



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

July 11, 2000

Dianne Middle, Director
Department of Public Safety Standards and Training
550 North Monmouth Avenue
Monmouth, OR 97361

Re: Opinion Request OP-2000-1

Dear Ms. Middle:

You ask several questions concerning the effect on the Department of Public Safety Standards and Training (DPSST) of an order issued under ORS 137.225 setting aside a person's conviction and sealing the official records in the case underlying that conviction. We set forth your questions and our brief answers below, followed by our analysis.^{1/}

1. Does an order issued under ORS 137.225, setting aside a conviction and sealing official records in the case, apply to records on file at DPSST?

If the State of Oregon is a party to the case to which the order pertains, an order setting aside a conviction and sealing the official records in the case applies to DPSST if DPSST either receives a certified copy of the order from the court or acquires actual knowledge of the order.

2. If an order issued under ORS 137.225 applies to records on file at DPSST, what action is required of DPSST?

If DPSST is subject to the order, then it must seal the original record of conviction, record of arrest and all other official records in the case, or copies of those records, that DPSST possesses. While Oregon case law is not clear on this point, we believe that a court would not consider DPSST records regarding its administrative proceedings or certification decisions that reference a set aside conviction or the underlying criminal activity as "other official records in the case" required to be sealed.

3. If DPSST has revoked a person's certification based on a record of past conviction, and that person reapplies to DPSST for certification after obtaining an order setting aside the conviction and sealing the official records in the case, may DPSST consider its records, including the record of conviction, when determining if certification is appropriate?

If the State of Oregon was a party to the criminal case underlying the order and DPSST either received a certified copy of the court order or acquired actual knowledge of the order, DPSST may not refer to or use sealed records for any purpose. DPSST may consider information contained in its unsealed records, including records that reference the set aside conviction or the criminal conduct that led to the set aside conviction.

4. Are records concerning an individual's certification subject to disclosure under the Public Records Law if those records include or refer to a conviction that was set aside?

Records sealed under ORS 137.225 are exempt from disclosure under the Public Records Law, ORS 192.410 through 192.505. Records other than official records in the case in which the conviction was set aside do not have to be sealed and are not exempt from disclosure merely because they refer to a set aside conviction. Such records, of which DPPST-created materials are an example, are exempt from disclosure only if they are subject to exemption under the Public Records Law on a basis independent of an order issued under ORS 137.225.

5. May DPSST disclose the reason for its revocation of an individual's certification to persons who request that information by telephone or in writing if the conviction that served as the basis for the revocation was subsequently set aside and the official records in the case sealed?

DPSST may disclose that DPSST revoked an individual's certification because of a conviction so long as the records used by DPSST to respond to the inquiry are not official records in the case sealed under ORS 137.225.

Discussion

A person meeting requirements imposed by statute may apply to the appropriate court to have the person's conviction set aside.^{2/} ORS 137.225. If the court grants the person's motion, the court issues an order setting aside the conviction. The statute speaks to the effect of the order:

Upon the entry of such an order, the applicant for purposes of the law shall be deemed not to have been previously convicted * * * and the court shall issue an order sealing the record of conviction and other official records in the case[.]

ORS 137.225(3). The statute requires the clerk of the court to forward certified copies of the court's order "to such agencies as directed by the court" and specifies that a copy must be sent to the Department of Corrections (DOC) if the applicant has been in DOC custody. ORS 137.225(4). The statute further provides:

Upon entry of such an order, such conviction, arrest or other proceeding shall be deemed not to have occurred, and the applicant may answer accordingly any questions relating to their occurrence.

ORS 137.225(4).

1. Application to DPSST Records of Orders Setting Aside Convictions and Sealing Records

Your first question asks in what circumstances an order issued under ORS 137.225 applies to records on file at DPSST. The language of ORS 137.225 is unclear as to whom a court's order "sealing the record of conviction and other official records in the case" applies. This is because the statute does not specify the parties to whom the court shall issue the order.

When a court orders a conviction set aside and records sealed, the power of contempt may be used to punish a violation of the order. *See* ORS 33.015(2)(b). To answer your question, therefore, we looked to how the law of contempt would apply to a state agency that either received a certified copy of the order from the clerk upon the direction of the court or otherwise acquired knowledge of the order. We considered whether a court could hold such an agency in contempt for failing to seal official records in the case that the agency has in its possession.

"Contempt of court," among other things, means "[willful] [d]isobedience of, resistance to or obstruction of the court's authority, process, orders or judgments." ORS 33.015(2)(b). According to one treatise, a nonparty to a judicial proceeding may be found in contempt for violating a court's order if "the nonparty ha[s] notice or knowledge of the court's order and either act[s] in concert with or * * * is in privity with a person to whom the court's order is directed." 7 ALR 4th 893, 897. Put somewhat differently, if a nonparty has either notice or actual knowledge of the court's order and either aids a party in violating the order or is "legally identified" with a party and acts to violate the order, the court may hold the nonparty in contempt.^{3/} *Id.*

Oregon case law indicates that Oregon courts adhere to this theory of a nonparty's obligation to abide by a court's order. *See State ex rel v. Lavery*, 31 Or 77, 49 P 852 (1897), and *State ex rel Kruckman v. Rogers*, 124 Or 656, 265 P 784 (1928) (business partners held in contempt for violating court order that enjoined one partner from taking action when the court concluded that the other partner took the enjoined action "by authority or at least with the full knowledge, consent and approval" of the partner enjoined by the order. *Id.* at 658. The court also concluded that the partner not enjoined by the order nonetheless had knowledge of that order).^{4/} In *Lavery*, the court considered whether it could hold in contempt the brother of a party to the underlying litigation as a result of the brother diverting creek waters that the court had enjoined his sibling from diverting. The court did not hold the brother in contempt because no proof had been given that he had either been served with a copy of the order or had actual knowledge of it. In reaching this conclusion, the court observed that "[w]hile there is some conflict of authority upon the question of the liability of a person for violating the process of a court, the weight and better reason seem to support the rule that a stranger to an injunction, who has notice or knowledge of its terms, is bound thereby, and may be punished for contempt for violating its provisions." *Lavery*, 31 Or at 85.^{5/} While the court in neither *Lavery* nor *Rogers* explicitly states that a nonparty to the litigation must have a legally identified relationship with a

party to be held in contempt for violating a court's order, the facts show that such a relationship existed in each case.

ORS 1.010 sets out the powers that each court of justice has in its administration of court business and proceedings. ORS 1.010(4) provides one such power as being "[t]o compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein."^{6/} The Oregon Supreme Court has opined that this provision "concern[s] the conduct of persons who are involved with judicial proceedings as parties, jurors, witnesses, or officers of the court." *State ex rel Roach v. Olsen*, 295 Or 107, 110, 663 P2d 767 (1983). In *Olsen*, the issue was whether the trial court could compel the Children's Services Division to give a criminal defendant access to a child witness in the division's custody. Defendant claimed that ORS 1.010(4) provided statutory authority to the trial court to compel access. The Supreme Court held that the statute did not provide the necessary authority; although the State of Oregon was a party to the criminal trial, the Children's Services Division was not. In an earlier opinion dealing with the same issue, the Supreme Court found that a court had no general authority to compel a nonparty to act. The Supreme Court highlighted the distinction between a court directing an order toward a particular state agency that is not a party to a proceeding versus directing the order toward the state itself: "When an order is simply addressed to the state as a party, represented by the prosecutor, it leaves to the state the relationships and arrangements among the various agencies or officials that may be involved in complying with the order." *State ex rel Roach v. Roth*, 293 Or 636, 641, 652 P2d 779 (1982). In other words, in *Roth* the court appears to imply that the state may be held to comply with an order issued against it, and that the state then has the responsibility to ensure compliance through its relevant agencies. Conversely, a court lacks the authority to issue an order directly to a state agency that is not a party to the case.

An agency of the State of Oregon, without question, has a legally identified relationship with the state. The state acts through its agencies and, in turn, through the agencies' officers and employees. ORS 131.025 requires that the State of Oregon be named as plaintiff in all criminal actions except for those based on violations of municipal or county ordinances. When the state is the plaintiff in a criminal case and an agency of the state such as DPSST either is sent a certified copy of an order issued under ORS 137.225 or acquires actual knowledge of the order, the agency is obligated to comply with the order.^{7/}

We do not interpret the language of ORS 137.225(4), requiring the clerk of the court to "forward a certified copy of the order to such agencies as directed by the court," to allow an agency with actual knowledge of a court's order to ignore it when the state is a party to the case merely because the agency does not receive a certified copy of the order. The purpose of ORS 137.225 is to confer "upon persons convicted of certain crimes the privilege to act, and answer, in the future as if their conviction had never occurred." *Bahr v. Statesman Journal Co.*, 51 Or App 177, 180, 624 P2d 664 (1981). The court in *Bahr* goes on to explain that "[t]he statute was enacted to enhance employment and other opportunities for such formerly convicted persons. It was intended to remove the stigma associated with the conviction of a crime and to give those individuals another chance, so to speak, unencumbered by that stigma." *Id.* To construe ORS 137.225(4) to limit the applicability of the order to those agencies that receive a copy of the order

pursuant to the court's direction is inconsistent with the statute's purpose as construed in *Bahr*. Interpreting ORS 137.225(4) as an effort by the legislature to help ensure that agencies most likely to maintain originals or copies of "official records in the case" receive notice of the court's order is more consistent with the purpose of the statute. Based on this analysis, we conclude that the legislature intended an order issued by a court under ORS 137.225 to apply to originals or copies of "official records in the case" held by an agency that has actual knowledge of the order, even if the clerk fails to forward a certified copy of the order to the agency.^{8/}

2. Effect of Orders Issued under ORS 137.225 on DPSST and Its Records

If the state is the plaintiff in the underlying criminal proceedings, and therefore named on the order issued by the court pursuant to ORS 137.225, and DPSST either is provided a certified copy of the order by the court clerk or otherwise acquires actual knowledge of the order, DPSST is obligated to comply with the order. In this section, we address DPSST's obligations with respect to sealing records.

ORS 137.225(3) provides that when a court sets aside a conviction the court will also issue an order "sealing the record of conviction and other official records in the case, including the records of arrest." In *State v. K.P.*, 324 Or 1, 8, 921 P2d 380 (1996), the court defined "other official records in the case," as follows:

"Other" means other than those enumerated. "Official" means created by a public, governmental body. "Records" means a report of something that occurred that is memorialized or kept track of, whether by print or electronic means. "In the case" means that the occurrences or events referred to and recorded are, in legal contemplation, related to the same aggregate set of operative facts as those that gave rise to the arrest record or conviction that is to be set aside, and which are also to be sealed.

DPSST is not obligated to seal any records other than those described above. *K.P.* left some questions, however, as to which records the court would consider to be "in the case." The court's definition of "other official records in the case" indicates that, even for records that are generated in the course of a particular criminal proceeding or "case," whether those records are records "in the case" depends on whether they address factual circumstances ("occurrences or events") that were integral to the person's commission of the crime. At the same time, the court's statement could be interpreted to mean that records generated for purposes unrelated to the criminal proceeding, but that address those same factual circumstances, may also be affected by an order to seal records in a particular case. The *K.P.* court stated that "[a] case-by-case, fact-specific inquiry must be undertaken where the issue arises that the records addressed are not records in the case." *Id.* at 11. We believe, however, that if presented directly with the question of whether records other than those generated in the course of a particular criminal proceeding have to be sealed the court would conclude that such records do not.^{9/} Based on this state's well-established and consistently-applied rules of statutory construction, the phrase "other official records in the case" does not readily appear to apply to records generated in the course of civil

proceedings such as those conducted by DPSST. We base this conclusion on the following statutory analysis.

In interpreting a statute, we first look at the text and context of the statute to determine the legislative intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). If the legislative intent is clear from the text and context, the search ends there. If the legislative intent is not clear from the text and context of the statute, we look to the legislative history to attempt to discern the legislative intent. *Id.* at 611-612. In construing the phrase “in the case” used in ORS 137.225(3), we look at the meaning of each term. First, we find it significant that the legislature chose the preposition “in” rather than a broader term such as “related to” or “resulting from.” Second, in *Osborn v. PSRB*, 325 Or 135 (1997), the court concluded, in another context, that the legislature’s use of the definite article “the” indicates that the legislature is referring to a particular item. Third, the term “case” is singular. The pertinent legal meaning of the word “case” is “an action, cause, suit or controversy, at law or in equity.” BLACK’S LAW DICTIONARY 195 (5th ed 1979). Taken as a whole, the language used by the legislature indicates that records generated for purposes other than the criminal proceeding resulting in the conviction that is later ordered set aside are not records “in the case.”

Applying the above interpretation, we conclude that “other official records in the case” ordinarily will include all records that were generated by law enforcement or the court in the course of the criminal investigation and judicial proceeding arising out of a particular criminal episode. Such records typically would include police reports, an indictment or other accusatory instrument, trial transcripts, a plea agreement or jury verdict, a judgment of conviction, pre-sentence investigation reports, a sentencing order, and a sheriff’s statement of imprisonment. DPSST must seal all such records in response to an order applicable to the agency.^{10/} The order would apply to copies of such records, as well as to originals, that are in DPSST’s possession.

Our description of records included under the rubric of “other official records in the case” does not include records created by DPSST in carrying out its certification function. For example, DPSST is authorized to deny or revoke a person’s certification as a public safety officer if that person falsifies any information submitted on an application for certification or on any documents submitted to the Board on Public Safety Standards and Training (BPSST) or DPSST.¹¹ ORS 181.662(1)(a), (2)(a). DPSST is also authorized to deny or revoke a person’s certification if a person has been convicted of a crime described in ORS 181.662 or OAR 259-008-0070. In exercising this authority, we anticipate that DPSST creates its own records documenting that DPSST denied or revoked a person’s certification because that person falsified information about a prior conviction or because that person was convicted of a crime. Based on the above analysis, we conclude that such records created by DPSST are not “official records in the case.” Rather, those records are related to DPSST’s decision whether to deny or revoke a person’s certification. Therefore, even if DPSST is subject to an order under ORS 137.225(3) sealing records, we do not believe that the order would require DPSST to seal records that merely reflect a sealed conviction or arrest.

As a general matter, DPSST will not have to seal records obtained from outside sources that merely reflect a set aside conviction or arrest, such as newspaper articles and administrative

records from other agencies, in response to a court's order under ORS 137.225(3). But there may be circumstances in which DPSST may need to assess in a case-by-case fact-specific inquiry whether records that originated outside of DPSST are "official records in the case" to which a court's order under ORS 137.225(3) would be applicable. For example, it is our understanding that DPSST sometimes receives copies of internal affairs investigatory reports from law enforcement agencies that contain information relevant to DPSST's certification responsibilities. In one situation, a law enforcement officer may have been the subject of an internal affairs investigation that was parallel to, but completely independent from, a criminal investigation. In this case, we would not consider the internal affairs records as "other official records in the case" required to be sealed. If, however, an internal affairs investigation led to a criminal inquiry, arrest and conviction, so that some or all of the internal affairs records became part of the criminal investigatory file, DPSST would need to examine the facts of the situation before it could determine whether it must seal internal affairs records in its possession. We would be available to provide advice to assist DPSST in this task.

3. Limitations on DPSST's Use of Information Regarding a Set Aside Conviction and Underlying Criminal Conduct

The text of ORS 137.225 suggests that the legislature did not intend an individual's conviction to be used as a basis for legal action after a court has set aside that conviction. ORS 137.225(3) states that once a conviction has been set aside "the applicant for purposes of the law shall be deemed not to have been previously convicted." If the law no longer recognizes that a conviction occurred, it is difficult to argue on the basis of the text of the statute that DPSST, if it has knowledge of the set aside order, may base its denial of certification on the existence of that "conviction." A court, however, looks not only at the text but also at the context of a statute when determining the legislature's intent. *PGE*, 317 Or at 610. The Oregon Supreme Court has declared that the "context" of a statute includes case law interpreting that statute. *Gaston v. Parsons*, 318 Or 247, 252, 864 P2d 1319 (1994).

With regard to ORS 137.225, the Oregon Supreme Court has advised that "[a]n order [to set aside a conviction and seal records] is not designed to 'rewrite history' and deny the occurrence of an event but to limit the purposes for which official records may be used to exhume that past event."^{12/} *State v. Langan*, 301 Or 1, 4 n 3, 718 P2d 719 (1986). Before *Langan*, the Oregon Court of Appeals opined regarding the limited effect of ORS 137.225 in this way: "The statute does not * * * impose any duty on members of the public who are aware of the conviction to pretend that it does not exist. In other words, the statute authorizes certain persons to misrepresent their own past. It does not make that representation true." *Bahr*, 51 Or App at 180.

DPSST may not refer to or use sealed records in making certification decisions, or for any other purpose. Within the context of this prohibition we previously advised that "if * * * the applicant voluntarily discloses to the BPST the existence of the prior conviction, or if the BPST independently obtains knowledge of that [set aside] conviction, the BPST could use that information in deciding on certification to the same extent that it may use any other conviction." Letter of Advice dated March 17, 1988, to John F. Hoppe, Standards and Certification

Coordinator, Board on Police Standards and Training at 3 (OP-6209). Recognizing that an appellate court has yet to directly address the issue of a state agency's use of information regarding a set aside conviction,^{13/} we confirm our conclusion stated in OP 6209. In light of the judicial construction of ORS 137.225 provided in *Langan* and *Bahr*, we draw the following conclusions as to how DPSST may use information about a set aside conviction in deciding whether to deny or revoke certification.^{14/}

First, we conclude that DPSST may use information about a set aside conviction that it obtains independent of sealed records, including information that DPSST receives from the individual whose certification is at issue.^{15/} *Langan* and *Bahr* support an interpretation of ORS 137.225(3) that permits convicted or arrested individuals whose convictions or arrests have been set aside to lie about their past. Both *Langan* and *Bahr* distinguish between this right and the rights of the public. *Langan* posits that the setting aside of a conviction or arrest is not meant to change history. *Id.* at 4. *Bahr* says that although an individual may lie about the occurrence of a set aside arrest or conviction, the public, upon learning of that conviction or arrest from elsewhere than a sealed record, does not have to "pretend that it does not exist." *Id.* at 180. While *Bahr* examined the use of information regarding a set aside conviction by a newspaper, rather than the actions of a state agency, the opinion gives no indication that the court intended for its conclusions regarding the legality of "the public's" actions under ORS 137.225(3) to be inapplicable to the state. Therefore, we consider the statements in *Bahr* as to the rights of the public to apply to state agencies.

Second, we conclude that, under ORS 181.662(1)(a) or (2)(a), DPSST may deny or revoke certification due to an individual falsifying information regarding a prior conviction in application materials submitted to DPSST or BPSST. DPSST requires an applicant to state whether he or she has been convicted of a crime. If a set aside order has not been issued, DPSST may deny or revoke certification on the ground of falsifying information if a previously convicted individual states in the application materials that the individual has not been convicted of a crime. If a set aside order has been issued, the effective date of the order will determine whether the applicant may be found to have falsified information submitted to DPSST on this subject. If an applicant completes application materials after a conviction has been set aside by the court, the individual may deny being convicted, and DPSST may not take action to deny or revoke certification due to the falsifying of information. On the other hand, if the applicant has sought to have his conviction set aside under ORS 137.225 but a court has not issued an order to do so by the date the application materials are submitted to DPSST, the agency may deny or revoke certification if the application materials state that the applicant had not been convicted of a crime.

In addition to confirming the conclusion stated in OP 6209 regarding information about set aside convictions, we also conclude that DPSST may use information regarding criminal conduct underlying a set aside conviction, so long as DPSST acquires the information from elsewhere than a sealed record. This conclusion is based on the holding in *Leong's, Inc. v. Oregon State Lottery Commission*, 142 Or App 460, 467, 921 P2d 988 (1996). The appellant in that case, whose application for a video lottery contract was denied by the Lottery, had attached to the application information describing Mr. Leong's actions underlying a set aside conviction

for promoting gambling. *Id.* at 462-63. The court held that the Lottery did not violate ORS 137.225 by denying the application on the basis of this information.^{16/}

Under DPSST's rules, one way the agency may use information about conduct underlying a set aside conviction is in determining whether a person meets the minimum standards of moral fitness required for certification as a law enforcement officer. DPSST's enabling legislation requires the BPSST to "establish by rule reasonable minimum standards of * * * moral fitness for police officers, certified reserve officers, corrections officers, youth correction officers, parole and probation officers and fire service professionals." ORS 181.640(1)(a). Under DPSST administrative rule OAR 259-008-0010, an individual is not eligible for basic certification as a law enforcement officer if the individual cannot meet minimum employment standards.^{17/} Under section 5 of this rule, "[a]ll law enforcement officers must be of good moral fitness as determined by a thorough background investigation." If DPSST has information acquired from elsewhere than a sealed record, e.g., from an applicant's explanation of events, that provides reliable evidence regarding criminal conduct for which an applicant applying for certification as a law enforcement officer was convicted, DPSST may consider the information about the underlying conduct in assessing the applicant's moral fitness under the criteria contained in OAR 259-008-0010(5).^{18/}

4. Sealed Records and Oregon's Public Records Law

Under Oregon's Public Records Law, ORS 192.410 to 192.505, "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420. You ask whether records related to an individual's certification status are subject to disclosure under the Oregon Public Records Law if those records include or refer to a conviction that was subsequently sealed. ORS 192.410(4) defines a "public record" as including: "any writing containing information relating to the conduct of the public's business * * * prepared, owned, used or retained by a public body regardless of physical form or characteristics." Records related to an individual's certification status are writings relating to the conduct of the public's business. Any such records prepared, owned, used or retained by DPSST are within the definition of "public record." To respond to your question, we first determine on what statutory basis a sealed record is exempt from disclosure and next determine whether a record that refers to a sealed record is also exempt on that basis.

The Public Records Law exempts from disclosure public records that are less than 75 years old that have been "sealed in compliance with statute or by court order." ORS 192.496(2). In addition, ORS 192.502(9) exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." The disclosure of a record sealed under ORS 137.225, by definition, is prohibited by law.^{19/} A record sealed under ORS 137.225, therefore, is exempt from disclosure under the Public Records Law and may only be disclosed pursuant to a subsequent court order issued for reasons specified in ORS 137.225(9) or (10).

A public record, however, is not necessarily exempt from disclosure under ORS 192.496(2) or 192.502(9) merely because it *refers to* a sealed record. ORS 137.225(3) requires that the court's order seal "the record of conviction and other official records in the case." ORS 137.225(3). As discussed above, an order issued pursuant to ORS 137.225 does not affect those records that, although referring to a record of conviction that was sealed, are not "official records in the case." Therefore, if DPSST has, for example, records of its administrative proceedings or newspaper articles that reflect a person's conviction or arrest, these records are not exempt from disclosure under ORS 192.496(2) or 192.502(9) as sealed records.^{20/}

5. Disclosure of Reason for Revocation of Certification

Finally, you ask whether DPSST may disclose its reason for revoking an individual's certification to persons who request that information, if the reason for the revocation was based on a conviction that was subsequently set aside, with the record of conviction being sealed. As discussed above, public records, including records that set forth DPSST's decision to revoke an individual's certification and the reasons supporting that decision, are not exempt from disclosure under ORS 192.496(2) or 192.502(9) merely because they refer to a sealed conviction, but only if they are "official records in the case" under ORS 137.225(3). As a general matter, therefore, DPSST may disclose that it revoked an individual's certification because of the individual's conviction so long as the records actually used by DPSST staff in responding to the request are not sealed records. Before responding to a request, however, DPSST should determine that the disclosure of information is not prohibited due to other considerations. For example, if DPSST's information regarding the conviction was obtained from Oregon State Police (OSP) criminal history databases, before disclosing the reasons for revoking a certification DPSST should determine whether disclosure is prohibited by its agreement with OSP granting DPSST access to the databases, or the statutes and rules pertaining to agency use of those databases.

DPSST is under no legal obligation to disclose its reason for revoking a certification if DPSST has no unsealed records disclosing such reason. In other words, DPSST "[is] not required to create a record to disclose the 'reasoning' behind [its] actions, or other 'knowledge' [its] staff might have." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL at 5 (1999 ed). In such a situation, while there is no specific legal prohibition against a DPSST staff member responding to a public query from his or her own personal knowledge of the revocation,

we recommend that agency officers and employees refrain from such action in light of the fact that the vagaries of one's memory may not serve the agency well.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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^{1/} While you inquire about DPSST's obligations to comply with an "expungement" order, such orders, issued pursuant to ORS 419A.262, only apply to records of juvenile court delinquency proceedings. The order that you sent as an attachment to your request for advice was imposed under ORS 137.225, which provides for the setting aside of convictions and arrests and the sealing of records with respect to adult offenders. "The word 'expungement' is a misnomer and should not be used for an order under ORS 137.225(1)(a). That statute does not call for expunging anything from the record of conviction but for sealing the record." *State v. Langan*, 301 Or 1, 4 n 3, 718 P2d 719 (1986). We restated your questions to address the effect on DPSST of an order issued under ORS 137.225.

^{2/} ORS 137.225(1)(a) requires the individual seeking the set aside to "apply to the court wherein that conviction was entered."

^{3/} See, e.g., *Brightbill v. Rigo, Inc.* 418 A2d 424, 430-13 (Pa. Super., 1980), *Hickinbotham v. Williams*, 305 SW2d 841, 843 (1957) and *Walker v. City of Birmingham*, 181 So2d 493 (1965).

^{4/} See also *Renninger v. Renninger*, 82 Or App 706, 712-13, 730 P2d 37 (1986) (Husband in divorce case held in criminal contempt for violating court order through actions of another.)

^{5/} The order at issue in *Lavery* enjoined the "defendant Daniel Lavery, his agents, attorneys, and employees, and all persons acting under, by, or through him." *Lavery*, 31 Or at 85. The court's conclusion as to who may be held in contempt for violating its order, however, does not appear to require such inclusive language in the underlying order to hold a "stranger" to that order in contempt. The copy of the order attached to DPSST's request for advice, in fact, fails to specify the persons who must comply with the order. It would appear to be disingenuous to argue that as a result of this omission no one is required to consider the applicant's conviction as set aside and to seal the original and copies of the official records in the case.

^{6/} The act of contempt defined in ORS 33.015(2)(b), and sanctions for contempt in ORS 33.045, appear to serve as a means by which to punish those who willfully disregard the court's power stated in ORS 1.010(4).

^{7/} If the State of Oregon is not a party to the underlying criminal proceeding, and therefore not named on the order issued by a court under ORS 137.225, DPSST would not be obligated to seal records in its possession even if DPSST received a copy of the order from the court or acquired actual knowledge thereof.

^{8/} The language in ORS 137.225(4) requiring the clerk of the court to send certified copies of an order to agencies as directed by the court was added by Oregon Laws 1973, ch 836, § 265. The amendment was part of the comprehensive revision of the Oregon Criminal Procedure Code proposed by the Criminal Law Revision Commission. The commission's commentary to the proposed amendments to ORS 137.225(4) provides no insight as to whether the commission intended the amendment to narrow the applicability of the order to only those agencies directed to receive a certified copy by the court. Oregon Criminal Procedure Code, Final Draft and Report, November 1972, by the Criminal Law Revision Commission, § 429 at pp. 227-28.

^{9/} The **K.P.** court was required to decide whether police investigatory reports that led to a person's arrest and conviction were records "in the case" and therefore required to be sealed when a court set aside the resulting conviction. In holding that the reports were "in the case," the court did not have to decide whether official records created for purposes unrelated to the criminal proceeding but containing information regarding the set aside conviction or underlying criminal conduct had to be sealed.

^{10/} If the records required to be sealed are in paper or other physical form, DPSST should segregate them from other records and place them in sealable containers (such as envelopes or boxes) marked with appropriate notice of their status. If the records are in electronic form, access should be blocked electronically. If that is technically infeasible, electronic records should be reduced to physical form and placed in sealed containers as with other physical records, and the electronic version should be deleted.

^{11/} The definition of "public safety officer" includes corrections officers, youth correction officers, emergency medical dispatchers, parole and probation officers, police officers, certified reserve officers, telecommunicators and fire service professionals. ORS 181.610(16). Although youth correction officers and fire service professionals are included within the definition of "public service officer," DPSST's authority with regard to these two groups of persons under the statutes cited in the opinion is not always co-existent with its authority in relation to other persons considered to be public service officers. *See, e.g.,* ORS 181.662.

^{12/} The purposes for which official records that have been sealed under ORS 137.225 may be used to exhume past events are set forth in ORS 137.225(9) (civil actions in which truth is an element of the claim or defense) and ORS 137.225 (10) (upon motion of any prosecutor or defendant in a case involving records sealed under ORS 137.225).

^{13/} **Bahr** held that a defamation defendant who said that the plaintiff was convicted of a crime has a "truth" defense despite the setting aside of the plaintiff's conviction. The language quoted from **Langan** in the preceding paragraph in the text is "obiter dictum," i.e., unnecessary for the decision of the case. Neither case held that a state agency may consider information about a set aside conviction obtained independently of sealed records.

^{14/} Whether DPSST may consider an out-of-state conviction that has been set aside as a basis for denying or revoking certification depends on the facts of the case. In **Delehant v. BPST**, 317 Or 273, 855 P2d 1088 (1993), the Oregon Supreme Court determined that the BPST could consider an applicant's Idaho conviction in denying certification despite the fact that the applicant had obtained an order in Idaho "expunging" that conviction. The court determined that the individual would not have qualified for an order under ORS 137.225 had the convictions occurred in Oregon. 317 Or at 281. Consequently, the applicant had no basis for asserting that he had not been "convicted of a crime" in any other jurisdiction. *Id. Delehant* thus suggests that DPSST is required to give effect to an out-of-state order setting aside a conviction only if the order would be authorized under Oregon law. Because this analysis requires

interpretation of the laws of this and other states, we recommend that you seek the assistance of this office if DPPST receives an order issued by an out-of-state court.

^{15/} If DPSST denies certification and the applicant requests a hearing, DPSST may need to produce witnesses who can verify the agency's allegations regarding the set aside conviction. The same is true if DPSST denies or revokes certification based on information about the applicant's criminal conduct underlying the set aside conviction. *See* following paragraph in text.

^{16/} The attachments to the video lottery application describing Mr. Leong's conduct were a narrative statement (not a sealed record) and the transcript from Mr. Leong's criminal trial (a sealed record). Although the court stated that the Lottery "did not surreptitiously obtain information concerning the prior gambling-related conduct from sealed official records," the court's holding did not determine if the Lottery had based its denial on the narrative statement or the trial transcript. *Leong's Inc.*, 142 Or App at 467. Therefore, *Leong's Inc.* does not support an agency's use of information from a sealed record when the agency receives that record from a person not subject to a court order issued under ORS 137.225. Because a state agency's use of information taken from sealed records appears to contradict the legislature's intent in enacting ORS 137.225, in the absence of an appellate court holding to the contrary we conclude that an agency may not use information from sealed records even if those records are supplied to the agency by an applicant or another person not subject to the court's order.

^{17/} OAR 259-008-0005(19) defines "law enforcement officers" to mean "all police, corrections, and parole and probation officers who are included in the Public Safety Standards and Training Act."

^{18/} Because ORS 181.640(1)(e) only permits DPSST to revoke an individual's certification "in the manner provided in ORS 181.661 to 181.664," we believe that DPPST may not use an individual's failure to conform to the moral fitness criteria in OAR 259-008-0010(5) to revoke that person's certification.

^{19/} To define "sealing of records," BLACK'S LAW DICTIONARY states that "[s]tatutes in some states permit a person's criminal record to be sealed and thereafter such records cannot be examined except by order of the court or by designated officials." BLACK'S LAW DICTIONARY at 1211 (5th ed 1979).

^{20/} It is possible, of course, that such records could be exempt under a separate provision of the Public Records Law.