

# TORRANCE POLICE DEPARTMENT

## INTRA-DEPARTMENTAL CORRESPONDENCE

**TO:** Chief Mark Matsuda **DATE:** February 27, 2015

**FROM:** Capt. Ross Bartlett  
Administrative Bureau Commander

**SUBJECT:** Change in Procedure of Handling of Firearms pursuant to *Roberts v. Matsuda, et al.*

### INTRODUCTION

Michael Roberts filed a lawsuit against members of the Torrance Police Department after firearms he voluntarily relinquished pursuant to a valid restraining order were destroyed three years after relinquishment although Mr. Roberts sought their return after there was no longer a valid restraining order against him.

### BACKGROUND AND ANALYSIS

On February 26, 2010, David Roberts turned in twenty-one (21) firearms (handguns, shotguns, and rifles) for his brother, Michael Roberts ("Roberts"), the plaintiff in the above-referenced action, pursuant to a valid temporary restraining order. According to court records, the hearing scheduled for March 8, 2010 was taken off calendar at the request of the petitioner and was ultimately dismissed for lack of prosecution. Over two years later, on May 9, 2012, Plaintiff sought and received a court order for the return of his firearms "pursuant to California Penal Code Section 33850 et seq. and TPD is to follow orders/directives of the Department of Justice regarding the return of any firearms."<sup>1</sup>

On May 23, 2012, one of our services officers spoke to Plaintiff's girlfriend, Elaine Farmer regarding Roberts' firearms. Ms. Farmer stated that she and Roberts had received the Department of Justice release authorization dated May 14, 2012. That services officer informed Ms. Farmer that only four (4) firearms were currently registered and that Roberts would need to register the remaining firearms or show proof of ownership before the police department could release the firearms. The services officer also informed Ms. Farmer that one of the firearms would not be released at all because it was an assault rifle. Roberts picked up the four firearms that were registered to him and was given the necessary paperwork to have the other firearms registered on June

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<sup>1</sup> Court Order of the Superior Court of the State of California for the County of Los Angeles, Case No. 0SY03397, dated May 9, 2012 signed by Commissioner Brad M. Fox.



12, 2012. In February of 2013, another services officer assigned to the Property Room asked the detective assigned to the case if the firearms could be scheduled for destruction since there had been no contact from Roberts since June of 2012. The detective informed the services officer that there was no longer a valid restraining order and that since it had been over six months since the last contact with Roberts, the firearms could be scheduled for destruction. After no further contact from Roberts, the remaining firearms were destroyed on April 18, 2013.

Our personnel relied on the information provided by the California Department of Justice ("DOJ") in retaining Roberts' firearms in this matter. One of the documents provided by the DOJ stated that "[i]t is the responsibility of the court or law enforcement agency with custody or control of the firearm to verify that the applicant is the lawful owner or possessor of the firearm." Additional statements from the DOJ included, but were not limited to, "[i]n the case of a long-gun that is not recorded in Automated Firearms System ("AFS"), the long-gun can be returned to a person who is not listed in AFS as the owner/possessor of the long-gun because AFS generally does not include ownership/possession information about long guns... The person seeking return of a long-gun not recorded in AFS must present proof of ownership, such as a sales receipt from a licensed firearms dealer, or other *bonafide* evidence the long gun was sold or transferred to him or her in compliance with state and federal law."

However in a similar lawsuit with the cities of Oakland and San Francisco, the United States District Court dismissed the DOJ from the lawsuit because it is immune from suit under the Eleventh Amendment. (*Churchill v. Harris, et al.* 12-cv- 01740-LB, Doc. 30, p. 11.) Soon thereafter, the cities of San Francisco and Oakland settled the claims against them and revised their policies concerning the return of confiscated firearms.

## RECOMMENDATIONS

Based on the forgoing and with the concurrence of the City Attorney's office, the Research and Training Division suggests the following procedures be implemented in the Property Division of the Torrance Police Department:

- 1. In all situations where firearms are taken into custody (surrendered or seized), a receipt shall be issued to the person who possessed the firearms listing every firearm and any serial number or other identification on the firearms.***

Reasoning: The forgoing is a requirement located in Penal Code section 33800. This protects the Department against disputes relating to the number and types of firearms seized. At no time should firearms be taken into custody without a receipt being issued to the possessor.



**2. *Surrendered or seized firearms are to be entered on a temporary basis into the Department of Justice's ("DOJ") 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 sought to establish a chain of ownership for later retrieval of the firearms if the firearms are eligible to be retrieved.

**3. *Torrance Police Department 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 Department receives information that any firearms taken into custody were reported lost or stolen, the Department 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 Department also has an affirmative obligation to run the firearm through AFS under Section 33855 to determine if the firearm is stolen. If the firearm is no longer needed as evidence in an active investigation, the Department is obligated to inform the owner of its eligibility for retrieval under Sections 11108.5 and 1417.5.

**4. *Once it is determined that a firearm is no longer needed for an active case or investigation by the Department, 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 Department and can be returned to the individual, the Department shall provide notice to the individual who surrendered or had the firearm seized of the availability of the firearm for retrieval from the Department. 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 (DMV). 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 Department. The notice shall also state that if the individual does not contact the Department 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 Department, including its destruction, can be undertaken by the Department until 180 days after such notice has been given and the Department has thereafter reasonably determined that the firearm is unclaimed.

**5. Once the Department has provided notice to an individual of the availability of a firearm to be retrieved, the Department shall wait a minimum of 180 days before taking any further action on the firearm, including its destruction. If the Department receives written or verbal notice from the individual that he or she is claiming the firearm, the Department should stay any further action on the handling or destruction of the firearm for 180 days from the date the department 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 Department should consult with the City Attorney's office 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 then delays in effecting the firearm's retrieval, the City Attorney's office should be consulted to ensure that Section 33875 is not violated by the subsequent handling or destruction of the firearm.

**6. If an individual seeks return of a firearm, that individual is required to present a Law Enforcement Gun Release ("LEGR") response letter from the DOJ to the property officer that specifically references the subject firearm. The LEGR letter will inform the Department 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 Department.**

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.



**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 Department has no other independent information that the firearm has been reported lost or stolen, or is owned by another individual, the Department 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 Department'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 Department under the Penal Code other than the aforementioned requirement under Section 33855 for the Department 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.

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). It argued that any monetary liability for police departments in those cities who refused to return firearms to owners should be confined to 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 before releasing the firearms 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.

Given the DOJ's position in *Churchill* characterizing their statements in the LEGR letter as non-binding opinion, the City and Department would invite further legal liability by continuing to follow the instructions in the LEGR release letter of seeking additional proof of ownership or requiring registration within AFS as a condition of releasing an eligible firearm to an eligible individual.


In many instances with handguns, and in almost all instances with long guns, the Department should not reasonably expect to find any prior proof of ownership within AFS of such firearms by the individual who surrendered or had firearms seized by the Department, and so attempts to establish ownership through AFS are not a reliable method for establishing ownership. This is because of the nascent nature of laws requiring firearms registration. While most firearms purchased from dealers were registered to the purchaser the records created before the electronic system was put in place are often unavailable. For years private party transfers and transfers between immediate family members were allowed without the current requirement of a firearm dealer middleman or registration, respectively. There are, therefore, potentially numerous 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 acquired from a dealer until last year. Thus, the Department should expect that a significant number of all long guns that are surrendered or seized **will not** show up in AFS evidencing chain of ownership. Under Evidence Code section 637, and in the absence of any other information that the firearm has been reported as lost or stolen, the Department 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.

## CONCLUSION

Thus, recommend that Research and Training Division assist the Property Division in revising the Property Division Procedure Manual to include the foregoing recommendations and that affected personnel, sworn and non-sworn, be trained on such procedure.

Respectfully submitted,



Capt. Ross Bartlett

Administrative Bureau Commander

Concur:



John L. Fellows III

City Attorney