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ATTORNEY GENERAL OPINION NO. 2022-01

September 1, 2022

Robert L. Quinn, Commissioner
New Hampshire Department of Safety
James H. Hayes Safety Building
33 Hazen Drive
Concord, NH 03305

RE: Guidance on RSA Chapter 159-E (HB 1178)

Dear Commissioner Quinn:

You have requested that the Department of Justice (DOJ) provide a legal opinion regarding the scope and meaning of the bill commonly referred to as HB 1178 (2022). This letter responds to that request. To assist law enforcement with the day-to-day implementation of HB 1178, the DOJ has also provided guidance to all State and local law enforcement officers in the form of Frequently Asked Questions (FAQs). These FAQs have been posted to the DOJ's website and will be updated periodically to respond to additional questions that may arise. While these FAQs are intended to be the primary tool for guiding law enforcement officers and the public in the implementation of HB 1178, this opinion letter provides the legal analysis that underlies the answers to those FAQs.

INTRODUCTION

HB 1178 enacts RSA Chapter 159-E. It contains two substantive sections. The first, RSA 159-E:1, provides that any "political subdivision of this state, or any person acting under the color of state, county, or municipal law shall be prohibited from using any personnel or financial resources to enforce, administer, or cooperate with any law, act, rule, order, or regulation of the United States Government or Executive Order of the President of the United States that is inconsistent with any law of this state regarding the regulation of firearms[.]" The second section, RSA 159-E:2, enumerates a number of exceptions to the above general rule. Analysis of each section follows.

ANALYSIS

I. **Applicability of RSA 159-E:1**

In order for conduct to be prohibited by RSA 159-E:1, three conditions must be met:

1. The prohibition in this section applies to “personnel or financial resources” of “the state of New Hampshire, [any] political subdivision of this state, or any person acting under the color of state, county, or municipal law.”¹ RSA 159-E:1. Political subdivisions of the state include any county or municipal governmental entity.
2. The governmental entity must have engaged in conduct to “enforce, administer, or cooperate with any law, rule or regulation of the United States Government.”² Id.
3. Such conduct is barred only if it is “inconsistent with any law of this state regarding the regulation of firearms.” Id.

These last two conditions are discussed further below.

If all three of the above conditions are met, then the prohibition set forth in RSA 159-E:1 would apply, except as authorized in RSA 159-E:2, which is discussed in more detail below. If any of the above three conditions are not met, then the prohibition in RSA Chapter 159-E:1 would not apply to the particular conduct.

a. **“Enforce, administer, or cooperate”**

RSA 159-E:1 prohibits “enforc[ing], administer[ing], and cooperat[ing] with any [federal] law” that is inconsistent with New Hampshire laws regarding firearms. None of these three terms – enforce, administer, or cooperate – are defined in RSA Chapter 159-E. Undefined terms used in a statute “shall be construed according to the common and approved usage of the language[.]” RSA 21:2.

As for the first two terms – “enforce” and “administer” – it is a well-settled constitutional norm that the federal government cannot, without a state’s consent, require state or local employees to “enforce” federal laws (Printz v. United States, 521 U.S. 898, 925 (1997)), nor can it coerce states into “administering” federal programs (Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578 (2012)). The use of these two terms in RSA 159-E:1 codifies this federal constitutional principle into a state statute. Cf. RSA 99-D (codifying immunities that already existed at common law into a statute); RSA 508:4, I (codifying the common law discovery rule into the statute limiting

¹ For ease of reference, this memorandum uses the term “state or local officials.”

² Including Executive Orders of the President of the United States.

personal actions). Further, RSA 159-E:1 clarifies that, as a default rule, no state or local official can enforce or administer federal laws unless such action is consistent with authorization granted by another state statute. See RSA 159-E:1 (“Silence in the New Hampshire Revised Statutes Annotated pertaining to a matter regulated by federal law shall be construed as an inconsistency for the purposes of this chapter.”).

It bears emphasizing that “enforce” or “administer,” as used in this statute, means directly effectuating a federal firearms law solely pursuant to federal authority, such as charging someone with a federal crime. For instance, absent state legislative authority or the exemption stated in RSA 159-E:2, this provision bars state and local officials from investigating, arresting, or indicting an individual solely for the unlawful sale or disposition of a firearm under 18 U.S.C. § 922 (d). See RSA 159-E:2 (an exception to this rule is that state and local officials may “cooperate with” and aid federal officials in the enforcement of federal firearms laws in cases where the individual has violated a non-firearm-related federal or state law).

However, state and local officials, like the members of the general public, are clearly not immune from the application of the federal criminal laws. Accordingly, RSA 159-E:1 does not bar state or local officials from complying with federal criminal laws, including ones related to firearms. In other words, HB 1178 does not prohibit a state or local official from acting in a manner to avoid a violation of federal law. To be clear, a state or local official is not considered to be “enforcing” or “administering” federal law if, in some proceeding unrelated to the enforcement of federal firearms laws, a state or local official acts in such a manner to avoid committing a violation of federal criminal laws, such as aiding or abetting another in the illegal transfer of a firearm.

For example, an officer arrests a person for a non-firearm related crime pursuant to New Hampshire law and seizes a firearm after a search incident to the arrest. If the person later requests the return of his or her firearm and the officer knows or believes that he or she would potentially be committing a violation of federal law by returning the firearm (see, e.g., 18 U.S.C. § 3), then the officer may take whatever steps necessary to avoid committing a federal crime, including contesting the return of the firearm in a subsequent court proceeding. Moreover, an officer and/or prosecutor acting in this manner is not enforcing federal law (i.e., the officer is not seeking to charge the individual with a federal crime), rather, he or she is merely enforcing the applicable criminal laws of New Hampshire and statutes that are incidental thereto, such as those relating to forfeiture (RSA Chapter 617) and/or the treatment of contraband (RSA 595-A:6).³ An officer who lawfully seizes a firearm may hold it as long as necessary to produce or use it as evidence in a trial. RSA 595-A:6. The court, upon application of the prosecutor or defendant, may order the return of any property of evidentiary value except property which “constitutes contraband.” Id.

³ Also, see infra., Section I (b): where an officer is acting under authority granted by New Hampshire law in a manner that is also consistent with federal law, the prohibitions set forth in RSA 159-E:1 would not apply.

“‘Contraband’ materials are those which are prohibited or excluded by law or treaty” and includes that which is barred by federal law.” State v. Cohen, 154 N.H. 89, 91 (2006). HB 1178 does not alter a law enforcement officer’s or a prosecutor’s authority to take action pursuant to these laws.

RSA 159-E:1 also prohibits using personnel or financial resources to “cooperate with any law [sic]...of the United States” with regard to federal firearms laws. The plain and ordinary meaning of the term “cooperate” means “an association of individuals who join together for a common benefit.” Cooperate Definition, BLACK’S LAW DICTIONARY, 359 (8th ed. 2004) (emphasis added). Therefore, “cooperate” as used in this section prohibits state and local officials from “joining together” with federal authorities in the enforcement and administration of federal law, again, unless such act is consistent with another duly enacted law or by RSA 159-E:2.⁴

Although it is usually sufficient to rely on the common meaning of a term, certain “technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such peculiar and appropriate meaning.” RSA 21:2. As the Legislature acknowledges in RSA 159-E:2, prior to the enactment of HB 1178, there existed a “long-standing practice of cooperation between federal, state, and local law enforcement agencies[.]” (emphasis added). This long-standing practice of cooperation references the decades-long joint-efforts by federal officials deputizing state or local officials and establishing joint task forces to voluntarily aid in the enforcement of federal law. Prior to the enactment of HB 1178, this was typically done solely under the authorization and application of federal law. See, e.g., 21 U.S.C. § 878 (Drug Enforcement Agency’s authority to deputize); 34 U.S.C. § 10152 (Byrne JAG program). Understood in this technical and historical context, this restriction on “cooperation” is construed to prohibit state or local officials from being deputized by federal officials to conduct or assist in joint investigations or to participate in joint task forces that solely concern enforcement of federal firearms laws. After the enactment of RSA Chapter 159-E, in order for any state or local officer to be deputized to solely enforce federal firearms laws, there now must be statutory authorization for that state or local official to do so. RSA 159-E:1

The plain language of RSA 159-E:1 does not prohibit any state or local official from reporting a potential federal crime or sharing information with federal officials. The statutory scheme of RSA Chapter 159-E itself contemplates that the term “cooperate” connotes something different, and more involved, than merely “rendering aid or assistance” to federal officials. Compare RSA 159-E:1 (which prohibits “enforce[ing], administer[ing], and cooperat[ing]”) with

⁴ The prohibition of “cooperation” applies to cooperation with federal agencies and officials, not federal laws. This interpretation is supported by the statutory scheme. Rankin v. S. St. Downtown Holdings, Inc., 172 N.H. 500, 503 (2019) (Terms are given meaning by “interpret[ing] statutory provisions in the context of the overall statutory scheme.”) The term “cooperate” is the only operative term to appear in both the first and second sections of RSA 159-E. In the second section of HB 1178, the Legislature makes clear that “cooperation between federal, state, and local law enforcement agencies” is permitted in certain circumstances and that “nothing in this chapter shall prevent a state, county, or local official from cooperating with...federal officials,” as further described below. RSA 159-E:2.

RSA 159-E:2 (which permits “cooperating” and “rendering aid or assistance”); see also State v. Mayo, 167 N.H. 443, 452 (2015) (holding that where a term is used in one part of a statute and omitted in another, the term is construed to be excluded where absent). Moreover, in several New Hampshire statutes governing law enforcement officials, the Legislature has made clear that “cooperating” is distinct from the dissemination or sharing of information between law enforcement agencies. See, e.g., RSA 106-B:11 (State Police “shall cooperate and exchange information with any other law enforcement agency both within and without this state, including federal authorities, for the purpose of preventing and detecting crime and apprehending criminals[.]”); RSA 597:2, VII (state and local law enforcement may “detain” persons arrested while on bail, probation, or parole for a federal crime and “notify the appropriate...federal...law enforcement official); RSA 261:75-b (authorizing law enforcement officers to enter and exchange information into the National Crime Information Center (NCIC) background check system when there is a positive alert generated by an automated number plate scanning device); RSA 106-B:14 (relative to compiling and sharing records and information pertaining to criminal records); see also RSA 106-B:14-c. Because RSA 159-E:1 does not prohibit rendering aid or assistance or exchanging information with federal officials, state and local law enforcement officials are not barred from doing so.

As an example, state and local officials are barred from directly executing a federal search or arrest warrant that is solely related to the enforcement of federal firearms laws. However, state and local officials may provide back-up or render aid or assistance to the federal government in such a circumstance provided such state and/or local law enforcement officers are performing a generalized public safety function to prevent or respond to a potential non-firearm related threat or traffic control functions. See also, infra., Section II. Providing such assistance or aid is not considered “cooperating” with federal authorities.

To be clear, HB 1178 does not restrict the dissemination or communication of facts or the mere sharing of information or reports by members of the public or by state and local officials. The principle of “see something, say something” remains a critical component of protecting public safety in our communities, especially in our New Hampshire schools. Reporting a potential or perceived threat to the community, or to a school, does not violate the law because such conduct does not qualify as “cooperating” with federal officials with respect to firearms laws.

b. “Inconsistent”

Under RSA 159-E:1, state and local officials are barred from enforcing, administering, and cooperating with the federal government only to the extent that such conduct is “inconsistent with any law of this state regarding the regulation of firearms.” Id. The term “inconsistent” means “lacking consistency; not compatible with another fact or claim.” Inconsistent Definition, BLACK’S LAW DICTIONARY, 781 (8th ed. 2004). Additionally, in accordance with RSA 159-E:1, if a statute is “silent” with respect to a matter regulated by federal law, it is deemed to be “inconsistent.” Id.

In other words, any state or local official taking action with respect to firearms in a manner consistent with the authority granted by a state statute would not violate RSA 159-E:1. Whether or not a specific action is consistent with other state laws would depend on the provisions of the particular authorizing statute.

For example, pursuant to RSA 159-D, the Department of Safety is designated as the point of contact for the federal government for the purpose of conducting federally required background checks using the NICS system for handgun purchases. By opting-in to this system, the Department is authorized to enforce, administer, and cooperate with the federal government with respect to the regulation of firearm purchases, because such acts are consistent with state law and are therefore not barred by RSA 159-E:1.

As another example, RSA 159:7 provides that “[n]o person shall sell, deliver, or otherwise transfer a pistol, revolver, or any other firearm to a person who has been convicted, in any jurisdiction, of a felony.” For misdemeanor crimes of domestic violence, state law confers broad discretion to peace officers in order to prevent further abuse. Pursuant to RSA 173-B:10, I, “whenever any peace officer has probable cause to believe that a person has been abused... that officer shall use all means within reason to prevent further abuse including, but not limited to: (a) Confiscating any deadly weapons involved in the alleged domestic abuse and any firearms and ammunition in the defendant's control, ownership, or possession.” If an officer is authorized by law to confiscate a weapon based on mere probable cause, then surely state or local law enforcement officers have the authority under this law, in instances where a person has been convicted beyond a reasonable doubt of a crime of domestic violence, to request that a Court not return firearms to the individual to prevent further abuse. This means that opposing the return of a firearm in a domestic abuse case would not be “inconsistent” with state law and therefore would not be prohibited by RSA 159-E:1.⁵

As another example, RSA 159:6, I (a) states that the “chief of police of a city or a full-time police officer [of a town] designated by [the selectboard]...upon application of any resident of such town, city... shall issue a license to such applicant authorizing the applicant to carry a loaded pistol or revolver... unless the applicant is prohibited by New Hampshire or federal statute from possessing a firearm.” (Emphasis added). Because RSA 159:6 authorizes local officials to deny a license application based on a federal disqualifier, such a denial would be consistent with New Hampshire law, and therefore would not be prohibited by RSA 159-E:1.

Questions have arisen regarding the effect of HB 1178 and the new federal law, known as the Bipartisan Safer Communities Act, with respect to disqualifying individuals from purchasing a firearm. In particular, the federal government has adopted a new disqualifier for those convicted

⁵ Moreover, merely conveying information to the court that a person is federally prohibited from purchasing or possessing a firearm would not constitute “enforcing, administering, or cooperating” with federal law in light of the above analysis.

of a crime of domestic violence who are in a “dating relationship.” 18 U.S.C. § 922(d)(9); 18 U.S.C. § 921 (a)(33)(A)(ii). This new federal term is consistent with New Hampshire’s definition of crimes of domestic violence, in particular those offenses committed by individuals who are “intimate partners” pursuant to RSA 631:2-b, III (b). The federal term “dating relationship” and the state law term “intimate partner” are consistent with one another in that they both hinge on a “romantic” relationship where the individuals were not current or former spouses or cohabitating together, or share a parental relationship. Because New Hampshire and federal law align in this regard, individuals who are convicted of a crime of domestic violence as an “intimate partner” under New Hampshire will be reported to the NICS system as being disqualified from purchasing a firearm pursuant to RSA 159-D:1.

However, under the new federal law, the “dating relationship” disqualifier for domestic violence convictions was not adopted for the purposes of the protective order disqualifier under 18 U.S.C. § 922(d)(8). Instead, the protective order disqualifier under federal law still requires a showing that the person was an “intimate partner,” which under federal law means a “spouse,” “former spouse,” “a parent of a child,” or “a person who cohabitates or has cohabitated with the person.” 18 U.S.C. § 921(1)(32). This remains consistent with the term “family or household member” as used in RSA 173-B:1, X. In other words, the new federal law does not bar individuals who are subject to a protective order from possessing a firearm if they are in a “dating relationship,” unless that person also meets the definition of “intimate partner” contained in 18 U.S.C. § 921(1)(32). In sum, the domestic violence protective order provisions set forth in RSA 173-B remain consistent with federal law, and therefore the provisions of RSA Chapter 159-E do not apply.

The above examples are not a complete and exhaustive list of state statutes that authorize state and local officials to act in a manner consistent with federal law. State and local officials with questions about whether a particular statute authorizes specific conduct with respect to firearms should consult with legal counsel or, as appropriate, the Attorney General’s Office.

II. Applicability of RSA 159-E:2

The second section of HB 1178, RSA 159-E:2, contains several exceptions to the prohibition created in RSA 159-E:1. If a state or local official is engaging in conduct that falls into one of the enumerated exceptions, then such conduct is not prohibited under state law.

The first exception provides that state and local law enforcement agencies are not prevented from:

cooperating with or rendering aid or assistance to federal officials in any circumstance where there is reasonable suspicion to believe that a person who is the subject of an investigation for violation of federal firearms law [sic] by RSA

159-E:1 also has committed, is committing, or is about to commit a violation of New Hampshire law or a violation of a federal law...not covered by RSA 159-E:1.

RSA 159-E:2. In other words, this exception authorizes law enforcement officers to “cooperate with or render aid or assistance” to federal officials as long as the criminal investigation is not solely one concerning violations of federal firearms law. In such cases, state or local officials are authorized to “cooperate with or render aid or assistance” to federal officials in the enforcement of federal firearms laws.

For example, state and local law enforcement officers are empowered to respond to, investigate, and take action with respect to any potential threat to the community, including schools, pursuant to their authority under the New Hampshire Criminal Code. The passage of RSA 159-E does not alter this. If any state or local official, or member of the public, feels threatened or believes that a crime has occurred or is about to occur on school property, with or without a firearm, that person should immediately contact law enforcement by dialing 911 or otherwise immediately notify a law enforcement officer.

Under this exception, any law enforcement officer who has reasonable suspicion that a state criminal code violation has occurred and, during the course of an investigation (or after an arrest has been made), subsequently or simultaneously discovers that the person may also have violated a federal firearms law, then the law enforcement officer may “cooperate with” or “render aid” to federal authorities in that instance.

As another example, RSA 318-B:23 authorizes “all peace officers within the state, and [] all county attorneys, to enforce all provisions of [the Controlled Drug Act] and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to controlled drugs.” Therefore, any law enforcement officer, pursuant to a federal drug interdiction program, investigating an individual for a federal or state drug-related offense, may “cooperate with or render[] aid” to federal officials with respect to a federal firearms law violation.

The second exemption under RSA 159-E:2 is not just applicable to law enforcement agencies. Any state or local official may provide to “authorized federal officials, upon their request” any “official state, county, or local records that are available to the public.” Again, merely providing such information to the federal government or officials is not considered “cooperation” with respect to federal firearms laws.

The remaining exemptions listed in RSA 159-E:2 are specific to certain types of records. State and local authorities are expressly authorized to provide “criminal history records” and information provided under the National Crime Prevention and Privacy Compact to aid officials

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investigating firearm violations. Finally, the judicial branch is expressly authorized to enter protective order information “into law enforcement databases.”

CONCLUSION

As with the enactment of any new law, questions may arise about the applicability of RSA Chapter 159-E in circumstances not specifically addressed above. This Office is committed to assisting all state and local officials, especially law enforcement agencies, in resolving those questions as expeditiously as possible. As previously stated, all State and local law enforcement officers, as well as the public, are encouraged to reference the FAQs posted on the DOJ’s website for guidance in the implementation and legal impact of HB 1178. These FAQs will be updated periodically if and when additional questions regarding HB 1178 arise. Please do not hesitate to contact me if you have further questions.

Sincerely,



John M. Formella
Attorney General

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