



EO 16-02 Section II Firearm Background Check Gap Analysis Summary

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Abstract

In February 2016, Washington Gov. Jay Inslee issued Executive Order 16-02 “Firearm Fatality Prevention – A Public Health Approach.” This report contains the results of the Office of Financial Management’s gap analysis of the firearm background check system, as instructed in the order. The gap analysis searched for traits of the system that have the potential to allow individuals, who would otherwise be prohibited from possessing a firearm, to obtain one through otherwise legitimate means. Agency procedures related to the firearm background check were assessed through a series of interviews during the course of the analysis. Overall, 14 gaps were identified in the firearm background check system that could contribute to a prohibited individual obtaining a firearm directly or to overall system slowdowns. While the general assessment of the system found that most of the background check functioned as intended, the gaps covered in the report are worth consideration when looking to improve the system for law enforcement, dealers, firearm purchasers and public safety.

Background

Executive Order 16-02

In February 2016, Gov. Jay Inslee issued Executive Order 16-02 “Firearm Fatality Prevention – A Public Health Approach.” This initiative brought together the Department of Health (DOH), the Attorney General’s Office (AGO) and the Office of Financial Management (OFM) to investigate ways to reduce firearm-related fatalities in Washington state. This report contains the results of OFM’s gap analysis of the firearm background check system, as instructed in the order. These findings are intended to supplement the legal review performed by the AGO and wider community efforts spearheaded by DOH and to provide information on how the background check system functions and could be improved.

Background checks on firearm sales have been federally mandated since the Brady Handgun Violence Prevention Act of 1993. Purchases through licensed dealers across the nation are run through the National Instant Criminal Background Check System (NICS), which is maintained by the FBI. Typically, results are returned within minutes. If the NICS check finds an indication that the buyer may be ineligible due to a criminal record or other concerns, the FBI has up to three days to investigate this and return its determination before the seller is legally allowed to transfer the firearm regardless. Since its inception in 1998, NICS has run 230 million checks that have resulted in 1.3 million denials.

Along with the required federal background check, many states have laws in place that require additional steps for firearm purchases and transfers. Washington is one of these states, and requires purchasers of handguns to undergo a more extensive check by state agencies. The 2014 passage of Initiative 594 requires private firearm transfers between individuals to undergo a background check, which can be completed at the location of any federally licensed firearms dealer (FFL dealer) in the state. Long guns such as rifles or shotguns require only a NICS check upon purchase or transfer, and are not subject to any background checks by local agencies.

Information used in performing a background check is largely composed of criminal histories and active warrants. Background checks also make use of mental health information such as involuntary commitments or insanity pleas. These are included in both the NICS check and in Washington’s state-level background check for handgun purchases. As individuals who have received inpatient treatment are at higher risk for suicide, the inclusion of mental health data may help background checks reduce firearm-related deaths. Firearm fatalities, as outlined in Executive Order 16-02, are composed of both homicides and suicides, and the firearm background check system is intended to reduce these fatalities while still allowing nonprohibited individuals to obtain firearms without excessive delay.

The gap analysis contained in this report seeks to aid the background check system in these goals by highlighting areas where its procedures may not carry out their intended functions.

Gap analysis

To assess the completeness of the firearm background check procedure for Washington, OFM was asked to conduct a gap analysis with the agencies involved in the process. This analysis differed from an audit in that it did not review the completeness or accuracy of any data used in conducting background checks. Although missing data are ultimately mentioned in some of the gaps, the analysis focused on instances where procedure or laws did not align and might regularly complicate

the system. While it is possible to define a gap in many ways, this report uses the following definition:

A gap is a trait of the system that has the potential to allow an individual, who would otherwise be prohibited from possessing a firearm, to obtain one through otherwise legitimate means.

This definition means that the gap analysis excludes individuals or system actors breaking the law in any way during the background check or transfer process. It also assumes that system actors will not intervene or delay the transfer of firearms while awaiting the completion of a background check, although it is possible for them to do so.

Information on agency procedures used in the gap analysis was obtained through a series of interviews with those most closely involved in the process. Each state agency that contributed to the gap analysis provided access to a number of individuals familiar with their particular practices and any associated complexities that could be considered gaps. The in-depth responses of five local law enforcement agencies and two FFL dealers were also used to document their procedures. A representative sample of law enforcement and FFL dealers was not required as the gap analysis focuses only on commonalities and general trends in procedure rather than individual cases. The input of these interviewees was combined for their respective sections.

The results of the gap analysis are presented in this report and on an accompanying interactive map. Included in this report are details on each agency's procedure for supplying information or conducting a portion of a firearm background check, followed by a list of gaps found in the system. The interactive map illustrates the connections and information sharing among agencies as well as the approximate location of gaps in the system. It is advisable to refer to both documents in order to gain a full understanding of the firearm background check system's operation.

Gaps Identified

Lack of clarity in firearm surrender process

Many points in the background check process allow for an individual to obtain a firearm before the entire state check has been completed. For instance, concealed pistol license (CPL) holders may receive their firearm upon passing a NICS check. Individuals without a CPL may obtain one if the result of their check is not known within 10 days. This creates the potential for the state to become aware that a person is prohibited from owning a firearm after the transfer has already taken place. A similar situation may arise following the revocation of an individual's CPL. In all these cases, there appears to be confusion about which actor is responsible for retrieving these firearms. This may allow prohibited individuals to retain them illegally.

Interviews conducted with firearm dealers, law enforcement and the Washington State Patrol (WSP) during the course of the gap analysis consistently found that most of the actors were aware of the issue but none had clear statutory authority to address it. In cases where dealers were informed by law enforcement that they should not transfer a weapon they had already transferred, dealers simply advised law enforcement of the situation. Law enforcement agencies that became aware of these situations would generally take note of them, but no agency interviewed indicated having a regular procedure to retrieve firearms from prohibited individuals.

Revocations of CPLs contain more extensive directions on responding to individuals prohibited from possessing firearms, but then fall short of naming a specific actor in cases of noncompliance. When CPL holders are found to be ineligible to possess a firearm, they are informed by letter that their CPL license has been revoked and that they are responsible for surrendering these weapons to the court. If an individual is found to have firearms but does not turn them over to the court or to law enforcement, then there are grounds for arrest. However, law enforcement largely indicated that it does not pursue these cases and instead informs the court of any noncompliance.

The issue of firearm retrieval is both dangerous and time consuming, which creates a much higher burden on smaller jurisdictions. Any potential solution would need to take into account the variability in resources available to law enforcement agencies and courts in different parts of the state. It is difficult to dismiss this gap; without a way to retrieve guns from CPL holders who fail state-level checks, Washington effectively forfeits the benefits provided by its own system in these cases.

No follow-up after failed Form 4473 or NICS check

When an individual initiates a firearm transfer for a long gun or possesses a CPL at a dealer location, that person is required to fill out ATF Form 4473 and undergo a NICS check prior to obtaining a firearm. In the event that either of these checks is failed, the transfer is halted and the individual cannot attempt to retry the transaction. That individual is, however, free to leave that location and attempt another purchase at any other dealer because there is no follow-up to firearm background check failures at this stage.

Some of the dealers interviewed for the gap analysis expressed particular concern about having no recourse in the case of a failed check. While the NICS check results are unlikely to change, Form 4473 is entirely self-declared, which could effectively allow an individual to make multiple attempts at different locations if the person is prohibited by the form on the first try. This gap doesn't allow a firearm to enter an individual's hands directly, but it may allow a prohibited buyer to make multiple unquestioned attempts at purchasing a firearm, thereby increasing the odds of eventually succeeding without law enforcement or dealers being aware of previous unsuccessful attempts.

Long guns receive a reduced check

As discussed in greater detail above, the purchase or transfer of handguns is required to go through state-level background checks in addition to a NICS check while long guns are required to undergo only a NICS check. It is generally the case that state-level checks are more thorough, given the abilities of local law enforcement to consult a wider variety of sources and access local information that may not qualify for entry in NICS. In this sense, handguns are subject to a more thorough investigation despite the fact that any factors prohibiting possession of firearms apply equally to handguns and long guns.

Gaps arise for long gun transfers due to this disparity in cases where NICS may not contain the same information that the state system does. Other gaps in this section give more detail on disparities in receiving mental health data, misdemeanor warrants and criminal history information. In addition, the length of time that local law enforcement has to complete the state-level check provides additional safeguards against recently prohibited individuals attempting to purchase firearms before the system becomes aware of their status. NICS checks are generally complete

enough that some states rely upon them entirely for all their background checks, but when considering what may be a hole in Washington's system specifically, the differences between checks for handguns and long guns are pertinent ones.

Potential time delay for mental health data

The prohibiting factors related to mental health include pleas of not guilty by reason of insanity and involuntary commitments of longer than 14 days. When one of these determinations is reached by a court, the information needed for the firearm background check system is submitted to the Administrative Office of the Courts (AOC), which then passes it on to the Department of Licensing (DOL) and NICS. By state law, the court system has up to three days to submit this information. Involuntary commitments are handled civilly, at a higher level of privacy, which requires manual entry by AOC personnel. In practice, most cases are submitted to DOL and NICS by the end of the day that the court provides a ruling, but the possibility exists that the data entry may take longer.

The three days it can take to submit some cases to NICS and DOL may allow a short window in which a prohibited individual could purchase a firearm without the system detecting the person. Those committed to a less-restrictive alternative that frees them from physical custody have the ability to enter a dealer's location and attempt to purchase a firearm. If they are a CPL holder or are purchasing a long gun, they need to pass only a NICS check prior to obtaining the firearm and being free to leave the premises. While state-level checks and the notification to DOL sent by the courts would identify prohibited CPL holders, these findings would come after the firearm transfer had already taken place and would necessitate the retrieval of the firearm from the individual.

No retention of mental health data by DOL

When an individual is found not guilty by reason of insanity or is involuntarily committed for a period of 14 days or longer, AOC has up to three days to send this information to NICS and DOL. As mentioned above, this submission typically takes place inside of a day but has the potential to take longer. Once DOL personnel receive the notice that an individual is ineligible to possess a firearm, they check their database of CPL holders for that person. If there are no matches, DOL takes no further action and does not retain that identifying information as there is no statutory authority to do so.

A potential gap arises in the case where an individual attempts to apply for a CPL shortly after being involuntarily committed with a less restrictive alternative. If the law enforcement agency conducting the background check for the CPL consults NICS prior to AOC's submission of the involuntary commitment, the commitment will not appear in that person's records and will allow law enforcement to proceed with the remainder of the check. At that point, if AOC sends information to DOL and NICS that prohibits that person from owning a firearm, it will be too late for another NICS check and too early for DOL to find the individual in its CPL database. If that individual manages to pass the rest of the check and obtain a CPL — which would also require passing a law enforcement check with DSHS — the individual will be able to carry the license until the next CPL renewal date because the DOL system will not have flagged him or her as ineligible to possess.

It is relevant to note that this particular gap does not give individuals direct access to firearms. However, there is the potential that they could gain a CPL, which would allow them to appear as licensed to carry a concealed pistol when they are, in fact, prohibited from carrying. While the chances of this particular gap arising are fairly remote, it could impede efforts by law enforcement to

verify whether a person is in lawful possession of firearms. Given that this gap is also tied to involuntary commitments, this may be of particular concern for assisting individuals who are at risk for suicide.

No on-site verification for CPLs

One of the primary features of Washington's gun purchasing system is the ability of individuals to undergo a single background check to obtain a CPL and expedite the transfer process for future handgun purchases. In these cases, dealers are able to transfer possession of the handgun after a successful federal background check and before local law enforcement is notified. While a full state background check is still performed when a CPL is presented, it takes place following the transfer.

A potential gap arises due to the fact that dealers are not provided with a robust system for checking the validity of CPLs other than their own familiarity with the appearance of the license. If law enforcement or the courts revoke an individual's CPL for a reason that does not appear in the NICS database, it may not become apparent prior to the state-level background check. While the check by local law enforcement would identify if the individual is prohibited from owning firearms, it is probable that the transfer would already have taken place.

Not all misdemeanor warrants entered in NICS

When law enforcement agencies create an active felony warrant, that information is submitted to NICS and required to be updated over the course of the following years. It is also possible to enter misdemeanor warrants, which can also be at least temporary prohibiting factors in a firearm background check, but entering these is not required. Because of the maintenance required to continually update the warrants in NICS, many law enforcement departments choose not to upload misdemeanor warrants and instead upload them only to the Washington Crime Information Center.

The absence of some state-held misdemeanor warrants from NICS creates the possibility that a prohibited individual could pass a federal check but would receive a hold or a "do not proceed" for a state-level check. This means that long guns, which undergo only a NICS check, may be transferred without the state becoming aware of the discrepancy. CPL carriers purchasing handguns might also acquire them before the completion of the state background check and, due to confusion over which actor is responsible for confiscating firearms from prohibited individuals, may also be able to retain them.

Unknown dispositions delay checks

After law enforcement enters a warrant or an arrest pending a conviction, it is required to regularly update the NICS system about the status of the case. The eventual disposition can drastically change the results of a firearm background check depending on whether a person was found guilty of an offense or if charges were dropped or reduced. This requirement is true for law enforcement nationwide but is not always followed to the letter, resulting in some entries missing a disposition. When law enforcement personnel encounter a missing disposition during a background check, they must contact the agency or court system responsible for those charges to ascertain the status of that case.

Some instances of missing dispositions can be quickly resolved, but others can take well beyond the 10-day window that law enforcement has to complete a background check. Law enforcement has the ability to request an extension to 30 days in these cases. If the disposition check takes even

longer, law enforcement can also inform the dealer of the delay directly and advise the dealer to wait for the results prior to transfer. Cases like these become a particular problem during high-volume periods and create additional difficulty for law enforcement to complete the state-level check before the time limit passes.

NICS may reject some WASIS entries

Washington's criminal history database WASIS (Washington State Identification System) and its federal counterpart III (the Interstate Identification Index) both track entries using fingerprints. When inputting criminal history information on individuals, each system requires the associated fingerprints to be complete enough for reliable identification. This validation causes III to occasionally reject uploads from WASIS on the basis that the fingerprints do not contain sufficient detail for its database. WSP is made aware of this and has the opportunity to correct its entry, if possible, but this can cause temporary delays in entering Washington's criminal history in the NICS check.

This situation becomes a potential gap when a firearm undergoes only a NICS check prior to being transferred, as is the case for long guns and for CPL holders. As is true with several other gaps, CPL holders purchasing handguns go through a state-level check that includes the WASIS database. Although this check would account for any discrepancy between WASIS and III, it would only do so after the transfer had taken place and require retrieval of the firearm. Long gun transfers in these cases would not be identified and would be completed since they do not undergo a state-level check.

Dealers not informed when check has started

When conducting a handgun transfer, dealers initiate a state-level background check by sending the pistol transfer application (PTA) to the law enforcement agency whose jurisdiction coincides with the address of the buyer. In many cases, the PTA is sent to law enforcement by fax. While practice varies by agency, it is often the case that the dealers will not get any notice of receipt, particularly during high-volume periods. In cases where the PTA is not successfully transferred for any reason, dealers are left with the assumption that the check has begun.

This scenario becomes a gap in cases where the 10-day window allotted to law enforcement elapses without a state-level check having been initiated. When dealers call to inquire about the status of the background check and find that law enforcement was unaware of the request, they then have the option to transfer possession of the handgun in question without waiting any longer for the background check. It should be noted that many dealers avoid proceeding on transfers until all checks are completed, regardless of the 10-day time period, but this still creates an undue wait for dealers and their customers.

PTAs do not contain prior buyer names

As a part of the background check process, buyers of handguns are required to fill out a PTA, which is managed by DOL. Once completed, this form contains information on the buyer that dealers and law enforcement need to run firearm background checks, including the recipient's name, date of birth, and license or ID card number. Earlier versions of the PTA have contained a space for alternate names, or an also known as an AKA section. Because some of the background checks rely on an exact name match, some dealers have expressed concern that not having an AKA section excludes some information they could use for a more comprehensive check.

This particular gap may be most common for married individuals or others who have legally changed their name. If a NICS check is run against only an individual's current name, it is possible for the system to miss records associated with a previous name and information. In that case, NICS would return with no results and indicate that the transfer may proceed. Law enforcement typically has more resources at its disposal with which to conduct background checks and may find prohibiting factors associated with a previous name later in the process. This may be sufficient to prevent transfer to individuals without a CPL, but would necessitate a retrieval of the firearm from someone who held a CPL as the transfer likely would have already taken place.

Law enforcement may not check with DSHS

Prior to 2014, the Department of Social and Health Services (DSHS) was responsible for sending information on involuntary commitments to NICS. However, it was not receiving all cases from behavioral health organizations (BHO) instantaneously. For that reason, law enforcement was advised to check with local BHOs during the background check to ensure that no recent commitments were being missed. Since that time, responsibility for submitting involuntary commitments to NICS has moved to AOC; DSHS has begun to receive its reports from BHOs on a daily basis. However, at the time of this report, some law enforcement agencies were still checking with their local BHOs and skipping over the check with DSHS.

Instances where law enforcement checks with a local BHO rather than DSHS allow for the possibility that authorities will miss involuntary commitments in other parts of the state. It is now a part of the regular state background check process that law enforcement will consult with DSHS, and WSP has updated its training to clarify this point. Given the efforts already in progress, this gap is unlikely to persist for much longer.

ACCESS system updates cause delays

The system used by law enforcement to run national and state-level background checks (ACCESS) is maintained by WSP and must undergo regular system updates. These are scheduled once per month during the lunch hour to minimize the impact on agencies conducting the checks. Even so, some law enforcement agencies expressed concern about not having contact with the system during high-volume periods, which may cause checks to be delayed and miss the 10-day window. Taken alone, the ACCESS system updates are not a significant impediment to the background check process, but they can complicate law enforcement's ability to complete the check in time if combined with factors such as unknown dispositions and NICS crashes.

NICS crashes cause delays

The NICS Index and its associated systems are maintained by the FBI and well beyond the jurisdiction of Washington state. Every firearm background check in the country is required to go through NICS. This can cause incredible strain on the system during periods of peak activity. When the online system crashes, both dealers and law enforcement must call the FBI and perform the background checks over the phone, which takes considerably longer. In combination with other factors such as missing dispositions or a system update of ACCESS, a NICS crash can make it extremely difficult for law enforcement to complete background checks in the allotted 10 days.

Discussion

It is extremely important to note that the majority of the background check system appears to work exactly as it was intended to. The tone of a gap analysis inherently tends toward the negative, and a few of the gaps highlighted in this report require a perfect storm of system lapses to occur. As the system now functions, agencies and FFL dealers report receiving on-time data transfers and background checks in nearly all circumstances. While this report contained no audit of the data and cannot vouch for the accuracy of the records used in the background check, the overall procedure for firearm background checks that was examined appears largely sound despite the gaps found.

Many of the gaps that were identified during the course of the analysis share a common thread: The main risk they pose is causing law enforcement to miss its allotted 10-day window before a handgun transfer becomes legal without the results of a background check. A number of these gaps can be resolved through adjustments to agency and dealer procedures that promote better communication and streamline processes. Addressing gaps that slow down the system may allow for shorter waiting periods prior to pistol transfers, fewer time constraints on law enforcement and less chance of a background check going beyond the 10-day window.

Some other gaps arise from the way in which the system is structured and may pose greater problems for law enforcement and firearms purchasers in the future. Gaps that may regularly allow for the transfer of a firearm before the completion of a state background check create the possibility for an individual to receive a firearm despite being prohibited from possessing it under state law. This uses resources and creates an individual risk for any law enforcement personnel who may respond to retrieve the weapon. It may also pose a risk to the recipient of the firearm and those around the recipient, depending on the circumstances that lead to the denial, or cause significant inconvenience if the person is asked to surrender the firearm.

This report does not provide any recommendations on resolving these gaps. Instead, these gaps are highlighted and discussed to inform the agencies involved, those responsible for creating the laws regulating the system and the public as to where the system may need revision to reach its intended purpose. Whether any of those revisions occur and the manner in which they are approached are beyond the scope of this report.