Adoptions, inquiry about firearms ownership

Number: INFORMAL

Date: August 03, 2009

The Honorable Thad Altman
Senator, District 24
6767 Wickham Road, Suite 211
Melbourne, Florida 32940

Dear Senator Altman:

You ask whether a private adoption agency, licensed by the State of Florida, may require prospective adoptive parents to store legally owned firearms in a manner more restrictive than is required by state statute. You also ask whether a private adoption agency may compile a list, record, or registry of privately owned firearms or the owners thereof in light of the provisions of section 790.335, Florida Statutes.

You have advised this office that the private adoption agency requires prospective adoptive parents, before being allowed to adopt a child, to execute an affidavit entitled "Affidavit of Compliance with Firearms Safety Requirements." The affidavit apparently references Rule 65C-13.011(140),[1] Florida Administrative Code, and states that "[i]f the adoptive parent owns a gun, the ammunition and the unloaded firearm must be keep separately in locked cabinets." You state that the affidavit also requires the prospective parents to list all firearms owned by the family and to identify the location of those firearms.[2] Prospective parents are required to attest to their understanding that "violations of this policy could result in denial or revocation of our adoption/license."

The authority of this office to issue opinions is prescribed by statute and is limited to public officials on questions relating to the requesting officer's own official duties.[3] Accordingly, this office must decline to formally comment on the issues raised in your letter. In an effort to be of some assistance, however, the following informal comments are offered.

As you are aware, Rule 65C-13.011, Florida Administrative Code, entitled "Minimum Standards for Licensure of Family Foster Homes, Family Emergency Shelter Homes and Family Group Homes," has been repealed.[4] The current rule, 65C-13.030(5)(h), entitled "Standards for Licensed Out-of-Home Caregivers," provides:

"6. Dangerous weapons shall be secured in a location inaccessible to children. Storage of guns shall comply with the requirements in Section 790.174, F.S. Weapons and ammunition shall be locked and stored separately, and in a place inaccessible to children."

Both the former and current rules implement section 409.175, Florida Statutes, which relates to the licensure of family foster homes, residential child-caring agencies, and child-placing agencies. The terms "family foster home," "residential child-caring agency," and "child-placing agency" as defined by statute would not appear to encompass adoptive parents.[5]

Section 790.174(1), Florida Statutes, provides:

"A person who stores or leaves, on a premise under his or her control, a loaded firearm, as defined in s. 790.001, and who knows or reasonably should know that a minor is likely to gain access to the firearm without the lawful permission of the minor's parent or the person having charge of the minor, or without the supervision required by law, shall keep the firearm in a securely locked box or container or in a location which a reasonable person would believe to be secure or shall secure it with a trigger lock, except when the person is carrying the firearm on his or her body or within such close proximity thereto that he or she can retrieve and use it as easily and quickly as if he or she carried it on his or her body."[6]

A requirement that a firearm and ammunition be stored separately would appear to be more restrictive than the provisions of section 790.174, Florida Statutes.

You refer to section 790.33, Florida Statutes, which states in pertinent part:

"Except as expressly provided by general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or regulations relating thereto."

The statute, however, refers to action by a governmental entity and not to action taken by a private entity.[7] You question whether the fact that the private adoption agency is licensed by the state means that the private agency is acting "under color of state law." This office is not aware of any decision by the courts of this state holding that a private entity, by reason of state licensure alone, is acting "under color of state law." The Eleventh Circuit Court of Appeals has set forth the test to determine when private parties will be considered state actors, requiring a court to conclude that one of the following three conditions has been met:

"(1) the State has coerced or at least significantly encouraged the action alleged to violate the Constitution (State compulsion test);

(2) the private parties performed a public function that was traditionally the exclusive prerogative of the State (public function test); or

(3) the State had so far insinuated itself into a position of interdependence with the private parties that it was a joint participant in the enterprise (nexus/joint action test)."[8]

The determination, however, of whether a private, non-profit organization licensed by the state to provide adoption services is a "state actor" for purposes of determining whether the organization’s actions are actionable as a violation of federal and state constitutional guarantees is a mixed question of law and fact that may not be resolved by this office. You may wish to contact the Department of Children and Families, as the licensing agency, on this issue.

You also inquire about the interpretation of section 790.335(2), Florida Statutes, which provides:

"No state governmental agency or local government, special district, or other political subdivision or official, agent, or employee of such state or other governmental entity or any other person, public or private, shall knowingly and willfully keep or cause to be kept any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms."

Section 790.335(3), Florida Statutes, sets forth various exceptions from the prohibition contained in subsection (2).

It does not appear that this section has been interpreted by the appellate courts of this state. The language utilized in subsection (2) of the statute is broad and encompasses both public and private entities.[9] It refers not only to lists and registries, but also to records of privately owned firearms or the owners of those firearms kept by a governmental entity or public or private person. An examination of the exceptions in subsection (3) of the statute indicates the breadth of the prohibition.[10]

You have advised this office that the affidavit required by the private adoption agency states that if an adoptive parent owns a gun, the adoptive parent must keep the unloaded firearm and ammunition separately in locked cabinets. The affidavit further requires that adoptive parents attest to their understanding that violations of this policy could result in denial or revocation of their adoption or license. Such a provision would not appear to violate the provisions of section 790.335, Florida Statutes, as it is not a list, record, or registry of gun owners or their firearms. According to your letter, however, the affidavit also requires the prospective parents to list all firearms owned by the family and to identify the location of those firearms. To the extent that a portion of the affidavit constitutes a "list, record, or registry" of firearms owned by a prospective adoptive parent, the maintenance of such a record by the private adoption agency may violate the statute.

A violation of the statute constitutes a felony of the third degree, punishable as provided in section 775.082 or section 775.083, Florida Statutes.[11] In addition, a governmental entity, or designee of a governmental entity, in whose service or employ a list, record, or registry was compiled in violation of the statute may be assessed a fine of not more than $5 million, if the court determines that the evidence shows that the list, record, or registry was compiled or maintained with the knowledge or complicity of the management of the governmental entity.[12] It is the state attorney where the alleged wrongful conduct occurred who would be responsible for prosecuting violations under the statute.[13]

Regarding your comment that the Department of Children and Families may also be subject to liability pursuant to section 790.335(4)(c), you may wish to contact the department regarding your concerns on this issue.

I hope that the above informal comments may be of assistance to you in this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tsh

---

[1] It appears that the form references R. 65C-13.011(14)(c), F.A.C.

[2] The affidavit further requires the prospective parents to inventory all ammunition owned and to identify where the ammunition is stored.

[3] *See* s. 16.01(3), Fla. Stat. *And see* this office's statement concerning Attorney General Opinions, available online at: http://myfloridalegal.com/opinions.

[4] Rule 65C-13.011(14), F.A.C., entitled "Foster Home Safety" stated in paragraph (c) that "[i]f the substitute care parents own a gun, the ammunition and unloaded firearm must be kept separately in locked cabinets."

[5] *See* s. 409.175((2)(d), (e), and (j), Fla. Stat.

[6] *See also* s. 784.05, Fla. Stat., which provides:

"(3) Whoever violates subsection (1) by storing or leaving a loaded firearm within the reach or easy access of a minor commits, if the minor obtains the firearm and uses it to inflict injury or death upon himself or herself or any other person, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection does not apply:

(a) If the firearm was stored or left in a securely locked box or container or in a location which a reasonable person would have believed to be secure, or was securely locked with a trigger lock;

(b) If the minor obtains the firearm as a result of an unlawful entry by any person;

(c) To injuries resulting from target or sport shooting accidents or hunting accidents; or

(d) To members of the Armed Forces, National Guard, or State Militia, or to police or other law enforcement officers, with respect to firearm possession by a minor which occurs during or incidental to the performance of their official duties.

When any minor child is accidentally shot by another family member, no arrest shall be made pursuant to this subsection prior to 7 days after the date of the shooting. With respect to any parent or guardian of any deceased minor, the investigating officers shall file all findings and evidence with the state attorney's office with respect to violations of this subsection. The state attorney shall evaluate such evidence and shall take such action as he or she deems appropriate under the circumstances and may file an information against the appropriate parties."

[7] *Compare* s. 790.251, Fla. Stat., the "Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008," which applies to public and private employers.

[8] *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001), citing *NBC, Inc. v. Communications Workers of America*, 860 F.2d 1022, 1026-27 (11th Cir. 1988).

[9] The staff analysis for HB 155 (2004 legislative session) notes that "[t]he application of the records prohibition on private persons and entities arguably may violate First Amendment free speech rights." House of Representatives Staff Analysis on HB 155 w/CS, dated December 8, 2003, storage name: h0155a.ju.doc. The Attorney General's Office must presume the constitutionality of any duly enacted legislation.

[10] *See, e.g.,* s. 790.335(3)(h), Fla. Stat., providing:

"Records of an insurer that, as a condition to providing insurance against theft or loss of a firearm, identify such firearm. Such records may not be sold, commingled with records relating to other firearms, or transferred to any other person or entity. The insurer may not keep a record of such firearm more than 60 days after the policy of insurance expires or after notification by the insured that the insured is no longer the owner of such firearm."

[11] Section 790.335(4)(a), Fla. Stat., as amended by s. 1, Ch. 2009-229, Laws of Fla.

[12] Section 790.335(4)(c), Fla. Stat.

[13] Section 790.335(4)(d), Fla. Stat.