

SENIOR COUNSEL
C. D. MICHEL*

SPECIAL COUNSEL
JOSHUA R. DALE
W. LEE SMITH

ASSOCIATES
ANNA M. BARVIR
MICHELLE BIGLARIAN
SEAN A. BRADY
SCOTT M. FRANKLIN
BEN A. MACHIDA
THOMAS E. MACIEJEWSKI
CLINT B. MONFORT
JOSEPH A. SILVOSO, III
LOS ANGELES, CA

*ALSO ADMITTED IN TEXAS
*ALSO ADMITTED IN DISTRICT OF
COLUMBIA



180 EAST OCEAN BOULEVARD • SUITE 200
LONG BEACH • CALIFORNIA • 90802
562-216-4444 • WWW.MICHELLAWYERS.COM

OF COUNSEL
DON B. KATES
BATTLEGROUND, WA

RUTH P. HARING
MATTHEW M. HORECZKO
LOS ANGELES, CA

GLENN S. MCROBERTS
SAN DIEGO, CA

AFFILIATE COUNSEL
JOHN F. MACHTINGER
JEFFREY M. COHON
LOS ANGELES, CA

DAVID T. HARDY
TUCSON, AZ

MEMORANDUM OF LAW

Re: Model Policy Goals to Address Law Enforcement Liability Issues for Firearms Retention Following Seizure or Surrender

Acknowledging and Recording the Transfer of Custody to the Law Enforcement Agency

1. *In all situations where firearms are taken into custody (surrendered or seized), a receipt shall be issued by the law enforcement agency to the person who possessed the firearms listing every firearm and any serial number and other relevant identification on or regarding each of the firearms (other relevant information includes: Firearm type, Category, Serial Number, Make, Mode, Caliber, Firearm Origin, Color, Barrel Length, and any other distinguishing features or attachments, e.g., scope, bipod, additional handgrips, ammunition pouch).*

Reasoning: The foregoing is a requirement located in Penal Code section 33800. This type of policy also protects the agency against disputes relating to the number and types of firearms seized. The identified information on the receipt includes the categories of information needed by owners who subsequently apply to the Department of Justice (“DOJ”) to determine their eligibility for return of the surrendered/seized firearms. Ensuring continuity between the information submitted to and returned by the DOJ regarding the firearm and the information used by the law enforcement agency to identify and store the firearm will ensure that incongruous information between the agencies doesn’t form the basis for a liability claim against the law enforcement agency.

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2. *Surrendered or seized firearms are to be entered on a temporary basis into the DOJ's Automated Firearms System ("AFS").*

Reasoning: This requirement is codified in Penal Code section 11108(b) and comports with the identification requirements under Section 33800 for all law enforcement agencies who take possession of individual's/suspect's firearms. This also appears to be the method by which the Legislature *originally* sought to establish a chain of ownership for later retrieval of the firearms if the firearms are eligible to be retrieved, and the law requiring the law enforcement agency to make the temporary entry upon receipt of the firearm is still on the books. Under a recent amendment to Penal Code section 33865(d), the DOJ is supposed to automatically create a permanent entry of the firearm into AFS upon the DOJ's receipt of a Law Enforcement Gun Release ("LEGR") Application from the owner. In practice, however, the DOJ is not fulfilling this requirement and is, instead, putting the onus on firearms owners or law enforcement agencies to create the permanent record in AFS by registering the firearms themselves.

Conducting the Stolen Property Search

3. *Law enforcement agency personnel shall inspect all surrendered/seized firearms and run a background check on all surrendered/seized firearms to determine if such firearms are stolen, have been used in a crime, have been flagged as evidence in an ongoing investigation, or have been altered to make their physical characteristics not conform with California law (e.g., had features added or removed such that the firearm meets the definition of a prohibited assault weapon).*

Reasoning: If the agency receives information that any firearms taken into custody were reported lost or stolen, the agency is obligated under Penal Code section 11108.5 to notify the true owner of the discovery within 15 days of identification of the firearm's reported status. The agency also has an affirmative obligation under Section 33855 to run the firearm through a search in AFS to determine if the firearm is stolen. If the firearm is no longer needed as evidence in an active investigation, the agency is obligated to inform the owner of its eligibility for retrieval under Sections 11108.5 and 1417.5.

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Return of the Firearm

4. *Once it is determined that a firearm is no longer needed for an active case or investigation by the law enforcement agency, or the individual's criminal or administrative proceeding has concluded in such a way that the firearm no longer needs to be held by the agency and can be returned to the individual, the agency shall provide notice to the individual who surrendered or had the firearm seized of the availability of the firearm for retrieval from the agency. The notice of availability should be made via certified mail and regular U.S mail to the last known valid address of the individual provided to the Department of Motor Vehicles . The notice should include a copy of DOJ Form BOF 119 "Law Enforcement Gun Release Application," with instructions to the individual to prepare and submit such form to the DOJ prior to seeking release of the firearm from the agency. The notice shall also state that if the individual does not contact the agency within 180 days of the notice, the held firearms will be destroyed.*

Reasoning: Penal Code section 33875 requires such notice to be given. No further action regarding the possession of the firearm by the law enforcement agency, including its destruction, can be undertaken by the agency until 180 days after such notice has been given and the agency has thereafter reasonably determined that the firearm is unclaimed.

5. *Once the law enforcement agency has provided notice to an individual of the availability of a firearm to be retrieved, the agency shall wait a minimum of 180 days before taking any further action on the firearm, including its destruction. If the agency receives written or verbal notice from the individual that he or she is claiming the firearm, the agency should stay any further action on the handling or destruction of the firearm for 180 days from the date the agency received such notice to provide for successful retrieval of the firearm or the firearm will be considered abandoned and destroyed after the 180 days. The agency should consult with the agency's attorney about whether it would be appropriate at that point to destroy the firearm.*

Reasoning: Penal Code section 33875 requires that a minimum of 180 days elapse after notice of retrieval is given before a law enforcement agency can consider the firearm abandoned and destroy or dispose of that firearm. The Penal Code section also requires that the firearm go "unclaimed" during that 180 day time period in order for its subsequent destruction to be lawful. Thus, in situations where an individual responds to a notice of availability to retrieve a firearm and ostensibly makes a claim, but that individual

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then delays in effecting the firearm's retrieval, the law enforcement agency's attorney should be consulted to ensure that Section 33875 is not violated by the subsequent handling or destruction of the firearm.

The LEGR Process

6. *If an individual seeks return of a firearm, that individual is required to present a LEGR "Firearm(s) Eligibility Clearance" letter ("LEGR response letter") from the DOJ to the agency that specifically references the subject firearm. The LEGR letter will inform the agency whether (1) the individual is now eligible to retake possession of his or her firearm, and (2) the firearm to be retrieved is not "flagged" by the DOJ as being ineligible to be returned (e.g., been reported stolen or used in a crime, etc.) The LEGR release letter should be dated not more than 30 days earlier than the date of presentment to the agency.*

Reasoning: The LEGR response letter establishes the eligibility of the firearm to be released and of the recipient's eligibility to receive the firearm, per Penal Code section 33865.

The Extent of "Proof" of Ownership Required to Retrieve a Firearm

7. *If the LEGR response letter identifies the firearm as eligible to be released and the individual as eligible to receive the firearm, and the agency has no other independent information that the firearm has been reported lost or stolen, or is owned by another individual, the agency should notify the individual who surrendered the firearm or from whom it was seized that the individual has 180 days from the date of the notice that the firearm is available to be retrieved, or the firearm will be considered abandoned. No other proof of ownership is required.*

Reasoning: Although the DOJ's LEGR response letter advises of the law enforcement agency's ostensible obligation to further establish ownership or title to the firearm before returning the firearm to an individual, we have been unable to establish the existence of such an obligation of the agency under the Penal Code other than the aforementioned requirement under Section 33855 for the agency to run a background check on the firearm at the time of surrender/seizure to determine if the firearm has been reported lost or stolen in AFS.

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In litigation, the DOJ has acknowledged that its statements to this issue of establishing ownership in its LEGR response letter are mere opinion and should not be relied upon by law enforcement agencies in fulfilling their duties for safeguarding and releasing firearms under Penal Code section 33855. Specifically, the DOJ successfully extricated itself from a lawsuit brought against the DOJ and the cities of San Francisco and Oakland in 2012 by making this argument (*Churchill v. Harris*, U.S.D.C. – N.D. Cal. No. 3:12-cv-01740-LB). The DOJ successfully argued that any monetary liability to firearms owners for police departments in those cities refusing to return firearms based on the DOJ's release letter language should be borne by the cities themselves.

The DOJ in that case acknowledged that mere possession of the firearm by the individual at the time of surrender/seizure to the law enforcement agency could be sufficient basis for the law enforcement agency to determine that the individual lawfully owned or possessed the firearm. The court in that case agreed that the DOJ's opinion statements in the LEGR release letter regarding the law enforcement agencies' duties to further establish ownership was a non-binding opinion, and dismissed the DOJ from the action, leaving the affected cities to resolve the liability issues to the plaintiffs in that case on their own.

In many instances with handguns, and in almost all instances with long guns, the agency should not reasonably expect to find any prior proof of ownership within AFS, and so attempts to establish ownership through AFS are not a reliable method. This is because of the nascent nature of laws requiring firearms registration in AFS. While most firearms purchased from dealers were registered to the purchaser even prior to the advent of electronic records, the records created before the electronic system was put in place are often unavailable in AFS. For years, private party transfers and transfers between immediate family members were allowed without the current requirement of a firearm dealer middleman or paper or electronic registration. There are, therefore, many handguns in the state that are lawfully owned but not subject to registration in AFS.

Long guns were not required to be registered in AFS when purchased or transferred until last year. Thus, the agency should expect that a significant number of long guns that are surrendered or seized have not previously been subject to registration and will therefore not show up in AFS. Under Evidence Code section 637, and in the absence of any other information that the firearm has been reported as lost or stolen, the agency is legally justified in relying on the individual's prior possession of the firearm as a sufficient basis for concluding that the individual is the lawful owner of the surrendered/seized firearm.

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For an agency to request proof beyond that to establish ownership is inviting liability in the same manner as seen in the *Churchill* case.

Until the DOJ begins fulfilling its obligation under Section 33865(d) to register firearms that are the subject of LEGR Applications, the firearms that come into law enforcement agency's possession through seizure or surrender are in most instances not going to be in AFS.

For Further Assistance:

For links to free information on firearms laws, the Legal Resources section of our www.calgunlaws.com website has subsections on various firearms law topics. Check it out!

[#michellawyers.com#](http://michellawyers.com)

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