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100 North Carson Street
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October 12, 2017

OPINION NO. 2017-10

EXECUTIVE POWERS; WEAPONS:

Nevada may again request that the FBI perform the background checks required by the Background Check Act. In determining whether to make another request, the Governor should be aware that the "partial" POC status that Nevada would be seeking would be unique and unprecedented. Any change to Nevada's system that jeopardizes its current status as a full POC state for all federally required background checks, and all voluntary background checks, would have significant policy and safety implications that should be carefully considered.

The Honorable Brian Sandoval
Office of the Governor
101 N. Carson Street
Carson City, Nevada 89701

Dear Governor Sandoval:

By letter dated October 4, 2017, you requested an opinion from the Office of the Attorney General, under NRS 228.150, on one question:

QUESTION

Can Nevada change its [Point of Contact] status to "partial," allowing the FBI to conduct the background checks for private party transfers, as contemplated by Initiative Petition Question #1?

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BACKGROUND

Federal law requires certain background checks before federally licensed firearms dealers (“FFLs”) may sell a firearm to individuals. How these checks are conducted varies by state. In most states, all of the background checks are run by the FBI. Alternatively, in a full “Point of Contact” (“POC”) state—a term derived from federal regulation—the state through its own agency conducts all background checks required by federal law for firearms purchases. And in a few states, the state conducts some of the background checks required by federal law, while the remaining background checks required by federal law are conducted by the FBI. These are commonly referred to as “partial” POC states. Nevada has historically been a full POC state, and background checks for firearms purchases have been done by the Central Repository, Nevada’s state entity tasked with performing such checks.

But Nevada’s 2016 Background Check Act (“Act”) imposed a new background check requirement on private transfers or sales (i.e., those not made by a firearms dealer) that isn’t required by federal law. And for these private transfers or sales, Nevada state law specifically requires that the background check must be performed by the FBI, not through Nevada’s Central Repository. We understand that the choice to have the Act require that the check be run by the FBI and not through Nevada’s Central Repository was deliberate and specifically influenced by the intent of the Act’s proponents to avoid a state fiscal impact that could have made the initiative less attractive to voters.

After the Act passed, however, the FBI in December 2016 (and again in January 2017) told Nevada’s Department of Public Safety (“DPS”) that it will not perform the background checks required by the Act because the check performed by Nevada’s Central Repository is a superior check and because Nevada’s new state law “regarding background checks for private sales cannot dictate how federal resources are applied.”

In June 2017, the Governor’s office received a legal memorandum from Nevadans for Background Checks, a group that advocated passage of the Act, in which the group argues that the Governor’s office is bound to see the Act effectuated by seeking to persuade the FBI to change its position on performing the background checks required by the Act.

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SHORT ANSWER

Nevada can again ask the FBI to agree to run the background checks required by the Act, and therefore change Nevada's "Point of Contact" status as contemplated by Initiative Petition Question #1. The FBI has already repeatedly stated that it will not perform the checks required by Nevada law, because such checks are an inferior check to that performed by Nevada's Central Repository and because state law cannot dictate how federal resources are used. But how many times the State of Nevada should ask the FBI to change its position is undoubtedly a policy choice for the Governor to make, and nothing in the Attorney General's December 2016 opinion suggests that the Governor is legally prohibited from making another request of the FBI or attempting to negotiate a new arrangement.

Notably, the July memorandum from Nevadans for Background Checks does not dispute the legal conclusion reached by the Attorney General's December 2016 opinion—that is, (1) that the Central Repository cannot perform the background checks required by the Act, and (2) that if the FBI will not perform the checks required by the Act, then the Act is unenforceable. Instead, the memorandum urges the Governor to ask the FBI to reconsider its position and grant Nevada "partial" POC status. As noted above, as a policy matter, the Governor certainly may do so. But the July memorandum provided to the Governor contains several key errors that should be corrected so that the Governor, in considering whether to approach the FBI again, does so based on accurate information. Specifically, the memorandum argues that the FBI has allowed "partial" POC status to other states, and Nevada would only be asking for the same treatment. This ignores that the type of "partial" POC status that Nevada would be asking for would be, as far as we can tell, unique and unprecedented—which is presumably why the FBI rejected DPS's initial request in December. The memorandum also incorrectly asserts that the Attorney General led the Department of Public Safety to refuse to perform voluntary checks requested by private sellers. In fact, months ago this office advised the opposite.

ANSWER TO QUESTION

Yes. Nevada can, as a matter of policy, attempt to change its Point of Contact status to "partial." For this to be effective, the FBI would have to cooperate with Nevada and perform the checks required by the Act. Presumably, the Department of Public Safety, after the Act was approved, did ask the FBI whether it would perform such checks. But

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the FBI, in two different letters, refused such a request, concluding that states can conduct more comprehensive background checks and that state laws “cannot dictate how federal resources are applied.” The FBI declared the background checks required by the Act to be the “responsibility of the state of Nevada.” Dec. 14, 2016 FBI Letter to DPS, at 2.

In June 2017, Nevadans for Background Checks offered you a memorandum explaining how the group believes that the Act might be implemented despite the FBI’s stated unwillingness to perform the background checks in the manner required by the Act. The memorandum urges you to proceed by “pushing” the FBI to reverse its position and concludes that the Act’s enforcement is “possible” if the FBI “change[s] its mind.” Memo at 1, 3, 7, 12, 15. The memorandum is emphatic that the decision whether to ask the FBI to change its position is a policy choice entrusted to you. It points out, for instance, that Nevada’s POC status is determined by Nevada’s governor. Memo at 2, 11, 13. The authors of the memorandum claim that when they met with your staff in May, they “urge[d] you to take action” and see “no reason why” you have not yet acted on their request.

Just as there were no legal impediments preventing the original DPS inquiry of the FBI concerning the FBI’s willingness to perform the checks contemplated by the Act, there is no law or legal principle that would bar you from renewing that inquiry and implementing, through an executive order, any resulting modifications to Nevada’s current status as a full POC state.

We agree with Nevadans for Background Checks that our December 2016 opinion does not limit your POC discretion or otherwise restrict your authority to re-approach the FBI with a proposed policy solution to the legal predicament that was explained in the AG’s opinion. In fact, the memorandum’s authors do not dispute our basic conclusion that the Act is unenforceable, given the FBI’s position and the Act’s prohibition on DPS performing the required background checks. The memorandum states only that our office did not “analyze” certain policy options that are self-evidently beyond the scope of the initial opinion request and beyond the authority of this office to implement in any event. In short, the memorandum states that you confront not a legal problem, but a policy one.

Nevertheless, to ensure that your decision is based on an accurate understanding of the legal background, we address several key errors in the memorandum from Nevadans for Background Checks.

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First, the memorandum argues that multiple states have “partial” POC status and, thus, Nevada can simply ask for the same treatment. The problem, however, which the memorandum ignores, is that the “partial” designation for all other states that currently fall in that category simply means that the state takes on *some* of the checks required by federal law and leaves the FBI to perform the rest. (Non-Point of Contact states leave *all* of the federal checks to the FBI.) The key fact, with any POC program, is that at issue are only *federally required* background checks. Here, by contrast, Nevadans for Background Checks seeks to have you urge the FBI to conduct background checks required not by federal but by state law, while Nevada continues performing *all* of the checks required by federal law. In this arrangement, the only role for the FBI would be conducting background checks that are not required by federal law. This would be a new arrangement. It has no analogy to other “partial” POC states.

The group’s memorandum appears to acknowledge that it is urging Nevada to seek to be the “first partial POC state to divide responsibility for background checks” between firearm sales by private individuals (to be conducted by the FBI) and firearm sales by federally licensed dealers (to remain conducted by Nevada). Memo at 10. The memorandum quotes the FBI stating, in a letter to Nevada officials, that the Act presents a “brand new situation for the FBI.” Memo at 12 n.27. But the real problem, which the memorandum fails to acknowledge, is that the check for private individual sales is a state-law requirement, not a federal one. This distinction is crucial. It is the very reason the FBI rejected DPS’s request to have the FBI perform background-check requests made under the Act: the Act seeks to impose on the FBI a new obligation to perform a check required by *state* law alone. Dec. 14, 2016 FBI Letter to DPS, at 2.

Second, the memorandum from Nevadans for Background Checks claims that Attorney General Opinion No. 2016-12 “led DPS to determine that private persons can no longer even *voluntarily* request that Nevada’s agency conduct background checks for persons to whom the private person wants to sell a firearm.” Memo at 2, 7. This is wrong—and misleading to the extent that it has been reinforced through public statements. The authors of the Nevadans for Background Checks memorandum seem unaware that our office provided DPS with a legal memorandum in January of this year that explains why the Central Repository may *continue* to perform voluntary background checks on private sales. Memo from Katie Brady, DAG, to Mindy McKay, DPS, Jan. 27, 2017. This memorandum was issued six months before Nevadans for Background Checks sent you its

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memorandum. We issued that guidance to help address the considerable confusion that the Act introduced into existing Nevada firearms law.

Lastly, the background checks currently performed by Nevada's Central Repository for firearms transactions—both those required by federal law and those voluntarily sought for private purchases—are generally considered a superior background check to that performed by the FBI through the NICS system alone. For instance, the FBI noted that "POCs have access to more current criminal history records and more data sources (particularly regarding non-criminal disqualifiers such as mental hospital commitments) from their own state than does the FBI." FBI Letter, at 1-2. Thus, any change to Nevada's system that jeopardizes its current status as a full POC state for all federally required background checks, and all voluntary background checks, would be trading a superior, safer system for an inferior, less comprehensive one. This is an important policy consideration that should be weighed against competing policy considerations, including those advanced by the Nevadans for Background Checks.

Thank you for reaching out to our office and requesting an opinion on this important issue.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:



Gregory L. Zunino
Bureau Chief

GLZ/klr