the records would be inconsistent with other statutory mandates.

With regard to your first inquiry, you have noted that when a person is arrested and charged with a criminal offense, records related to the arrest, such as the police report and statements made by the defendant, are generally forwarded to the State's Attorney for use in prosecution of the offender. On occasion, because of the unavailability of a witness, or for other reasons, a decision is made to nolle prosequi the case, that is, to dismiss the proceedings on the criminal charge voluntarily. Thereafter, the defendant has filed a petition seeking the expungement of his or her "record of arrest" for the incident that gave rise to the prosecution and an order of

expungement has been entered by the court. Subsequently, when the State's Attorney has attempted to refile the charges, the defendant has claimed that the State's Attorney should be precluded from relying upon any "records of arrest" which were ordered expunged. Therefore, you have inquired whether section 5 of the Criminal Identification Act requires a State's Attorney to expunge records under his or her control.

Section 5 of the Criminal Identification Act provides, in pertinent part:

> " * * *
>
> (a) All policing bodies of this State shall furnish to the Department, daily, in the form and detail the Department requires, fingerprints and descriptions of all persons who are arrested on charges of violating any penal statute of this State for offenses that are classified as felonies and Class A or B misdemeanors * * *.
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> Whenever an adult or minor prosecuted as an adult, not having previously been convicted of any criminal offense or municipal ordinance violation, charged with a violation of a municipal ordinance or a felony or misdemeanor, is acquitted or released without being convicted, whether the acquittal or release occurred before, on, or after the effective date of this amendatory Act of 1991, the Chief Judge of the circuit wherein the charge was brought, any judge of that circuit designated by the Chief Judge, or in counties of less than 3,000,000 inhabitants, the presiding trial judge at the defendant's trial may upon verified petition of the defendant order the record of arrest expunged

from the official records of the arresting authority and the Department and order that the records of the clerk of the circuit court be sealed until further order of the court upon good cause shown and the name of the defendant obliterated on the official index required to be kept by the circuit court clerk under Section 16 of the Clerks of Courts Act, but the order shall not affect any index issued by the circuit court clerk before the entry of the order. The Department may charge the petitioner a fee equivalent to the cost of processing any order to expunge or seal the records, and the fee shall be deposited into the State Police Services Fund. The records of those arrests, however, that result in a disposition of supervision for any offense shall not be expunged from the records of the arresting authority or the Department nor impounded by the court until 2 years after discharge and dismissal of supervision. Those records that result from a supervision for a violation of Section 3-707, 3-708, 3-710, 5-401.3, or 11-503 of the Illinois Vehicle Code or a similar provision of a local ordinance, or for a violation of Section 12-3.2, 12-15 or 16A-3 of the Criminal Code of 1961, or probation under Section 10 of the Cannabis Control Act, Section 410 of the Illinois Controlled Substances Act, Section 12-43.b(1) and (2) of the Criminal Code of 1961, Section 10-102 of the Illinois Alcoholism and Other Drug Dependency Act when the judgment of conviction has been vacated, Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act when the judgment of conviction has been vacated, or Section 10 of the Steroid Control Act shall not be expunged from the records of the arresting authority nor impounded by the court until 5 years after termination of probation or supervision. Those records that result from a supervision for a violation of Section 11-501 of the Illinois Vehicle Code or a similar provision of a local ordinance,

shall not be expunged. All records set out above may be ordered by the court to be expunged from the records of the arresting authority and impounded by the court after 5 years, but shall not be expunged by the Department, but shall, on court order be sealed by the Department and may be disseminated by the Department only as required by law or to the arresting authority, the State's Attorney, and the court upon a later arrest for the same or a similar offense or for the purpose of sentencing for any subsequent felony. Upon conviction for any offense, the Department of Corrections shall have access to all sealed records of the Department pertaining to that individual.

* * *

(d) Notice of the petition for subsections (a), (b), and (c) shall be served upon the State's Attorney or prosecutor charged with the duty of prosecuting the offense, the Department of State Police, the arresting agency and the chief legal officer of the unit of local government affecting the arrest. Unless the State's Attorney or prosecutor, the Department of State Police, the arresting agency or such chief legal officer objects to the petition within 30 days from the date of the notice, the court shall enter an order granting or denying the petition. The clerk of the court shall promptly mail a copy of the order to the person, the arresting agency, the prosecutor, the Department of State Police and such other criminal justice agencies as may be ordered by the judge.

* * * "

(Emphasis added.)

As used in the Criminal Identification Act (20 ILCS 2630/0.01 et seq. (West 1998)), the term "Department" means the Department of State Police. (20 ILCS 2630/1 (West 1998).)

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. (People v. Latona (1998), 184 Ill. 2d 260, 269.) Legislative intent is best evidenced by the language used in the statute. (Davis v. Toshiba Machine Co. (1999), 186 Ill. 2d 181, 185.) Under the plain language of section 5 of the Criminal Identification Act, the circuit court may order the record of an arrest expunged from the official records of the "arresting authority" and the Department of State Police. Therefore, the dispositive issue is whether the phrase "arresting authority" encompasses the office of State's Attorney.

The phrase "arresting authority" is not defined in the Criminal Identification Act. It is well established, however, that undefined statutory terms must be given their ordinary and popularly understood meaning. (Gem Electronics v. Department of Revenue (1998), 183 Ill. 2d 470, 475.) Moreover, a statute must be read as a whole and no word or paragraph should be interpreted so as to be rendered meaningless. (Texaco-Cities Service Pipeline Co. v. McGaw (1998), 182 Ill. 2d 262, 270.) The phrase "arresting authority", in this context, clearly refers to a

public officer (e.g., the county sheriff) or a public agency (e.g., a municipal police department) vested by law with the authority to make arrests for offenses. Section 3-9005 of the Counties Code (55 ILCS 5/3-9005 (West 1998)) provides that a State's Attorney's duties primarily entail the representation of the State's or the county's interest in criminal and civil litigation and advising the county's officers on matters related to their official duties, not making arrests for violations of penal laws. Consequently, it is my opinion that a State's Attorney is not included within the commonly understood meaning of the phrase "arresting authority". To conclude otherwise would render meaningless those portions of subsections 5(a) and (d) of the Act which authorize the dissemination of previously expunged records of a defendant's arrest for the same or a similar offense "* * * to the arresting authority, [and] the State's Attorney * * *" and which require a notice of the petition for an order of expungement to be served on "* * * the State's Attorney * * * the Department of State Police, [and] the arresting agency * * *". These provisions plainly distinguish between the State's Attorney's office and arresting authorities or agencies. Consequently, it is my opinion that the provisions of section 5 of the Criminal Identification Act, when read as a whole, mandate the conclusion that it was not the intention of the General Assembly

to categorize the State's Attorney as an "arresting authority", for purposes thereof, and that records within the custody of a State's Attorney are therefore not subject to expungement pursuant to an order entered pursuant to section 5 of the Act.

Your second question concerns whether, under section 5 of the Criminal Identification Act, a State's Attorney is required to return all "identification materials" under his or her control to the arresting authority which provided the materials, when the arresting authority is subject to an order of expungement and has requested the return of the specified materials pursuant to that order. Prior to January 1, 1990, section 5 of "AN ACT in relation to criminal identification and investigation" (Ill. Rev. Stat. 1987, ch. 38, par. 206-5, now section 5 of the Criminal Identification Act), required the return of "* * *[a]ll photographs, fingerprints or other records of identification * * *" to a person who was acquitted or released without being convicted of a crime. This requirement was deleted by Public Act 86-575, effective January 1, 1990, presumably because the same information was part of the record of arrest and was subject to expungement by the circuit court. I will assume, therefore, that your use of the phrase "identification materials" refers to photographs, fingerprints and other records of identification of a former defendant or detainee.

As noted above, section 5 of the Criminal Identification Act authorizes the court to enter an order expunging "* * * the official records of the arresting authority and the Department [of State Police] * * *". Although a State's Attorney's prosecution files may contain copies of the official records compiled by an arresting authority, the State's Attorney's files do not constitute the "official records of the arresting authority" because, as discussed above, a State's Attorney is not an "arresting authority" and, consequently, copies of records in a State's Attorney's possession are not the "official records" of the arresting authority. Section 5 of the Act does not expressly authorize the entry of an order requiring the State's Attorney to expunge or surrender his or her files. Consequently, it is my opinion that a State's Attorney is not required to return identification materials or other records of arrest under his or her control to the arresting authority which originally provided the information pursuant to an order of expungement.

Lastly, you have inquired whether an order of expungement entered pursuant to section 5 of the Criminal Identification Act requires the county sheriff to destroy all records of arrest related to a particular case. In those cases in which the court deems it appropriate, section 5 of the Act authorizes the record of arrest to be "expunged" from the official records

of the arresting authority, and the records of the clerk of the circuit court to be "sealed" and the name of the defendant "obliterated" on the official index required to be kept by the circuit clerk. The term "expunged" is not defined in the Criminal Identification Act. In opinion No. 81-001, issued February 13, 1981 (1981 Ill. Att'y Gen. Op. 1), however, Attorney General Fahner addressed the proper procedures to be followed by the circuit clerk in executing an order of expungement which had been entered by the chief judge of the circuit with respect to circumstances in which the identity of a person was stolen or otherwise obtained without authorization. In reaching his conclusion that expungement did not require the destruction of records in that circumstance, Attorney General Fahner stated:

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> There is no Illinois statutory or case law definition of the term 'expunge'. Webster's Dictionary 863 (3d Ed. 1961) defines 'expunge' as follows:
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> '1 a: to strike out, obliterate, or mark for deletion (as a word, line, or sentence) b: to obliterate (a material record or trace) by any means * * *.
>
> * * * '
>
> Black's Law Dictionary 693 (4th Ed. 1968) defines 'expunge' as:
>
> 'to destroy or obliterate; it implies not a legal act, but a physical annihilation.

Andrews v. Police Court of City of Stockton, Cal. App., 123 P. 2d 128, 129. To blot out; to efface designedly; to obliterate; to strike out wholly.'

Although the word 'expunge' may be defined to mean destruction or annihilation, as discussed above, it is clear that the General Assembly, in this circumstance, did not intend that the records themselves be destroyed.

* * * The procedure set out in the Missouri appellate case State ex. rel. M.B. v. Brown (1976), 532 S.W. 2d 893, 896, provides a clear description of the physical acts necessary to expunction. Therein, the court held that the word 'expunge', in a Missouri statute which allowed a youthful offender who successfully completed probation to apply for a court order expunging all recordation of his arrest, trial, and conviction, does not call for destruction of the records themselves. In pointing out that the destruction of all such records would be inconsistent with other statutory mandates imposed on the clerk of the court, the court stated that:

' * * *

* * * As a practical matter, all records which must be retained by the court and which are identified in any way with the arrest, trial and conviction of the offender, should have all references to him eliminated. This may be done by striking out, blotting, obliterating or in any permanent manner completely concealing or excising the name of the offender, his address and any other identification which might associate him with the records of the court. This may be done through the use of ink, chemical or mechanical means just so long as there is no way to read de-

> fendant's name or address, or any other identifying words or numbers.
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> * * *
>
> (Emphasis added.)
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> * * *
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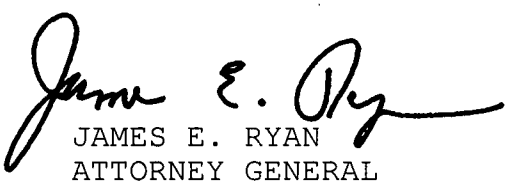
> (1981 Ill. Att'y Gen. Op. at 2-3.)

Moreover, in People v. Hansen (1990), 198 Ill. App. 3d 160, 166, the Illinois Appellate Court recognized that there may be reasons to preserve records that are the subject of an expungement order for future use. Thus, court files are generally impounded and sealed pursuant to an order of expungement rather than destroyed. See Administrative Office of the Illinois Courts, Manual on Recordkeeping (2nd Ed., 1996), Part 1, Section L.

It appears, therefore, that by using the term "expunged" rather than "sealed" or "impounded", with respect to records of an arresting authority, the General Assembly intended for such records to be destroyed pursuant to an order of expungement. Consequently, it is my opinion that a county sheriff's records related to an arrest generally are subject to physical destruction pursuant to an order of expungement, unless their destruction would be inconsistent with other statutory mandates. For example, under section 6 of the County Jail Act (730 ILCS 125/6 (West 1998)), the county sheriff is expressly required to "* * * keep an exact permanent calendar of all

persons committed to jail, registering the name, place of abode, time, cause and authority of their commitment, and the time and manner of their discharge". To destroy records relating to a particular person's confinement in the county jail would be inconsistent with the statutory mandate imposed upon the county sheriff under section 6 of the County Jail Act. Consequently, although a county sheriff's records of arrest are generally subject to physical destruction pursuant to an order of expungement, where the destruction of such records would be inconsistent with other statutory mandates, the pertinent records should not be destroyed. In those instances in which records are required be maintained, all references to a former defendant or detainee should be eliminated in accordance with the procedures suggested by Attorney General Fahner.

Sincerely,



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