



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 5, 2014

Senator Ted Ferrioli
Senate Republican Leader
900 Court Street NE S323
Salem OR 97301

Re: Reporting of failed firearm purchase criminal background checks

Dear Senator Ferrioli:

You asked our office whether the Department of State Police has the authority to notify a local law enforcement agency when a person attempts to purchase a firearm and during the criminal background check the department finds that the person has been convicted of a felony, has a criminal warrant for the person's arrest or has been committed to the Oregon Health Authority or is subject to a firearm prohibition order under ORS 426.130, or that the firearm has been stolen. We conclude that the department likely has the statutory authority to inform local law enforcement agencies of potential criminal activity, discovered as a result of conducting a criminal background check, for the purpose of enforcing criminal laws or apprehending offenders. However, if the department has concluded or has been advised that such authority does not exist, it is unlikely that the department will commence these notifications.

Background Information

In Oregon, the department performs the criminal background check required by state law prior to a person's purchase of a firearm from a gun dealer or at a gun show.¹ The department also serves as the "point of contact" for federal criminal background checks required by the Brady Handgun Violence Prevention Act of 1993 (Brady Act).² This means the department performs the National Instant Criminal Background Check System (NICS) inquiries for federal firearms licensees that is required by federal law. Under state law, a criminal background check means "determining the eligibility of a person to purchase or possess a firearm" by using Oregon criminal history and mental health databases, as well as the Law Enforcement Data System (LEDS), NICS and a state or federal stolen firearm database.³

As part of its duties in performing the background checks under federal law, the department is required to report NICS denials to the Federal Bureau of Investigation (FBI).⁴ The

¹ ORS 166.412, 166.436 and 166.438 (2013 Edition).

² P.L. 103-159, 107 Stat. 1536.

³ ORS 166.432.

⁴ 28 C.F.R. 25.6(h).

FBI then refers that information to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).⁵ The ATF's Brady Operations Branch then:

reviews the FBI referrals and forwards those denials that require a firearm retrieval or that meet the USAOs' [United States Attorneys' Office] prosecutorial guidelines to the NICS coordinator in the appropriate ATF division office. Each NICS coordinator reviews the referrals and disseminates them to the appropriate field or satellite office for investigation.⁶

On February 6, 2014, at the public hearing on Senate Bill 1551, Patricia Whitfield, the Oregon State Police Criminal Justice Information Systems Division Director, was asked by Senator Close if she had previously told the Senator that there was a state law prohibiting the department from sharing information obtained from failed criminal background checks with local law enforcement. Ms. Whitfield responded affirmatively. Ms. Whitfield then stated that the department was "required to report any denied transactions to the National Instant Check System at the FBI, and they in turn notify the ATF." As part of a series of questions from Senator Prozanski, Ms. Whitfield further clarified that ORS 166.412 does not grant specific authority to share the information.

In response to a question from Senator Dembrow, Ms. Whitfield went on to state that ORS 166.412 also requires, as part of the criminal background check, the department to determine whether the firearm subject to potential transfer is stolen. If the firearm is a possible match to a stolen firearm, the department reports those matches to law enforcement. When Senator Dembrow asked Ms. Whitfield to clarify if the reports were made to "local law enforcement" (emphasis in original), she stated that the department contacts the "state police dispatch center," who in turn reports the potential match to the appropriate local law enforcement agency.⁷

It is therefore our understanding that although the department currently reports potentially stolen firearms to the appropriate local law enforcement agencies, the department has determined or has been advised that it does not have the authority to report a failed criminal background check to local law enforcement agencies. However, whether the department actually has the statutory authority to report failed criminal background checks is a more complicated question.

Statutory Grants of Authority

Oregon courts generally examine the authority of an executive agency in several situations, including when deciding whether an administrative rule "exceeds the statutory authority of the agency,"⁸ or when reviewing administrative orders in contested cases to determine if the order is "[o]utside the range of discretion delegated to the agency by law."⁹ In

⁵ "Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Enforcement of Brady Act Violations Identified Through the National Instant Criminal Background Check System," United States Department of Justice Office of Inspector General Report No. I-2004-006 (July 2004), <<http://www.justice.gov/oig/reports/ATF/e0406/exec.htm>> (visited May 1, 2014).

⁶ *Id.*

⁷ Patricia Whitfield, public hearing on Senate Bill 1551, Senate Committee on Judiciary, February 6, 2014, <<http://www.leg.state.or.us/listn/archive/archive.2014s/SJUD-201402060807.ram>> (visited May 1, 2014).

⁸ ORS 183.400 (4).

⁹ ORS 183.482 (8)(b)(A) and 183.484 (5)(b)(A).

the context of rule and contested case order review, courts “look to the words of the statutes to determine the nature and scope of authority which they convey to the agency.”¹⁰

The Supreme Court has further described three distinct categories of statutes: those containing “[t]erms of precise meaning,” those containing “[i]nexact terms” that require interpretation, and those containing “[t]erms of delegation” that require policy determinations by the agency.¹¹ This last category, statutes that contain delegative terms, is used when the Legislative Assembly “cannot foresee all the situations to which the legislation is to be applied and deems it operationally preferable to give an agency the authority, responsibility and discretion for refining and executing generally expressed legislative policy.”¹² When delegative terms are used, a court will normally show considerable deference to agency interpretation, reviewing only to determine whether the interpretation is within the range of possible reasonable interpretations that could be adopted.

The Department of State Police was established by the enactment of ORS 181.020. Since the original grant of authority in 1931,¹³ members of the Oregon State Police have been “charged with the enforcement of . . . [a]ll criminal laws” and “authorized and empowered to . . . [p]revent crime” and “[p]ursue and apprehend offenders.”¹⁴ We view the grant of authority contained in ORS 181.030 as a statute containing “terms of delegation,” as the department is tasked with the broad goals of preventing crime and enforcing criminal laws without a list of specific procedures or policies to follow. Regarding this broad grant of authority, the Supreme Court stated:

Much criminal and regulatory law enforcement activity takes place pursuant to authority implied from a broad statutory directive. A broad directive to enforce the criminal laws, such as ORS 181.030, together with the specification of crimes developed by lawmakers, implies authority to undertake tasks necessary to carry out the delegated function. By and large, agencies of the executive branch are free to carry out their assigned responsibilities in ways of their own choosing. Making explicit the manner in which an agency is to accomplish its task falls to the agency head or that official’s designee to instruct or sub-delegate to subordinate officials.¹⁵

The Superintendent of State Police may also maintain a criminal investigations division for investigating crime and may “[e]nter into partnerships with local criminal justice agencies to provide expertise in the investigation and resolution of crimes and criminal activity.”¹⁶

However, deciding whether a specific action is within an agency’s authority is only the first step in analyzing the legality of that action. The Supreme Court has described the process

¹⁰ *Springfield Education Assn. v. Springfield School Dist. No. 19*, 290 Or. 217, 223 (1980).

¹¹ *Id.*

¹² *Id.* at 228.

¹³ Section 9, chapter 139, Oregon Laws 1931.

¹⁴ ORS 181.030.

¹⁵ *Nelson v. Lane County*, 304 Or. 97, 103 (1987). This discretion is limited when procedures infringe on constitutionally protected rights. When performing a search or seizure, for example, an executive agency “must have explicit authority from outside the executive branch” or fit into an exception to the warrant requirement. *Id.* at 104. See also *State v. Gerrish*, 96 Or. App. 582, 585 (1989).

¹⁶ ORS 181.070 (1).

of examining the legality of an official's or agency's action, in the context of administrative rule review, as follows:

In the proper sequence of analyzing the legality of action taken by officials under delegated authority, the first question is whether the action fell within the reach of their authority, the question which in the case of courts is described as "jurisdiction." If that is not in issue, as it is not in this case, the question is whether the action was taken by procedures prescribed by statute or regulation. Assuming that proper procedures were followed, the next question is whether the substance of the action, though within the scope of the agency's or official's general authority, departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute.¹⁷

Therefore, a court would also determine whether the reporting of failed criminal background checks would violate some other statute or constitutional provision.

Analysis

A person who attempts to purchase a firearm, knowing that the person is prohibited by state law from owning or possessing it, commits the crime of unlawfully purchasing a firearm.¹⁸ A person who has been convicted of a felony, or who has been committed to the Oregon Health Authority or is subject to a firearm prohibition order under ORS 426.130, is prohibited by state law from possessing a firearm. Such a person is therefore committing a crime if that person has knowledge of the prohibition and attempts to purchase a firearm.¹⁹

If the department performed a criminal background check for a person and discovered that the person was prohibited from possessing a firearm by state law, the department would have information that the person was very likely in the midst of committing a crime. Because the department was given the authority in ORS 181.030 to enforce all criminal laws, reporting that failed criminal background check to a local law enforcement agency for the purpose of prosecuting the person for the crime of unlawfully purchasing a firearm seems to fit within the department's statutory authority. If the department performed a criminal background check and discovered only that the person had a criminal warrant out for the person's arrest, it would not necessarily mean that the person was committing a crime by attempting a firearm purchase. However, because the department was also given the authority in ORS 181.030 to pursue and apprehend offenders, reporting the warrant to a local law enforcement agency for the purpose of arresting the person seems also to fit within the department's statutory authority.

However, our analysis does not end there because we must also examine whether the reporting would depart "from a legal standard expressed or implied in the particular law being

¹⁷ *Planned Parenthood Assn. v. Dept. of Human Resources*, 297 Or. 562, 565 (1984). The court was discussing the sequence in order to describe when a constitutional analysis of an administrative rule is proper, but we believe the quote accurately describes how a court would generally decide when an official is properly acting within delegated authority.

¹⁸ ORS 166.425.

¹⁹ When deciding if a person attempted a purchase, a court would look to see if the person had intentionally engaged in a "substantial step" toward making the purchase. ORS 161.405. Submitting to a prepurchase criminal background check very likely qualifies as a substantial step toward purchasing a firearm.

administered, or contravene[] some other applicable statute.”²⁰ There are several statutory limits on the department’s authority to enforce criminal laws, including some specifically pertaining to the keeping and sharing of records. For example, ORS 181.548 specifies that certain records kept by the department are to be kept “confidential and exempt from public inspection” except in certain circumstances. ORS 181.534 (15) requires that the department “restrict dissemination of information received under this section to persons with a demonstrated and legitimate need to know the information.” ORS 181.575 prohibits a law enforcement agency from collecting or maintaining information concerning a person’s religious, political or social views, associations or activities, except in certain circumstances. ORS 181.555 directs the department to adopt rules “establishing procedures . . . [t]o provide access to criminal offender information by criminal justice agencies and by other state and local agencies.” Finally, ORS 166.412 (7) directs the department to retain information collected during a firearm criminal background check for no longer than five years and specifies that the information is exempt from public records requests.

Despite these statutory limits on the department’s sharing of records and information, there is no Oregon statute limiting or prohibiting the department from notifying a local law enforcement agency when, during a firearm criminal background check, the department finds that the prospective recipient of the firearm has been convicted of a felony, has a criminal warrant for the person’s arrest or has been committed to the Oregon Health Authority or is subject to a firearm prohibition order under ORS 426.130, or that the firearm has been stolen. There are also no constitutional provisions that would prohibit this kind of notification. Under ORS 181.548 and 166.412, the information cannot be released to the public. However, there is nothing preventing the department from sharing the information with a law enforcement agency for the purpose of enforcing criminal laws or apprehending an offender.

Other Limitations on Authority

It is also important to review any possible limitations on information within the databases the department must consult when performing a criminal background check. LEDS is a state system to which law enforcement agencies already have access.²¹ NICS is regulated by federal law, and access to and distribution of information through it is restricted; however, we did not find any federal statutes or regulations that would prevent reporting background check denials to local law enforcement.²² The department is already required to report NICS denials to the FBI. While mental health information is obviously sensitive and confidential, the fact that a person is subject to a firearm prohibition order under ORS 426.130 is information that must be entered into LEDS.²³ Therefore, it is the type of information to which a local law enforcement agency already has access. Although there is not a corresponding statute requiring a LEDS entry when a person is committed to the Oregon Health Authority under ORS 426.130 *without* a specific firearm prohibition order, we do not think that a notification by the department to a local law enforcement agency, limited to the fact that a person who is prohibited by law from possessing a firearm is attempting to purchase one, would violate any law protecting health information.

²⁰ *Planned Parenthood*, 297 Or. at 565.

²¹ ORS 181.730 and 181.010.

²² While not strictly relevant to your question, it is worth noting that federal regulations require the retention of NICS Index records that indicate a person has received a firearm in violation of federal or state law and allow for sharing with law enforcement NICS Audit Log records of allowed transactions for the purposes of investigating and prosecuting violations of law. 28 C.F.R. 25.9(a) and (b).

²³ ORS 426.130 (1)(a)(D).

Conclusion

Pursuant to the department's general authority under ORS 181.030 to enforce the criminal laws of Oregon and pursue and arrest offenders, and in the absence of any statutes, rules or constitutional provisions to the contrary, we believe that a court would find that the department has the authority to notify a local law enforcement agency of potential criminal activity discovered when a criminal background check reveals that the prospective purchaser has been convicted of a felony, has a criminal warrant for the person's arrest or has been committed to the Oregon Health Authority or is subject to a firearm prohibition order under ORS 426.130, as long as the notification is for the purpose of enforcing criminal laws or apprehending offenders. We also conclude that a court would find that the department has the authority to notify a local law enforcement agency when a stolen firearm check reveals that the firearm in question has been stolen.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink, appearing to read 'J. Minifie', is written over a faint, light-colored signature of Dexter A. Johnson.

By
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Deputy Legislative Counsel