


STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY

To: Colonel Nathan Noyes
From: Commissioner Robert L. Quinn 
Date: January 11, 2021
Re: Gun Line and Background Checks

A. Introduction

It is evident that the Permits and Licensing Unit of the Division of the State Police must immediately change its procedures in order to fulfill its mission and best serve the public. This memorandum sets forth revisions to those procedures and the reasons for making these changes.

B. Background

Since 1968, federal law has prohibited certain individuals from possessing firearms. *See* 18 U.S.C. § 922(g). In 1993, Congress required the U.S. Attorney General to establish the National Instant Criminal Background Check System (“NICS”) to provide a means by which a federal firearms licensee (“FFL”) may obtain immediate information about whether an individual seeking to purchase a firearm is disqualified from doing so under 18 U.S.C. § 922(g). NICS is operated by the Federal Bureau of Investigation’s (“FBI”) Criminal Justice Information Services Division.

Federal law permits a state or local law enforcement agency to serve as a “point of contact” (“POC”) to conduct background checks. *See, e.g.*, 28 C.F.R. § 25.2. A POC serves as an intermediary between the FFL and the federal databases checked by the NICS. *Id.* POCs are authorized to receive NICS background check requests from FFLs, perform NICS inquiries, check state or local record systems, and determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under federal or state law. *Id.*; *see also* 28 C.F.R. § 25.6 (e) (“Upon receiving a request for a NICS background check, POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems.”). POCs respond to FFLs regarding the results of the records checks. *Id.*

Pursuant to state law, the Department of Safety (“DOS”) is authorized to be a POC. *See* RSA 159-D:1 (“The department of safety may become the point of contact for the federal government for the purposes of the National Instant Criminal Background Check System (NICS).”). Since approximately 1999, DOS has served as a “partial POC” in that an FFL

contacts the state for handgun purchases and contacts the FBI for all other firearms purchases. The Permits and Licensing Unit of the Division of State Police fulfills this role by operating what is commonly referred to as the “Gun Line.”

POCs must access the NICS as part of their background check process. *See* 28 C.F.R. § 25.6 (d). When the NICS receives an inquiry from a POC, it will search the same three databases used by the FBI for non-POC searches: the NICS Index,¹ the National Crime Information Center (“NCIC”) database,² and the Interstate Identification Index (“III”).³

In addition to accessing these databases through NICS, the Permits and Licensing Unit has also searched: the New Hampshire Criminal History Record database established pursuant to RSA 106-B:14, and a criminal record check in the state of birth of the prospective purchaser and any state in which the individual has a dual residency. The Permits and Licensing Unit will also check the NCIC database as well as a list provided by the New Hampshire Circuit Court Administrative Office for domestic violence orders that are disqualifying under New Hampshire state law.

Under federal law, a response to the FFL must be communicated within three (3) business days as either approved, denied, or delayed. If an inquiry has been moved to “DELAYED” status, an FFL has the ability to transfer the firearm after the third business day. It is the Gun Line’s practice to continue to research all cases in delayed status indefinitely and until the matter is resolved through an approval or denial. The FBI, on the other hand, will only follow up on a case in delayed status for 88 days at which time the NICS transaction number expires and the request is purged from its database.

Circumstances warrant immediate changes to current Permits and Licensing Unit procedures. Over the past decade the Permits and Licensing Unit has faced a significant increase in background checks. From 2012 to February 2020, the Permits and Licensing Unit has experienced a 14.27% average increase in volume. There was a peak increase of 33.37% increase between 2012 and 2016.

¹ The NICS Index is a database created for NICS. It contains information contributed by federal, state and local law agencies “pertaining to person prohibited from possessing or receiving a firearm pursuant to federal and/or state law.” National Instant Background Check System, *2019 Operations Report*, at p. 1. As of December 31, 2019, there were 20,929,713 available NICS Index records to be searched by NICS. *Id.*

² The NCIC contains records of “wanted persons, subjects of protection order, and other persons who may pose a threat to officer and public safety. National Instant Background Check System, *2019 Operations Report*, at p. 1. As of December 31, 2019, there were 6,946,803 available NCIC records to be searched by NICS. *Id.*

³ The III “provides access to criminal history records.” National Instant Background Check System, *2019 Operations Report*, at p. 1. As of December 31, 2019, there were 80,212,432 available III records to be searched by NICS. *Id.*

More recently, after the beginning of the COVID-19 pandemic in March of 2020, the Permits and Licensing Unit has seen a significant increase in gun sales when compared to the previous year. In 2019, the Permits and Licensing Unit received 53,010 requests through the Gun Line. In 2020, the Unit received 86,570 requests. In 2020, the average daily calls to the Gun Line increased by 92 calls per day when compared with 2019.

The Unit operates seven days a week; its hours of operation are Monday through Saturday 9:00 am until 8:00 pm and Sundays from 9:00 am until 6:00 pm. The Unit typically consists of one supervisor, six full-time Program Assistants II, and one part-time Program Assistant II. To augment the force due to the increase in demand, the Division has temporarily assigned eight state troopers.

These circumstances have resulted in considerable delays in processing FFL requests. This situation must be immediately addressed in order to achieve the objective of providing an immediate response to the FFL.

In a December 23, 2020 memorandum, I set forth new interim procedures governing the Permits and Licensing Unit.⁴ Those procedures eliminated the Unit's practice of conducting a criminal record check in the state of birth and any state in which the individual has a dual residency, as that practice results in considerable delays. The changes were a result of the careful consideration of the following factors:

First, current procedures undermine the stated purpose of the NICS: to provide an immediate determination of whether a commercial transaction would violate federal law. The U.S. Attorney General requires the FBI to maintain a 90 percent or better rate of immediate determination. *See National Instant Background Check System, 2019 Operations Report*, at p. 14. An immediate determination reflects the significant interests in vindicating the purchaser's constitutional rights, as well as fairness to the FFL. Indeed, the delays associated with the current system present a significant litigation risk. The Division's inability to keep pace with the requests for criminal background checks for the transfer of firearms puts the Division, the Department, and the State at risk of costly litigation in the form of a constitutional challenge of infringing upon a person's Second Amendment rights to purchase firearms.

Second, there is no state or federal law or regulation that requires DOS to conduct a search of a purchaser's state of birth or dual residency or to conduct an indefinite search of cases in delayed status. The Permits and Licensing Unit developed these procedures on its own initiative at a time when volumes of background check requests and staffing levels were at parity and the Permits and Licensing Unit's response times were, for the most part, more timely than they are today.

Third, given the breadth of the three NICS database checks, *see* notes 1-3, *supra*, it is unlikely that the additional search would systematically yield additional information that would result in determining that the transaction would violate federal law.

⁴ This document replaces and supersedes the December 23, 2020 memorandum.

Fourth, the current procedures strain the resources assigned to the Permits and Licensing Unit. Those resources would be better utilized to expedite resolution of transactions in delayed status as a result of other database searches.

The interim procedures set forth in my memorandum of December 23, 2020 have already shown positive results. As of this past weekend of 1/2/21-1/3/21, most of the backlog for requests in delay status has been eliminated, and the average processing time for those requests not in delay status has been reduced to 15-30 minutes per request. Based on these results and the other considerations set forth in my December 23, 2020 memorandum and this memorandum, I have determined that the interim procedures set forth in my December 23, 2020 memorandum should be adopted on a permanent basis. In addition, I am also now directing that the Permits and Licensing Unit cease its current practice of researching cases in delayed status indefinitely. Instead, the Permits and Licensing Unit will adopt the FBI's practice of following up on a case in delayed status for 88 days at which time the NICS transaction number expires and the request is purged from its database.

In coming to this conclusion, I have weighed alternatives and the corresponding risks. First, whether the State should transfer this responsibility to the FBI. However, state law prohibits firearm sales to individuals under an *ex parte* domestic violence protective order, while federal law only restricts firearm sales in such instances after the person received actual notice and an opportunity to participate in a hearing. RSA 173-B:4, II; 18 U.S.C. § 922 (g)(8). To accommodate this difference in the law, the New Hampshire Judicial Branch provides a list of currently active domestic violence orders which is reviewed by the Permits and Licensing Unit in conducting a background investigation. Maintaining this current practice as the partial POC not only benefits public safety, but ensures the continued enforcement of RSA 173-B:4, II.

Second, whether the state should increase the staff level assigned to the Permits and Licensing Unit. The recent redeployment of additional personnel to assist the Gun Line has not, by itself, had an appreciable effect in either reducing the wait time for a background check or the number of individuals placed in a delayed status. Both the wait times and the backlog of individuals in a delayed status are not caused by staff levels alone. The Permits and Licensing Unit's practice of conducting criminal background checks of an applicant's state of birth and any state in which the individual has a dual residence often contributes to the backlog of people placed in delayed status due to the lack of a timely response from the other state. Moreover, this practice is largely duplicative of running a check of the federal databases, thereby reducing the efficiency of the staff and, in turn, contributing to the increase in wait times. Even if more staff were assigned to the Permits and Licensing Unit to perform this otherwise *discretionary* function, it would continue to divert its scarce resources away from its core mission, i.e. to perform its federally *mandated* functions in a timely and efficient manner as a partial POC and to fulfill the statutory obligations under RSA 173-B:4, II. Therefore, in light of the historical increase in volumes of background checks, for the indefinite future it would be a more efficient use of state resources to deploy any existing and additionally assigned staff to conduct its state and federal duties, rather than continuing a practice that is not required by law.

C. Policy

Effective January 11, 2021 at 5:00 p.m., the following policy shall apply on a permanent basis to all criminal background checks conducted for commercial handgun purchases in the State of New Hampshire:

- It shall be the goal of the Permits and Licensing Unit to perform an instantaneous check in no less than 90% of commercial handgun purchases.
- The Permits and Licensing Unit shall operate as a Partial Point of Contact by conducting criminal record checks for commercial handgun purchases. The Permits and Licensing Unit will follow protocols instituted by the FBI. Specifically, the Permits and Licensing Unit will:
 - Conduct a background check using the NICS, NCIC, and III databases. 28 C.F.R. §25.6 (f);
 - Conduct a background check using the New Hampshire Criminal History Record database established pursuant to RSA 106-B:14;
 - Conduct a review of the list of individuals produced by the New Hampshire Judiciary who currently have a Domestic Violence Protection Order issued against him or her. RSA 173-B:4, II & RSA 173-B:5, II;
 - Pursuant to FBI policy, if a search of any of the above records or databases reveals a potentially disqualifying offense or potentially disqualifying criminal activity, the Permits and Licensing Unit will request criminal record information about the offense from the applicable state; and
 - Pursuant to FBI policy, if a search of any of the above records indicate that there is an active warrant to arrest the individual, the Permits and Licensing Unit must obtain records to determine whether the individual meets the “fugitive from justice” disqualifier. Pursuant to the FBI’s guidance, a person is a fugitive from justice if the person: (1) fled the State; (2) with a purpose to avoid prosecution for a crime or to avoid giving testimony in a criminal proceeding; and (3) is subjected to a current or imminent criminal prosecution or testimonial obligation.

In addition, effective immediately:

- Pursuant to FBI policy, the Permits and Licensing Unit shall cease research of requests in delayed status after 88 days and the NICS transaction number will expire. The Division, acting in conjunction with the Secretary of State’s Office, will adjust its record retention period to 88 days, after which any records must be purged.