OPINION NO. 83-100

Syllabus:

1. The Ohio State Board of Psychology does not have the authority to "expunge," or actually destroy, its official records, except as provided by law or pursuant to a schedule or application approved by the State Records Commission.

2. When a court orders that the criminal conviction of an individual who is a licensee of the Ohio State Board of Psychology be sealed, pursuant to R.C. 2953.32(C), the Ohio State Board of Psychology is not required to seal any of its official records because of the order, unless specifically directed to do so by the court.

3. To the extent that records maintained by the Ohio State Board of Psychology contain information or other data the release of which is prohibited by R.C. 2953.35(A), such records are not "public records" within the meaning of R.C. 149.43(A)(1). The Board may, therefore, seal such information or data or otherwise segregate it from its public records in order to comply with R.C. 2953.35(A).

To: Sally M. Hotchkiss, Ph.D., President, Ohio State Board of Psychology, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, December 21, 1983

I have before me your request for my opinion on a series of questions dealing with the Ohio State Board of Psychology's ability to "expunge" its official records. Specifically, you have posed three questions, which may be paraphrased as follows:

1. Does the State Board of Psychology have the authority to expunge its own public records, including information pertaining to disciplinary action taken by the Board against one of its licensees?

2. If such authority exists, what procedures govern the expungement of records by the Board?

3. Does a court's expungement of its records in a particular case influence the status of public records of the State Board of Psychology that relate to the court's action?

Your inquiry is premised upon R.C. 2953.31 through R.C. 2953.36, and specifically R.C. 2953.32. The term "expungement" is commonly used with respect to such sections, although it is in fact a misnomer. R.C. 2953.31 through 2953.36 specifically refer to the "sealing" of records, and can be distinguished from R.C. 2953.41 through 2953.43, which explicitly use the term "expungement" in regard to the record of "any person who has been arrested for any misdemeanor offense and has effected an agreed bail forfeiture." See R.C. 2953.42(A). In such instances, the statute provides for the actual destruction of certain records. See R.C. 2953.42(B). With respect to R.C. 2953.31 through 2953.36, the sections upon which your inquiry is based, there is no provision for the literal destruction of any

records. Instead, certain records are to be sealed under certain circumstances.[1] Accordingly, I interpret your questions, for the purpose of this opinion, as relating to the general issue of whether the State Board of Psychology is required to seal certain records under a given set of circumstances.

From information obtained from members of your staff, I understand that your inquiry is based on the following factual situation. A psychologist who was licensed by the State Board of Psychology, pursuant to R.C. Chapter 4732, was convicted of a misdemeanor offense. Specifically, the psychologist was convicted of one count of falsification, a violation of R.C. 2921.13. After his conviction, the Secretary of the Board filed written charges against the psychologist, proposing that the Board take professional action against the psychologist pursuant to R.C. 4732.17(A), which permits such action when a licensee of the Board has been convicted of "a felony, or any offense involving moral turpitude, in a court of this. . .state." (Emphasis added.)[2] Pursuant to R.C. Chapter 119 and R.C. 4732.17, a hearing was held on these charges. The matter was eventually resolved when the Board ordered that the psychologist be reprimanded and that his license be suspended for a fixed period of time, which has now expired.

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1 In Pepper Pike v. Doe, 66 Ohio St. 2d 374, 421 N.E.2d 1303 (1981), the Ohio Supreme Court stated that R.C. 2953.32 authorizes the "expungement and sealing" of records. 66 Ohio St. 2d at 376; 421 N.E.2d at 1305. Nevertheless, the Court added that "it is clear from the statute that expungement does not literally obliterate the criminal record." 66 Ohio St. 2d at 378, 421 N.E.2d at 1306. See also State v. Thomas, 64 Ohio App. 2d 141, 411 N.E.2d 845 (Cuyahoga County 1979) (if, subsequent to the granting of the "expungement," there is brought to the court's attention evidence demonstrating that appellant was not a "first offender" at the time of application, then the "expungement" is void and must be vacated).

2 R.C. 2921.13 states in its entirety:

> (A) No person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when any of the following apply:
> (1) The statement is made in any official proceeding.
> (2) The statement is made with purpose to incriminate another.
> (3) The statement is made with purpose to mislead a public official in performing his official function.
> (4) The statement is made with purpose to secure the payment of workers' compensation, unemployment compensation, aid for the aged, aid for the blind, aid for the permanently and totally disabled, aid to dependent children, general relief, retirement benefits, or other benefits administered by a governmental agency or paid out of a public treasury.
> (5) The statement is made with purpose to secure the issuance by a governmental agency of a license, permit, authorization, certificate, registration, or release.
> (6) The statement is sworn or affirmed before a notary public or other person empowered to administer oaths.
> (7) The statement is in writing on or in connection with a report or return which is required or authorized by law.
> (8) The statement is in writing, and is made with purpose to induce another to extend credit to or employ the offender, or to confer any degree, diploma, certificate of attainment, award of excellence, or honor on the offender, or to extend to or bestow upon the offender any other valuable benefit or distinction, when the person to whom such statement is directed relies upon it to his detriment.
> (B) It is no defense to a charge under division (A)(4) of this section that the oath or affirmation was administered or taken in an irregular manner.

Subsequent to the Board's action, the licensee had the record of his conviction sealed by the Court of Common Pleas, pursuant to R.C. 2953.32. He has now asked the Board to seal its records that were received and created on the basis of his criminal conviction.

An analysis to determine whether the Board has any authority to seal its own records must begin with a review of the procedure set forth in R.C. 2953.32. Division (A) of R.C. 2953.32 states:

> A first offender may apply to the sentencing court if convicted in the state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the record of his conviction, at the expiration of three years after his final discharge if convicted of a felony, or at the expiration of one year after his final discharge if convicted of a misdemeanor. (Emphasis added.)

R.C. 2953.32(B) mandates that upon application, the court shall schedule a hearing and give notice thereof to the prosecuting attorney. The appropriate probation officer or agency shall also be directed to investigate and report to the court concerning the applicant. R.C. 2953.32(C) states in pertinent part:

> If the court finds that the applicant is a first offender, that there is no criminal proceeding against him, that his rehabilitation has been attained to the satisfaction of the court, and that the sealing of the record of his conviction is consistent with the public interest, the court shall order all official records pertaining to the case sealed. . . . (Emphasis added.)

> (C) Where contradictory statements relating to the same fact are made by the offender within the period of the statute of limitations for falsification, it is not necessary for the prosecution to prove which statement was false, but only that one or the other was false.
>
> (D) Whoever violates this section is guilty of falsification, a misdemeanor of the first degree.

It does not appear to be an unreasonable conclusion that a violation of R.C. 2921.13 constitutes an "offense involving moral turpitude" within the meaning of R.C. 4732.17(A). It has been held that one who has performed acts with the intent to defraud the government has committed acts of moral turpitude. United States v. Reimer, 30 F.Supp. 767 (S.D.N.Y. 1939), aff'd, 113 F.2d 429 (1939). Moreover, in Winestock v. Immigration & Naturalization Service, 576 F.2d 234 (9th Cir. 1978), it was stated that "a crime having as an element the intent to defraud is clearly a crime involving moral turpitude." 576 F.2d at 235.

There are no specific references in R.C. 2953.31 though 2953.36 to licensing agencies or other administrative bodies.[3] Nevertheless, it should be noted that since R.C. 2953.32(C) empowers the court to order the sealing of "all official records pertaining to the case," a court may, by virtue of this language, have the authority to determine in a particular case that the official records of an administrative body are so interconnected with those of a related criminal case that such administrative records are in fact "official records pertaining to the case." Upon such finding, a court could order that pertinent records of an administrative agency such as the Board also be sealed.[4]

Also of concern is R.C. 2953.35(A), which states that with certain exceptions which are not relevant here, "any officer or employee of the state" who releases information concerning a matter the records with respect to which he had knowledge were sealed pursuant to R.C. 2953.31 to 2953.36 may be guilty of divulging confidential information, a misdemeanor of the fourth degree. R.C. 2953.35(A) does not, however, specifically direct the Board of Psychology or similarly situated agencies to seal or destroy any records.

The Board's own governing statutes, contained in R.C. Chapter 4732, would seem to suggest that records of the Board that are collected and created pursuant to hearings that are based upon criminal convictions of licensees or licensure applicants, are intended to remain in the public domain. R.C. 4732.07 states in part that the Board "shall keep a record of its proceedings." Your staff has advised me that the Board keeps a record of its proceedings in the form of official minutes of Board meetings. Pursuant to R.C. 4732.06, the Board must meet at least twice annually, although I am advised that in actual practice it meets more frequently. The minutes of the Board contain all official actions of the Board, including orders of the Board disciplining its licensees.

R.C. 4732.17 also requires that adjudication hearings conducted by the Board comply with R.C. Chapter 119, the Administrative Procedure Act. Under R.C. 119.07, the agency proposing to conduct the hearing must provide the subject thereof with notice of his right to such hearing and his ability to appear at such a hearing, with counsel or other appropriate representative, to present his position, arguments, or contentions in writing, and notice that at the hearing he may present evidence and examine witnesses. Under R.C. 119.09, a stenographic record of the testimony and other evidence submitted at the hearing shall be taken at the expense of the agency. R.C. 119.12 provides a judicial review process from

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[3] As an aside, it is of interest that R.C. 2953.33(B) indicates that in any application for a license, an applicant may not be questioned with respect to sealed convictions, "unless the question bears a direct and substantial relationship to the position for which the person is being considered." (Emphasis added.) This provision would seem to indicate that the State Board of Psychology would have the right to inquire into already sealed convictions of persons applying for licensure. R.C. 4732.10 indicates that the Board's Entrance Examiner shall determine that applicants for licensure are of good moral character. Under R.C. 4732.17(A), the Board may refuse to issue a license to a person who has been convicted of a felony or an offense involving moral turpitude. It, therefore, appears that the Board of Psychology may inquire of an applicant for licensure with respect to a sealed criminal conviction since such queries bear a direct and substantial relationship to the applicant's qualifications to practice psychology. The Supreme Court of Ohio has indicated that an applicant for admission to the bar may be questioned regarding a prior sealed felony conviction because of its "direct and substantial relationship" to the applicant's qualifications. In re Application of Davis, 61 Ohio St. 2d 371, 372, 403 N.E.2d 189, 190, note (1980).

[4] Since this issue is only indirectly related to your particular concerns, I have not considered, and accordingly offer no opinion as to, the type of evidence or information or the procedures a court may properly employ in order to make the requisite factual determination and to issue an order requiring a state administrative agency to seal its records.

adjudication orders and requires the agency to certify a complete record of its proceedings to the reviewing court. All of these administrative provisions indicate the public nature of the agency's proceedings. There is nothing in R.C. Chapter 119 to allow for a private or closed hearing; R.C. 119.01(E) specifically defines "hearing" as a public hearing by any agency in compliance with the procedural safeguards afforded by R.C. Chapter 119. Nor are there any provisions in R.C. Chapter 119 allowing any agency such as the Board to seal or close its records pertaining to the hearing once the hearing is concluded and all appeals are exhausted.

I therefore conclude that R.C. Chapters 119 and 4732 do not authorize the Ohio State Board of Psychology to seal its records relating to disciplinary action against a licensee or applicant for licensure.

The final set of statutes related to the question of whether the State Board of Psychology may seal its records are those contained in Ohio's Public Records Act (R.C. 149.31-.44) and Privacy Act (R.C. Chapter 1347). My predecessor, in 1983 Op. Att'y Gen. No. 83-003, concluded that materials of all varieties which are received by public officials and employees, or created and maintained by them at public expense, are considered records as defined in R.C. 149.40 if they serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the public office.

When the State Board of Psychology conducts an adjudication hearing based upon a person's criminal conviction under R.C. 4732.17(A) and R.C. Chapter 119, it typically creates and maintains, inter alia, the following materials: a notice of opportunity for hearing prepared pursuant to R.C. 119.07; a transcript of testimony and evidence, prepared pursuant to R.C. 119.09; a report and recommendation of a hearing examiner, if one is appointed to hear the case pursuant to R.C. 119.09 or R.C. 4732.06; objections filed to said report and recommendation, pursuant to R.C. 119.09; minutes of the full Board's deliberations; and the Board's final order, issued and journalized pursuant to R.C. 119.09. Invariably the evidence adduced before the Board will include certified copies of pertinent entries in the criminal case, including a copy of the entry of conviction itself. This usually constitutes the complete record of proceedings which is certified to the court of common pleas if the Board's order is appealed pursuant to R.C. 119.12.

As my predecessor noted in Op. No. 83-003, whether a particular item comes within the definition of "record" contained in R.C. 149.40 can be finally determined only on a case-by-case basis. I am, however, willing to conclude as a general rule that the items described in the preceding paragraph serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the Board of Psychology, and constitute records under R.C. 149.40.

The next matter to be considered in this analysis is whether these records are required to be open to public inspection as public records under R.C. 149.43. As my predecessor noted in Op. No. 83-003, materials which are classified as records under R.C. 149.40 are subject to R.C. 149.43, and, if they fall within the definition of "public record," are available for public inspection as provided therein. This conclusion is not limited by the provisions of R.C. Chapter 1347. See R.C. 149.43(C).

R.C. 149.43 states in part:

> (A) As used in this section:
> (1) "Public record" means any record that is required to be kept by any governmental unit, including, not not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.
> . . . .
> (B) All public records shall be promptly prepared and made available to any member of the genral public at all reasonable times

> for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, governmental units shall maintain public records in such a manner that they can be made available for inspection in accordance with this division. (Emphasis added.)

The "required to be kept" language of R.C. 149.43 has been interpreted by the Ohio Supreme Court in Dayton Newspapers, Inc. v. City of Dayton, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976) [also known as Dayton Daily News] (syllabus): "A record is required to be kept by a governmental unit, within the meaning of R.C. 149.43, where the unit's keeping of such record is necessary to the unit's excecution of its duties and responsibilities." This interpretation was applied by my predecessor in Op. No. 83-003, as well as in 1981 Op. Att'y Gen. No. 81-043, 1981 Op. Att'y Gen. No. 81-038, 1981 Op. Att'y Gen. No. 81-014, 1981 Op. Att'y Gen. No. 81-006, and 1980 Op. Att'y Gen. No. 80-103, and I see no reason to modify it at this time. I therefore conclude, in accordance with the pronouncements of the Ohio Supreme Court and of my predecessor, that a record is "required to be kept" for purposes of R.C. 149.43 if the maintenance of such record by a public office is necessary to the execution of the duties and responsibilities of that office.

As was noted in Op. No. 83-003, the determination of whether a "record" under R.C. 149.40 is also a public record available for inspection under R.C. 149.43 cannot be answered in the abstract, and is instead dependent upon a case-by-case analysis. Even if we were to assume that the records received, created, or maintained by the Board which I have discussed are "required to be kept" by the Board, such records are not open to public inspection if they fit within any of the exceptions set forth in R.C. 149.43, to-wit: medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law. It is this final category which is of major concern in cases relating to disciplinary actions based upon criminal convictions. R.C. 2953.35(A) referred to above, states in its entirety as follows:

> Except as authorized by divisions (D), (E), and (F) of section 2953.32 of the Revised Code, any officer or employee of the state, or a political subdivision of the state, who releases or otherwise disseminates or makes available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any department, agency, or other instrumentality of the state, any information or other data concerning any arrest, indictment, trial, hearing, conviction, or correctional supervision the records with respect to which he had knowledge of were sealed by an existing order issued pursuant to sections 2953.31 to 2953.36 of the Revised Code, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

This statute is pertinent to your inquiry because it prohibits, inter alia, the release, by a state officer or employee for a purpose involving licensing in connection with a profession, of information or other data concerning any arrest, indictment, trial, hearing, conviction, or correctional supervision the records with respect to which such state officer or employee has knowledge were sealed by an order issued pursuant to R.C. 2953.31 to R.C. 2953.36. The only recognized exceptions to the imposition of criminal liability are contained in R.C. 2953.32(D) (inspection permissible by any law enforcement officer or any prosecuting attorney, city director of law, village solicitor, or similar prosecuting attorney, or their assistants, to determine whether the nature and character of the offense with which a person is to be charged would be affected by virtue of the person's having previously been convicted of a crime; inspection permissible upon application by the person who is the subject of the records, by the persons named in his application); R.C. 2953.32(E) (proof of any otherwise admissible prior conviction may be introduced and proved in any criminal proceeding); and R.C. 2953.32(F) (the person or governmental agency, office, or department that maintains sealed records pertaining to sealed convictions may maintain a manual or computerized

index to the sealed records). If these exceptions do not apply in a given case, the release of any information or other data described in R.C. 2953.32(A) by a Board officer or employee is prohibited by state law.

On the basis of the foregoing, if the Board's records contain "information or other data" as described in R.C. 2953.35(A), the records containing such information or other data are records the release of which is prohibited by state law, and, therefore, are not "public records" open to public inspection within the meaning of R.C. 149.43. Because of the prohibition of R.C. 2953.35(A), it may be necessary for the Board to seal or segregate such records as a matter of internal security. It would appear, in the absence of a court order issued under R.C. 2953.32(C) which specifically orders the sealing of the Board's records, that the manner of sealing or segregating the records is a matter for the Board's discretion. The Board may not, however, remove, destroy, or dispose of the records except as provided by law or pursuant to a schedule or application approved by the State Records Commission. See R.C. 149.351; 1983 Op. No. 83-003. I am not aware, however, of any provision of law authorizing such actual destruction or expungement.

In conclusion, it is my opinion, and you are hereby advised, that:

1. The Ohio State Board of Psychology does not have the authority to "expunge," or actually destroy, its official records, except as provided by law or pursuant to a schedule or application approved by the State Records Commission.

2. When a court orders that the criminal conviction of an individual who is a licensee of the Ohio State Board of Psychology be sealed, pursuant to R.C. 2953.32(C), the Ohio State Board of Psychology is not required to seal any of its official records because of the order, unless specifically directed to do so by the court.

3. To the extent that records maintained by the Ohio State Board of Psychology contain information or other data the release of which is prohibited by R.C. 2953.35(A), such records are not "public records" within the meaning of R.C. 149.43(A)(1). The Board may, therefore, seal such information or data or otherwise segregate it from its public records in order to comply with R.C. 2953.35(A).