

CRIMINAL PROCEDURE:
CIRCUIT CLERK:
SUNSHINE BILL:

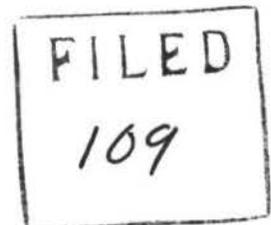
1. All records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty in the court in which

the action is prosecuted, and not merely the name of the defendant, must be removed from the records of the trial court which are available to the public, and must be kept in separate records which are to be held confidential. Where possible, pages of the public records should be retyped or rewritten, omitting those portions of the records which deal with such a defendant's case; however, where retyping or rewriting is not feasible because of the permanent nature of the record book, such record entries may be "blacked out" and recopied in a confidential record book. But the records of an appellate court which reverses a conviction and remands the case to the trial court are not to be closed, even if the case is nolle prossed, dismissed, or results in a finding of not guilty on remand. 2. The obligation to advise persons and agencies holding records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty, rests upon those who are aware that such persons and agencies possess such records, and who are aware of the outcome of the case. Primarily this responsibility devolves upon the prosecuting attorney. 3. Law enforcement agencies are required to maintain confidential records of matters which are required to be closed, as well as the public records which such agencies maintain on all other matters.

OPINION NO. 109

March 25, 1974

Honorable A. J. Seier
Prosecuting Attorney
Cape Girardeau County
721 North Sunset
Cape Girardeau, Missouri 63701



Dear Mr. Seier:

This official opinion is issued in response to your request for a ruling on the following questions:

"In order to comply with Section 7 of Senate Bill No. 1, 77th General Assembly [1973], we assume that some method must be devised to maintain the record entries so that they will be available to a defendant but preclude the name of the defendant who was charged, but

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was subsequently nolle prossed, dismissed or found not guilty being available to the public. May a Clerk 'black out' the name of the defendant in all indices and permanent records, but create a confidential index so that the name of the defendant is no longer public, while still retaining the capability of finding the record for the defendant? May the Clerk retype or rewrite all pages on which the name of a defendant appears, deleting such name, and make a confidential record of all such entries so that the entries would not be available to the public, but still available to the defendant? Does the Clerk of the Court, or anyone else, have an obligation to advise law enforcement officials that a case was nolle prossed, dismissed or that the defendant was found not guilty? Are the law enforcement agencies authorized to have two types of records, those that are public and those, formerly public, that are now confidential?"

You refer to what is now Section 610.105, RSMo Supp. 1973.

You state the following facts in conjunction with this request: When a criminal case is filed in the Circuit Court of Cape Girardeau County, the style of the case is placed in an alphabetical index, which is a permanently bound volume. An entry is made in the daily minute book which, thereafter, is transferred to a permanent record book. A docket sheet is prepared, as well as a fee bill. Bail bonds are recorded. A permanent index, which ultimately will be an index to all entries on a case, is begun. Entries concerning several different cases will appear on one page. The clerk does not make only one entry per page. As the case progresses, other entries will be made in the daily and permanent record books, and ultimately in a judgment book. Thus, a defendant's name may appear in the records many times, depending on the number of motions filed and hearings conducted.

Section 610.105 provides:

"If the person arrested is charged but the case is subsequently nolle prossed, dismissed or the accused is found not guilty in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records to all persons except the person arrested or charged."

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In our Opinion 311, issued November 30, 1973, to Ralph L. Martin, a copy of which is attached thereto, we held that records which are required to be closed under Section 7 are not to be expunged (that is, physically destroyed), but they are to be available to courts and law enforcement agencies only for purposes of litigation and otherwise must be inaccessible to the general public. We pointed out there and in our Opinion 299, issued September 28, 1973, to Theodore D. McNeal and Curtis Brostron, that Senate Bill 1, 77th General Assembly (1973) refers both to closing and to expungement, and that the former term implies a less stringent requirement than the latter. We enclose a copy of Opinion 299.

You have referred to the possibility of "blacking out" from indices and permanent records the name of a defendant who was charged, but subsequently nolle prossed, dismissed or found not guilty. We believe that the terms of Section 7 are sufficiently broad to require something more than the mere concealment of the defendant's name. The statute requires that "official records pertaining to the case" are to be closed. As we pointed out in our Opinion 311, supra, Section 7 applies to all records pertaining to the case, including the records of courts, prosecuting attorneys, and other law enforcement agencies. Moreover, there is a practical reason why merely "blacking out" the name of the defendant would not be sufficient under the statute: the public might be able to determine the defendant's identity from the context of the record entries.

"Blacking out" the name of the defendant, or even the entire record pertaining to the defendant, appears to be an act of expungement, although the distinction between closing and expungement would be properly preserved if a confidential index and record were created so that the record could still be found for the defendant and for courts and law enforcement agencies requiring it for purposes of litigation. We think the solution of retyping or rewriting pages on which records pertaining to the defendant's case appears, omitting all his records therefrom and retyping or rewriting them for inclusion in confidential record books, is the best solution where practical. However, where the records are kept in permanently bound volumes, it appears that the only practical solution would be to "black out" everything in such volumes pertaining to the defendant's case and to copy over those entries in a separate volume which is to be kept confidential.

Where a defendant has been convicted in the trial court, but his conviction is reversed and remanded, and his case is subsequently nolle prossed or dismissed or he is found not guilty

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upon retrial, the trial court must close all records pertaining to the case, including records of the original trial. But appellate court records of the appeal will not have to be closed in the manner we have outlined above. This is because of the provisions of Article V, Section 12 of the Constitution of Missouri, as amended effective January 1, 1972:

"The opinions of the supreme court and court of appeals and all divisions and districts of said courts shall be in writing and filed in the respective causes, and shall become a part of the records of the court and be free for publication."

Insofar as Section 610.105 conflicts with this provision, it is unconstitutional. Thus, the fact that a case is nolle prossed or dismissed or the accused found not guilty, on remand to the trial court from the Supreme Court or the Court of Appeals, could not subject the appellate court's opinion to closing under Section 610.105. To that extent, the record of the defendant's prosecution would remain open to the public.

Moreover, it would be useless and unreasonable to require the appellate court to close any other record entries it has made pertaining to the case; the purpose of closing records of the appeal to the public could not be served thereby, since the court's opinion would still be public. As we pointed out in Opinion 299, supra, the law favors constructions which harmonize with reason and which avoid absurd or unreasonable results. Therefore, none of the reversing appellate court's records need be closed, although the trial court's records pertaining to the case must be closed.

Your next question asks whether anyone has an obligation to advise law enforcement officials that a case was nolle prossed, dismissed, or resulted in a finding of not guilty. Nothing in Section 610.105 directly imposes such an obligation on any person. However, as we pointed out above, the records of law enforcement agencies as well as those of courts are to be closed upon nolle prosequi, dismissal, or a finding of not guilty. Clearly the law enforcement agencies cannot close their records unless they are informed of the outcome of the case.

The statute gives us little guidance in this matter, but we believe that the most sensible procedure is to place the responsibility (for informing law enforcement officials of the outcome of the case) upon those persons who are most likely to know the identity of the pertinent law enforcement agencies.

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Ordinarily, this would mean the prosecuting attorney, who would of course be aware of all the court's rulings. However, if the law enforcement agencies he notifies of the disposition of the case are aware of other agencies which also have records pertaining to the case, they should inform such other agencies themselves.

In light of what we said in answer to your first two questions, it should be obvious that law enforcement agencies, as well as courts, are not only authorized but required to have two types of records - those that are open to the public and those which must be kept confidential once the requirements of Section 610.105 apply to them - that is, when a case is nolle prossed, dismissed, or results in a finding of not guilty.

CONCLUSION

Therefore, it is the opinion of this office with respect to Section 610.105, RSMo Supp. 1973, that:

1. All records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty in the court in which the action is prosecuted, and not merely the name of the defendant, must be removed from the records of the trial court which are available to the public, and must be kept in separate records which are to be held confidential. Where possible, pages of the public records should be retyped or rewritten, omitting those portions of the records which deal with such a defendant's case; however, where retyping or rewriting is not feasible because of the permanent nature of the record book, such record entries may be "blacked out" and recopied in a confidential record book. But the records of an appellate court which reverses a conviction and remands the case to the trial court are not to be closed, even if the case is nolle prossed, dismissed, or results in a finding of not guilty on remand.

2. The obligation to advise persons and agencies holding records pertaining to the case of a defendant who has been nolle prossed, dismissed, or found not guilty, rests upon those who are aware that such persons and agencies possess such records, and who are aware of the outcome of the case. Primarily this responsibility devolves upon the prosecuting attorney.

3. Law enforcement agencies are required to maintain confidential records of matters which are required to be closed, as well as the public records which such agencies maintain on all other matters.

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The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. Danforth".

JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 311
11-30-73, Martin

Op. No. 299
9-28-73, McNeal