

RULES AND REGULATIONS

Title 37—LAW

STATE POLICE

[37 PA. CODE CH. 33]

Procedures and Specifications for Firearm Record Forms under the Uniform Firearms Act

The State Police amends § 33.103 (relating to confidentiality) to read as set forth in Annex A.

Effective Date

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

Statutory Authority

This final-form rulemaking is authorized under 18 Pa.C.S. § 6111.5 (relating to rules and regulations), which authorizes the State Police to promulgate regulations as necessary to carry out the provisions and intent of 18 Pa.C.S. §§ 6101—6127 (relating to Pennsylvania Uniform Firearms Act of 1995). Section 111(b) of the Mental Health Procedures Act (MHPA) (50 P.S. § 7111(b)) authorizes disclosure of mental health records information by the State Police.

Background and Summary

Under 18 Pa.C.S. § 6111.1(a) (relating to Pennsylvania State Police), the State Police is charged with the responsibility to administer 18 Pa.C.S. §§ 6101—6127. This charge has been described as “broad authority” for the purpose of “ensur[ing] public safety and welfare by keeping firearms out of the hands of dangerous individuals.” *In re Expungements*, 938 A.2d 1075, 1080—82 (Pa. Super. Ct. 2007). Section 6105(a)(1) and (c)(4) of 18 Pa.C.S. (relating to persons not to possess, use, manufacture, control, sell or transfer firearms) prohibits an individual who has been adjudicated as an incompetent or who has been involuntarily committed to a mental health institution for inpatient care and treatment under the MHPA from possessing, using, controlling, selling or manufacturing a firearm or obtaining a license to possess, use, control, sell, transfer or maintain a firearm in this Commonwealth. Furthermore, the possession of a firearm by the mentally ill is regulated by section 902(g)(4) of the Gun Control Act of 1968 (18 U.S.C.A. § 922(g)(4)), and essentially every state in the country.

Records regarding mental health commitments under the MHPA are confidential and are generally not subject to disclosure except as provided by law. Section 111(a) of the MHPA provides that all documents regarding persons in treatment shall be kept confidential and may not be released or their contents disclosed without that individual’s written consent. Section 111(b) of the MHPA provides an exception to this general rule that enables the State Police to obtain mental health records information, and disclose this information to any person, to administer 18 Pa.C.S. § 6105(c)(4), which prohibits an individual who has been adjudicated as an incompetent or who has been involuntarily committed under the MHPA from, among other things, possessing a firearm. See *Commonwealth v. Emmil*, 866 A.2d 420, 422 (Pa. Super. Ct. 2005) (“[t]he MHPA permits the State Police to obtain specific mental health records in order to ensure that Section 6105 is not violated.”). This exception allows the State Police to keep firearms out of the hands of individuals who have been adjudicated incompetent or involuntarily committed un-

der the MHPA by allowing direct access to the mental health records information that evidence the prohibiting event.

The State Police obtains mental health records information because section 109(d) of the MHPA (50 P.S. § 7109(d)) and 18 Pa.C.S. § 6111.1(f) require judges and certain mental health officers and administrators to notify the State Police regarding an individual’s involuntary commitment or incompetency adjudication within 7 days of its occurrence. This notice is a one-page form consisting of biographic information (not a copy of actual record of commitment or adjudication) and is used to create the State Police Mental Health Database for purposes of administering the firearm prohibition in 18 Pa.C.S. § 6105(c)(4).

The State Police’s regulations did not clearly provide for the permitted use of the confidential information consistent with the authorized use in section 111(b) of the MHPA. Section 33.103(e), which concerns the confidentiality of mental health records information, formerly only authorized the mental health records information to be used by the State Police for the purpose of determining whether a person applying to obtain a firearm or license to carry a firearm is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm. Section 111(b) of the MHPA, however, provides for a broader permissible use of this information and authorizes the State Police to disclose the information to any person to ensure compliance with 18 Pa.C.S. § 6105(c)(4). The lack of symmetry between former § 33.103(e) and section 111(b) of the MHPA may have been interpreted to prevent the State Police from using mental health record information for other purposes that are consistent with the 18 Pa.C.S. §§ 6101—6127 and the MHPA, but which are not seeking to obtain a firearm from a dealer or the issuance of a license to carry through the county sheriff.

The following are two examples for which the State Police would be using the information in the State Police Mental Health Database consistent with the authorization in section 111(b) of the MHPA, but which were not within the permitted use of this information under former § 33.103(e). First, it is consistent with section 111(b) of the MHPA for the State Police to query the State Police Mental Health Database in conducting a background check to determine whether local law enforcement officers, or candidates for those positions, are prohibited from possessing a firearm under 18 Pa.C.S. § 6105(c)(4). This is particularly important for a department prior to hiring an officer and issuing the officer a department-owned firearm. Allowing a police officer to possess a firearm when the officer has been adjudicated as incompetent, or involuntarily committed to a mental institution, has the potential to place residents in this Commonwealth at risk, not to mention allowing an individual to violate State or Federal firearms laws, or both.

Additionally, it is consistent with section 111(b) of the MHPA for the State Police to query the State Police Mental Health Database to assist police officers who identify a specific investigative need, in the course of an investigation under 18 Pa.C.S. §§ 6101—6127, to determine if a person is prohibited from possessing a firearm due to being adjudicated as an incompetent or

having been involuntarily committed under the MHPA. In many cases, officers are unable to conclusively determine if a person has been subject to a disqualifying adjudication or commitment, without checking the person against the State Police Mental Health Database, to determine if a mental health prohibition exists. Over the past two decades, there have been many highly publicized incidents when individuals possessed firearms, even though they had a mental health history that would have otherwise prohibited possession. Without information confirming that a person is prohibited under 18 Pa.C.S. §§ 6101—6127 from possessing firearms for mental health reasons, officers may be unable to take the necessary steps to seize firearms or make an arrest, or both.

The amendment to § 33.103(e) provides clarity and allows the State Police to clearly and fully utilize its lawful authority under the MHPA to protect the public from individuals who are prohibited from possessing a firearm due to an adjudication of incompetency or an involuntary commitment to a mental health institution.

Description of this Final-Form Rulemaking

This final-form rulemaking amends § 33.103(e) to bring it in line with the permitted use of mental health record information by the State Police under section 111(b) of the MHPA. As previously discussed, § 33.103(e) formerly authorized the mental health records information to be used by the State Police “only” for the purpose of determining whether a person applying to obtain a firearm or license to carry a firearm is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm. Section 111(b) of the MHPA provides for a broader permissible use of this information and authorizes the State Police to disclose the information to any person to ensure compliance with 18 Pa.C.S. § 6105(c)(4).

Accordingly, the State Police amends § 33.103(e) to provide for the permitted exceptions to the general rule of confidentiality for mental health records information maintained by the State Police under the MHPA and 18 Pa.C.S. §§ 6101—6127. Section 33.103(e)(1) contains the regulatory language concerning the permitted use for a person applying to obtain a firearm or license to carry a firearm; “only” is deleted because these two uses are not the only exceptions provided by law. Section 33.103(e)(2), which provides that the State Police may disclose the information in accordance with section 111(b) of the MHPA, creates consistency and aligns the regulation with the permitted use of mental health record information by the State Police under the MHPA. By directly tying the regulation to the MHPA, prior ambiguity caused by the interplay of the regulation and the MHPA as to the State Police’s ability to use the State Police Mental Health Database consistent with the MHPA is removed.

Response to Comments

Notice of proposed rulemaking was published at 48 Pa.B. 297 (January 13, 2018), with a 30-day public comment period. No comments were received from the public, the Independent Regulatory Review Commission (IRRC) or the General Assembly.

Fiscal Impact and Paperwork Requirements

This final-form rulemaking will not have adverse fiscal impact on the Commonwealth or its political subdivisions. This final-form rulemaking will not have additional paperwork requirements upon the Commonwealth, political subdivisions or the private sector.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on January 3, 2018, the State Policy submitted a copy of the notice of proposed rulemaking, published at 48 Pa.B. 297, to IRRC and the Chairpersons of the Senate Law and Justice Committee and the House Judiciary Committee for review and comment.

Under section 5(c) of the Regulatory Review Act, the Department is required to submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 27, 2018, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC effective June 27, 2018.

Additional Information

Additional information may be obtained from Sergeant Patrick Beaver, Regulatory Coordinator, Policy and Legislative Affairs Office, Pennsylvania State Police, (717) 705-1749, pbeaver@pa.gov and Assistant Counsel John J. Herman, Office of Chief Counsel, Pennsylvania State Police, (717) 783-5568, johnherman@pa.gov.

Findings

The State Police finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of the act of July 31, 1968 (P.L. 769, No. 240) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law.
- (3) This final-form rulemaking does not include amendments that would enlarge the scope of proposed rulemaking published at 48 Pa.B. 297.
- (4) The final-form rulemaking adopted by this order is necessary and appropriate for the administration of 18 Pa.C.S. §§ 6101—6127.

Order

The State Police, acting under the authorizing statutes, orders that:

- (a) The regulations of the State Police, 37 Pa. Code Chapter 33, are amended by amending § 33.103 to read as set forth in Annex A.
- (b) The State Police will submit this order and Annex A to the Office of General Counsel and Office of Attorney General as required by law for approval as to form and legality.
- (c) The State Police shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (d) The final-form rulemaking shall take effect upon publication in the *Pennsylvania Bulletin*.

LIEUTENANT COLONEL ROBERT EVANCHICK,
Acting Commissioner

(Editor’s Note: See 48 Pa.B. 4189 (July 14, 2018) for notice of IRRC’s deemed approval.)

Fiscal Note: Fiscal Note 17-85 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 37. LAW

PART I. STATE POLICE

CHAPTER 33. PROCEDURES AND
SPECIFICATIONS FOR FIREARM RECORD
FORMS UNDER THE UNIFORM FIREARMS ACT

GENERAL

§ 33.103. Confidentiality.

(a) Information furnished under this chapter by an applicant, purchaser, transferee or licensee, or collected by the designated issuing authority under this chapter, is confidential and not subject to public disclosure.

(b) Information collected or maintained under this chapter by the State Police is confidential and not subject to public disclosure.

(c) Nonpublic disclosure by the State Police of information collected, furnished or maintained under this chapter is restricted to:

(1) Disclosure upon request of the applicant, licensee, purchaser or transferee, as described in sections 6109 and 6111 of the act (relating to licenses; and sale or transfer of firearms), upon documentary certification that the requestor is in fact the applicant, licensee, purchaser or transferee.

(2) Disclosure upon request of a county sheriff or a criminal justice agency, defined as any court, including the minor judiciary, with criminal jurisdiction or any other governmental agency, or subunit thereof, created by statute or by the State or Federal constitution, specifically authorized to perform as its principal function the administration of criminal justice, and which allocates a substantial portion of its annual budget to this function.

Criminal justice agencies include: organized State and municipal police departments, local detention facilities, county, regional and State correctional facilities, probation agencies, district or prosecuting attorneys, parole boards, pardon boards and agencies or subunits thereof, as are declared by the Attorney General to be criminal justice agencies as determined by a review of applicable statutes and the State or Federal Constitution, or both.

(d) No disclosure of information forwarded, collected or maintained under this chapter will be made to requests of noncriminal justice agencies, or individuals other than the applicant, licensee, purchaser or transferee as described in sections 6109 and 6111 of the act.

(e) Mental health records information received or maintained by the State Police under section 6111.1(b) and (f) of the act (relating to Pennsylvania State Police) and section 109(d) of the Mental Health Procedures Act (50 P.S. § 7109(d)) are confidential and not subject to disclosure, except for all of the following:

(1) The information will be available to the State Police for the purposes of determining, under sections 6109(d) and 6111.1(b) of the act, if the potential applicant is prohibited from possessing, using, controlling, selling, transferring or manufacturing a firearm, or obtaining a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth, as defined under Federal or State law, and for the purpose of informing the licensee/sheriff making inquiry under sections 6109(d) and 6111.1(b)(iii) of the act.

(2) The State Police may disclose the information in accordance with section 111(b) of the Mental Health Procedures Act (50 P.S. § 7111(b)).

[Pa.B. Doc. No. 18-1317. Filed for public inspection August 24, 2018, 9:00 a.m.]