

OAKLAND CITY COUNCIL


City Attorney

RESOLUTION No. _____ C.M.S.

FILED
OFFICE OF THE CITY CLERK
OAKLAND

Introduced by Councilmember _____ APR 10 PM 5:40

RESOLUTION IN SUPPORT OF AB 2696 (KREKORIAN) – “FIREARMS: REQUIRING THE CALIFORNIA DEPARTMENT OF JUSTICE (DOJ) TO ENTER INTO A MEMORANDUM OF UNDERSTANDING WITH THE FEDERAL BUREAU OF INVESTIGATION (FBI) TO PROVIDE INFORMATION TO, AND PARTICIPATE IN, THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICBCS)”

WHEREAS, each year a majority of Oakland homicides are the result of gun violence; and

WHEREAS, the City of Oakland fully supports the ability of local governments to enact enforcement regulation that will increase the safety of the people of the City of Oakland; and

WHEREAS, the City of Oakland also supports the use of systems that can provide swift and accurate background data on persons attempting to purchase a hand gun or long gun; and

WHEREAS, AB 2696 (Krekorian) will require the California Department of Justice to enter into a memorandum of understanding with the FBI for the purpose of providing information to the NICBCS and to participate in the system; now, therefore be it

RESOLVED: that the City of Oakland declares its support for AB 2696 (Krekorian); and be it

FURTHER RESOLVED: that the City Council hereby directs the City Administrator and the City’s legislative lobbyist to advocate for the above positions in the California State Legislature.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 20____

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

AB 2696

Page 1

Date of Hearing: April 1, 2008
 Chief Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
 Jose Solorio, Chair

AB 2696 (Krekorian) - As Amended: March 28, 2008

SUMMARY : Requires the Department of Justice (DOJ) to participate in the National Instant Criminal Background Check System (NICS), as specified. Specifically, this bill :

- 1) Requires DOJ to participate in NICS, and states that the DOJ shall be the point of contact for initiating a background check through NICS, in accordance with the Memorandum of Understanding (MOU) entered into by the DOJ and the Federal Bureau of Investigation (FBI) for the purpose of implementing NICS and state and federal law regarding confidentiality.
- 2) Provides that upon receipt of information demonstrating that a person is prohibited from possessing a firearm pursuant to specified federal law, the DOJ shall report the name, date of birth, physical description, and any other reasonably available identifying information about the person, including fingerprints, to the NICS Denied Persons Files, in accordance with the MOU with the FBI regarding NICS.
- 3) Requires commencing July 1, 2011, that mental health facilities that must submit reports to the DOJ regarding mentally disordered persons admitted to those facilities to submit the required reports exclusively by electronic means, in a manner prescribed by the DOJ.

EXISTING LAW :

- 1) Provides that to the extent that funding is available the DOJ may participate in NICS, as specified, and requires DOJ to notify the dealer and the chief of police of the city or county in which the sale was made, or if the sale was made in a district in which there is no municipal police department, the sheriff in the county the sale was made, that the purchaser is a person that is prohibited from acquiring a firearm under federal law. (Penal Code Section 12076(d)(2).)

AB 2696

Page 2

- 2) Requires a mental health facility that admits a person who has been taken into custody, and assessed to be a danger to himself, herself, or others to immediately, on the date of admission, submit a report to the DOJ containing information that includes, but is not limited to, the identity of the person and the legal grounds upon which the person was admitted to the facility. States that any report submitted shall be confidential, except for the purposes of specified court proceedings, and for the purpose of determining the eligibility of the person to own, possess, control, receive, or purchase a firearm. (Welfare and Institutions Code (WIC) Section 803(f)(2).)
- 3) Provides that for each person certified for intensive treatment under specified provisions, the facility shall immediately submit a report to the DOJ containing information that includes, but is not limited to, the legal identity of the person and the legal grounds upon which the person was certified. (WIC Section 803(g)(2).)

FISCAL EFFECT : Unknown

COMMENTS :

1) Author's Statement . According to the author, "California law currently prohibits certain persons who have been admitted to a mental health facility from purchasing or possessing firearms, and requires mental health facilities to immediately report information about these persons to DOJ, so that it can perform background checks on prospective purchasers of firearms. Current procedures allow mental health facilities to submit this information to the DOJ by mail, requiring manual entry of consumer data into the background check databases. In order to address the volume of records that must be transferred to the DOJ, mental health facilities frequently delay sending this information to the DOJ, waiting sometimes weeks, or even months, to consolidate their shipments. AB 2696 would correct this problem by requiring transmission of this data to the DOJ beginning on July 1, 2011.

"Additionally, no law currently requires the DOJ to forward information to NICS whenever the DOJ becomes aware that a person falls into any prohibited category. AB 2696 would

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AB 2696
Page 3

acknowledge the DOJ's MOU with the FBI in statute, and would require DOJ to forward information about all federally prohibited purchasers to NICS. Thus, this bill will codify existing practice and ensure that California continues this practice in the future."

2) Interaction of State and Federal Law on Background Checks :
Under current federal law, persons who cannot possess firearms are also barred from possessing ammunition. (18 USC 922(g).) Federal law requires that the ammunition or firearm at some time (even prior to that person acquiring it) have crossed a state line or international boundary.

In addition, 18 USC 922(d) makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is prohibited by 18 USC 922(g) from possessing or acquiring ammunition or firearms. The federal disposition provision applies to any person and does not necessarily require a "commerce" nexus, to wit: that at some prior time the firearm or ammunition crossed a state or an international boundary.

This has not been decided by the United States Supreme Court since its United States Supreme Court's decision in United States v. Lopez , 514 U.S. 549 (1995), which required a "commerce" or other specific jurisdictional basis granted by the United States Constitution to Congress to criminalize behavior. However, the Seventh Circuit in United States v. Haskins , 511 F.3d 688, 694-695 (7th Cir. 2007), as well as the Eight Circuit in United States v. Monteleone , 77 F.3d 1086, 1092 (8th Cir. 1996) and the Eleventh Circuit in United States v. Peters , 403 F.3d 1263, 1278 (11th Cir. 2005), have all upheld section 922(d) as it deals with a commercial activity amenable to the reach of Congress' Commerce Clause power. Therefore, the statute is constitutional despite its failure to include a requirement that the firearm or ammunition traveled in interstate or foreign commerce.

The Seventh Circuit also held in Haskins that to convict a person of violating 18 USC 922(d) the government does not have to prove defendant's knowledge of that particular felony the recipient was convicted of, just that he was a felon or in a prohibited class. (511 F.3d at 693.)

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Prior to the enactment of the Brady Handgun Violence Prevention Act of 1993, federal law did not mandate background checks prior to an FFL delivering a gun to a non-FFL. This had no effect in California as California has long required background checks; it did have an impact on the state as to be a state licensed dealer one had to be federally licensed.

As enacted in 1993, the Brady Handgun Violence Prevention Act has several components. The first component is that before a FFL may deliver a handgun to a non-FFL, there was a five-day federal waiting period. The Brady handgun waiting period expired on November 30, 1998 to be replaced by an instant background check on all guns. California and at least 30 other states were "Brady handgun waiting period exempt states" because these states had and have stricter background check requirements. The second component of Brady was the creation of a federal instant check system by November 30, 1998 to be replaced by a background check on all guns (the NICS system).

At least \$1.5 billion in federal moneys funds have been paid to centralize, update, and computerize state and federal criminal records, military records, domestic violence orders, and mental health records. This data is to be downloaded into a central federal data bank in order to quickly determine if persons wishing to acquire guns are legally prohibited from acquiring the same under state and federal law.

Under the NICS system, no gun can be delivered until the earlier of two time-frames: (a) the FFL is affirmatively notified that a record check does not indicate a disqualifying factor prohibiting acquisition, or (b) three days from the date that the person applies to acquire the gun. The instant check is in effect a three-day waiting period unless an affirmative clearance is given. NICS is overseen by the FBI. The FBI takes inquiries from state criminal justice agencies. While the federal system has a procedure for FFLs to directly call the FBI, this procedure is cumbersome. For that reason, almost every state has encouraged to have inquiries processed through state agencies.

3) California Interaction with Federal System : As noted above, the Brady Handgun Violence Prevention Act of 1993 had no effect in California as California has long required background checks; it did have an impact on the state as to be a state licensed dealer one had to be federally licensed. As

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noted above, while the federal system has a procedure for FFLs to directly call the FBI, this procedure is cumbersome. For that reason, almost every state was encouraged to have inquiries processed through state agencies.

As part of AB 689 (Bowler), Chapter 235, Statutes of 1997, DOJ in essence was made the sole and exclusive means (i.e., the POC) whereby state-licensed dealers (who are ipso facto FFLs) may contact the federal Instant Check system. It was determined during 1998 as a result of meetings with the relevant federal entities that various additional statutory changes were required for California to act as a POC. As a result, two additional pieces of legislation were required: (i) SB 63 (Peace-Perata), Chapter 908, Statute of 1998, which dealt with "cut-off dates" on delivery of guns to avoid state background checks; and (ii) AB 2011 (Hertzberg), Chapter 911, Statutes of 1998 (an urgency measure effective November 30, 1998) which dealt with processing long gun curio and relic

transactions.

4) DOJ Switch to Electronic Reporting and Registration under Current Statutory and Budget Mandates Has Been Ongoing since 1996 : Since the enactment of SB 671 (Lewis-Peace), Chapter 128, Statutes of 1996 as well as subsequent legislation, DOJ has moved to a electronic-paperless registration and background check system which relies on email type systems to process and clear gun transactions and register handguns.

In the normal transaction, a gun dealer swipes a drivers license which brings up all the information on the license on a computer screen with the relevant "yes-no" questions being asked and then that information is emailed in from the dealership to DOJ to conduct the background checks. While there are still some concerns about the mechanics of how DOJ registers handguns, this system is generally viewed as being a major improvement over the old system.

Over the last several years because of appropriations in Budget Acts, DOJ's firearms data management systems are, currently undergoing a substantial redesign, slated to be completed by June 2010. DOJ's information technology and data center staffs are fully occupied with this project until completion. For that reason, adding on additional requirements immediately has been discouraged.

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AB 2696

Page 6

In addition, SB 327 (Migden), pending referral by the Assembly Rules Committee, proposes upgrades in the handgun registration system. However, those upgrades are delayed to take account of the 2020 date - though there are ongoing discussions with the Administration on this as SB 327 provisions (or part thereof) were committed to as part of the enactment of AB 1471 (Feuer), Chapter 572, Statutes of 2007. The Governor's proposed 2008-09 Budget projects that the DROS Account will have a \$5 million reserve by the end of the budget year.

5) Mandatory Electronic Reporting of Mental Health Information as to 8103(f) and (g) : Currently, the courts are providing DOJ with information as to court adjudications and the like that prohibit a person from having a gun. This is part of a coordinated effort commenced by former Attorney General Lockyer and Chief Justice George acting through the Judicial Council. Similar requirements exist as to domestic violence prohibitions when law enforcement agencies are involved as to mental health records - some of which come from private facilities - the mails are still used. This can result in gaps in reporting with prohibited persons inadvertently acquiring guns.

This bill amends WIC section 8103 to require that where a mental health prohibition is imposed, commencing January 1, 2011 facilities shall submit reports exclusively by electronic means in a manner prescribed by DOJ. This should result in instantaneous submissions and thus avoid a number of gaps in current processing. Given the fact that facilities are reimbursed through background check fees now, this requirement is fully funded. The two-year lead time should allow DOJ to gear up and not interfere with its ongoing computerization program. Similar lead time is provided on registration requirements contained in SB 327.

The electronic reporting in this bill is tied to - but not necessarily mandated solely by - the NICS Improvement Act. The timing in this bill is designed to avoid disruption to the on-going upgrades as well as avoiding precipitous fee hikes to consumers who finance the DROS and related firearms programs.

REGISTERED SUPPORT / OPPOSITION :

Support

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AB 2696
Page 7

Legal Community Against Violence
California Campaign Brady Campaign to Prevent Gun Violence

Opposition

None

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