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One Commerce Plaza, 99 Washington Ave., Suite 650
Albany, New York 12221
Tel (518) 474-2518
Fax (518) 474-1927
www.dos.ny.gov/ogor

Executive Director

Robert J. Freeman

October 3, 2014

David Harper, Esq.
Law Office of David Harper, PC
480 Broadway, Suite 214
Saratoga Springs, NY 12866-2267

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Harper:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the New York State Police. Specifically, you questioned whether the State Police could release "the number of 'assault weapons' which have been registered" under the SAFE Act.

Initially, we note that provisions of the SAFE Act of 2013, specifically Penal Law §400.00(5), requires duplicate copies of all applications for firearm licenses to be filed with the State Police for inclusion in a statewide database. It is our understanding that applications for the registration of assault weapons, a subset of weapons generally known as firearms, that were registered prior to the date of the enactment of the SAFE Act are required to be made directly to the State Police (§400.00[16-a]).

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (l) of the Law. Here, the initial ground for denial, §87(2)(a), is relevant. That provision authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute."

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As you noted, the SAFE Act protects records maintained by the State Police in the statewide database as follows:

"Records assembled or collected for purposes of inclusion in the database shall not be subject to disclosure pursuant to article six of the public officers law.... Records assembled or collected for purposes of inclusion in the database established by this section shall be released pursuant to a court order." (§400.02).

Both the state's highest court, the Court of Appeals, and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

"Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" (Capital Newspapers v. Burns, 67 NY2d 562, 567, 505 NYS2d 576 [1986]).

In like manner, in construing the equivalent exception to rights of access in the federal Freedom of Information Act, it has been found that:

"Exemption 3 excludes from its coverage only matters that are:

***specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.**

"5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' Baldrige v. Shapiro, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly explicit non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' Irons & Sears v. Dann, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure" (Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 [1987]; modified on other grounds, 831 F.2d 1184 [1987]; reversed on other grounds, 489 U.S. 789 [1989]; see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central

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Intelligence Agency, D.C.D.C.1981, 525 F.Supp. 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C. Fla.1979, 479 F.Supp. 1291).

In short, to be "exempted from disclosure by statute", both state and federal courts have determined that a statute must be clear.

In our opinion, §400.02 makes application records assembled or collected and maintained by the State Police confidential. There is no exception indicated, however, for data derived from those records. Specifically, there is no indication that aggregate data or that which can be derived from the collected records is protected.

In tandem with the provisions to protect application records collected by the State Police, the SAFE Act sets forth grounds on which an applicant may rely to protect his/her identity, as follows:

- "(i) the applicant's life or safety may be endangered by disclosure because:
- (A) the applicant is an active or retired police officer, peace officer, probation officer, parole officer, or corrections officer;
 - (B) the applicant is a protected person under a currently valid order of protection;
 - (C) the applicant is or was a witness in a criminal proceeding involving a criminal charge;
 - (D) the applicant is participating or previously participated as a juror in a criminal proceeding, or is or was a member of a grand jury; or
 - (E) the applicant is a spouse, domestic partner or household member of a person identified in this subparagraph or subparagraph (ii) of this paragraph, specifying which subparagraph or subparagraphs and clauses apply.
- (ii) the applicant has reason to believe his or her life or safety may be endangered by disclosure due to reasons stated by the applicant.
- (iii) the applicant has reason to believe he or she may be subject to unwarranted harassment upon disclosure of such information." (§400.00[5][b].)

In sum, protection of the identity of an applicant for a firearm permit is based on whether disclosure may endanger the applicant, whether the applicant has reason to believe that disclosure may cause endangerment, or whether the applicant has reason to believe s/he may be subject to unwarranted harassment.

Based on events immediately prior to enactment of the SAFE Act, including the online publication of names and addresses of firearm permit holders and interactive maps showing the geographic locations of their homes, we believe these provisions were primarily adopted in order to protect the safety of those who apply for and receive firearm licenses, including those for assault weapons.

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Accordingly, due to the lack of reference in the statute, the statute's purpose of protecting applicants from harm, and legal precedent from the highest court requiring specific statutory authority, it is our opinion that disclosure of aggregate data or that which can be derived from the collected records and reported without identification of individual licensees is subject to disclosure pursuant to the Freedom of Information Law.

In our opinion, none of the discretionary exceptions appearing in §87(2) of the Freedom of Information Law would permit the State Police to deny access to aggregate data regarding firearm and assault weapon permits reported without identification of individual applicants. On the contrary, we believe that data of that nature must be disclosed pursuant to §87(2)(g)(i), which specifies that "statistical or factual tabulations or data" contained within internal agency records be disclosed. Accordingly, it is our opinion that such non-identifying data is required to be disclosed upon request.

Sincerely,



Camille S. Jobin-Davis
Assistant Director

c: Records Access Officer, New York State Police