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FIREARMS LAW UPDATE

A NEWSLETTER FOR THE MASSACHUSETTS GUN OWNER

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This free monthly publication is designed to educate and inform law abiding Firearms owners and enthusiasts about the complex firearms laws of the Commonwealth of Massachusetts.

If you have a firearms-related legal story or topic which you would like us to include in future issues, please e-mail Attorney Cohen.

Answers to Frequently Asked Questions

Question: Can I have both a FID and LTC at the same time?

Answer: Yes. And you probably should.

FID cards are **shall issue** licenses. This means that there is no discretionary determination of suitability. So as long as you have no disqualifying criteria you can possess non-large capacity rifles and shotguns regardless of the licensing authority's opinion of your suitability.

G.L. c. 140 § 129B(3) provides, in relevant part, as follows: "[a]ny person residing or having a place of business within the jurisdiction of the licensing authority… within a city or town may submit to the licensing authority an application for a firearm identification card, or renewal of the same, which **the licensing authority shall issue**……**The licensing authority may not prescribe any other condition for the issuance of a firearm identification card…"**

FID cards can only be revoked or denied upon the occurrence of a disqualifying condition such as a conviction of a crime.

FID cards cannot be revoked when a case is continued without a finding or some other alternative disposition occurs.

Unlike FID cards, the issuance of LTCs is discretionary. Pursuant to G.L. c. 140 § 131, the **"**licensing authority or said colonel **may** issue [a LTC] if it appears that the applicant is a suitable person to be issued such license, and that the applicant has good reason to fear injury to his person or property, or for any other reason…" Many LTCs have been denied or revoked even after cases are dismissed or a not guilty verdict has been rendered. This is often because the licensing authority has determined that probable cause is enough to warrant the action. Such decisions are often upheld by the Courts unless they are arbitrary, capricious, or abuses of discretion. In many cases, a FID card may be retained while the LTC is suspended or revoked.

The Use of Sealed Records in Massachusetts Firearms Licensing

By Attorney Brian E. Simoneau

The use of sealed records in firearms licensing has been the source of considerable controversy. Certain licensing authorities take the position that the use of such records is completely permissible, while some advocates for gun owners claim that sealed records, or even unsealed records containing the same information as sealed records, can never be used in firearms licensing. Both positions are incorrect. A careful analysis of the facts and circumstances of each case is the first step in arriving at the correct result. Such an analysis is necessary because not all sealed records enjoy the same protections. As outlined below, there are generally 4 types of sealed records in Massachusetts.

1. Adult records, sealed pursuant to G.L. c. 276 § 100A & G.L. c. 276 § 100C
2. Juvenile records sealed pursuant to G.L. c. 276 § 100B
3. Records of drug related convictions sealed pursuant to G.L. c. 94C § 34
4. Records of relating to offense(s) for which the person received a Governor's Pardon, which are automatically sealed pursuant to G.L. c. 127 § 152

Questions regarding role of sealed records in firearms licensing arise, in part, because G.L. c. 140 § 131(d)(i) disqualifies for life an applicant who "(i) has, in any state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (a) a felony; (b) a misdemeanor punishable by imprisonment for more than two years; (c) a violent crime as defined in § 121; (d) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; or (e) a violation of any law regulating the use, possession or sale of controlled substances as defined in G.L. c. 94C § 1." The broad sweep of this provision renders a large number of individuals permanently ineligible from holding a License to Carry Firearms. See e.g. Commonwealth v. Wheeler, 52 Mass. App. Ct., 631, 632-633 (2001) (Grasso, J.) (Veteran police officer prevented from renewing his LTC because of a single and long past incident of juvenile delinquency; "Neither trial judges nor appellate justices are, like Merlin, able to do away with harsh and unforeseen collateral or contingent consequences of criminal proceedings with a wave of the judicial wand.") In determining whether an applicant is statutorily disqualified from holding a LTC, G.L. c. 140 § 131(e) requires the licensing authority to check "files maintained by the department of probation [BOP] and statewide and nationwide criminal justice, warrant and protection order information systems and files including, but not limited to, the National Instant Criminal Background Check System." This mandate has been interpreted to require licensing authorities to at least run a BOP, III, and QNP check on the applicant. The source of information containing disqualifiers is an important consideration because, depending on the applicable sealing statute, certain record holders are ordered to seal their records while others are not. Likewise, § 100B commands only the Commissioner of Probation, court clerks, and the Department of Youth Services to seal their records. It has no effect on other records, such as those maintained by local police departments or those appearing in the Interstate Identification Index (III). Certainly, if a licensing authority discovered disqualifying offenses by consulting unsealed records, such as those contained in databases enumerated in G.L. c. 140 § 131(e), the licensing authority could not lawfully issue the applicant a LTC. The fact that a separate sealed record maintained by another agency might contain the same offenses as the unsealed record obtained from an independent source is of no consequence.

The Use of Sealed Records in Massachusetts Firearms Licensing
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If the unsealed record contains disqualifying offenses, the licensing authority cannot lawfully issue the license. Therefore, the nature of the record being used is as important as its contents.

Adult Sealed Records
Useable for Suitability & Disqualification

In the case of Rezeznik v. Chief of Police of South Hampton, 374 Mass. 475 (1978), our Supreme Judicial Court ruled that **adult records sealed pursuant to G.L. c. 276 § 100A could lawfully be used in firearms licensing**. The Court based this ruling on the language of the adult sealing statute itself. Specifically, the provision which stated that "in response to inquiries by authorized persons **other than any law enforcement agency**, any court, or any appointing authority, [the Commissioner of Probation] shall in the case of a sealed record . . . report that no record exists." "This provision must be read to imply that law enforcement agencies, courts, and appointing authorities do have access to criminal records which have been sealed." As discussed in more detail below, it is important to note that no such provision exists in G.L. c. 276 § 100B, the statute governing juvenile sealed records.

Juvenile Sealed Records
Not Useable for Suitability or Disqualification
(unless unsealed record obtained from an independent source)

G.L. c 276, § 100B, the juvenile sealed records statute, requires such records to be sealed upon request if the following three conditions are met: "(1) the 'court appearance' or any disposition resulting from the delinquency proceeding terminated at least three years earlier, (2) the person has not been adjudicated delinquent or convicted of a criminal offense within the Commonwealth during the preceding three years, and (3) the person states that he or she has not been adjudicated delinquent or convicted of a criminal offense in any other jurisdiction during the preceding three years." Commonwealth v. Gavin G., 437 Mass. 470, 473 (2002). The statute further provides that the police can know only that a "sealed delinquency record over three years old" exists. See G.L. c. 276 §100B. **"Once it has been sealed, the police are no longer allowed to see the record itself."** Commonwealth v. Gavin G., 437 Mass. 470, 475 (2002). Sealed juvenile records may only be used by a judge or probation officer for sentencing purposes, if a juvenile re-offends. Id. "All others making inquiry pertaining to a sealed juvenile record (including inquiries from an 'appointing authority' that would normally have access under § 100A) must be told that there is "no record."

There are no published superior or appellate court decisions on use of sealed juvenile records in firearms licensing. However, in the case of Booker v. Evans, Dorchester District Court, 0107CV1203 (2003) (Nasif, J.), the refusal to issue a LTC because of a sealed juvenile record was overturned. Although Booker is only a district court decision, it was well reasoned and likely to be followed by other courts. In Booker, Judge Kenneth Nasif, a former Juvenile Court Judge, ruled that, "[t]he juvenile sealing statute (§ 100B) clearly goes further than its adult counterpart (§ 100A) and strictly limits access to sealed juvenile records to a judge or probation officer and then only under limited conditions." Id. Accordingly, Judge Nasif ruled that, ***"[t]he unsealing of Mr. Booker's fifty-five year old sealed delinquent record by the commissioner of probation and referring to its contents with the Boston Police Commissioner was clearly a violation of G.L. c. 276 § 100B…Information in a sealed juvenile record still can only be unsealed and made available either to a judge or a probation officer and then only if the individual involved has been convicted or a subsequent crime..."***

Records Sealed Pursuant to G.L. c. 127 § 152

Prior to July, 1983 Useable for Suitability

After July 1983, not Useable - Unless Unsealed Record Obtained

(Note: "all proper officers" required to seal records)

Not Useable for Disqualification

The leading case on the use of records sealed under the G.L. c. 127 § 152, the pardon statute, is DeLuca v. Chief of Police of Newton, 415 Mass. 155 (1993). DeLuca was sentenced to ten years in state prison for shooting and killing a nineteen year old. On April 6, 1983, he received a pardon for manslaughter and other less serious offenses. In 1998 he applied for a License to Carry Firearms. In denying DeLuca's application, the Newton Police Chief wrote, correctly, "…[t]his pardon had the effect of erasing the direct legal consequences of any past convictions. It is important for you to realize my denial of your application is not based upon your convictions of these various offenses. While you are legally eligible to apply to obtain a license, I feel that the circumstances surrounding your past conduct make you unsuitable to carry a firearm…"

DeLuca appealed the denial of his application on the grounds that it was unlawful to rely on the pardoned offenses to deny him a LTC. In ruling on the case, the SJC noted that Deluca was pardoned four months before G.L. c. 127 § 152, the law mandating that mandated the sealing of records of pardoned offenses, went into effect. Because DeLuca was pardoned before his records were required to have been sealed, it was legal for the Chief to use them not to determine whether DeLuca was statutorily disqualified, but to decide whether he was suitable. As explained above, DeLuca's records were not sealed because his pardon pre-dated the applicable sealing statute by four months. Nevertheless, the SJC held that the licensing authority could not use the convictions for which DeLuca was pardoned to deny his application. However, when deciding whether DeLuca was a suitable person to hold a LTC, since DeLuca's records were not sealed, the licensing authority could properly consider the underlying criminal acts when deciding whether DeLuca was a "suitable person." In reaching this conclusion, the SJC found controlling from Commissioner of the Metro. Dist. Comm'n v. Director of Civil Serv., 348 Mass. 184 (1964), the following principle: "[t]he pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible." Deluca, quoting Commissioner of the Metro. Dist. Comm'n at 203, quoting Williston, Does a Pardon Blot out Guilt, 28 Harv.L.Rev. 647, 653 (1915).

Many licensing authorities erroneously interpret DeLuca to allow for the use of sealed records of pardoned offenses as a basis for denial. This is plainly wrong. In DeLuca, the SJC held that **"[i]t is clear that records required to have been sealed pursuant to G.L. c. 127 § 152, could not lawfully have been used by the defendant as part of his investigation of the plaintiff."** This means that a licensing authority cannot use records sealed pursuant to G.L. c. 127 § 152 for ANY purpose, either to determine whether an applicant is suitable, qualified, or disqualified. The phrase "…could not lawfully have been used by the defendant as part of his investigation…" strongly supports this conclusion. As explained above, the Chief was allowed to consider his record only because the pardon pre-dated the sealing statute. If a pardon is issued after G.L. c. 127 § 152 went into effect, (on or about July of 1983), the records relating to the pardoned offense are protected by the aforementioned statute and cannot be used in any aspect of firearms licensing. Furthermore, records of pardoned offenses are, like other sealed records, inadmissible in any court proceeding. See G.L. c. 127 § 152 ("…**Such sealed records shall not disqualify a person in any** ...**application fo**r employment or other benefit ... including ...**licenses** ... **nor shall such sealed record be admissible in evidence or used in any way in any court proceeding** or hearing before any board, commission or other agency....") Therefore, even if a licensing authority were to rely in such sealed records in firearms licensing, the licensing authority could not

expect to prevail in court. Without the sealed records as evidence, absent other sufficient reasons, the licensing authority would not be able to justify the denial.

The above-mentioned bright line prohibition on the use of records sealed pursuant to G.L. c. 127 § 152 in firearms licensing raises the question of exactly what records must be sealed. Unlike G.L. c. 276 § 100A-C , which specifically command certain probation and court officials to seal their records, G.L. c. 127 § 152 provides, in relevant part that "[u]pon approval of a petition for pardon, the governor shall direct all proper officers to seal all records relating to the offense for which the person received the pardon. Such sealed records shall not disqualify a person in any ...application for employment or other benefit ... including ...licenses ... nor shall such sealed record be admissible in evidence or used in any way in any court proceeding or hearing before any board, commission or other agency...." The phrase "all proper officers" appears to suggest that law enforcement agencies are also required to seal their records. The records at issue in DeLuca were Waltham Police Department reports. Without explicitly ruling on the issue of whether such reports were records maintained by "all proper officers," and therefore fell within the scope of § 152, the Court treated them as such.

In summary, a licensing authority can lawfully declare an applicant unsuitable to hold a LTC based not on the pardoned offenses, but based on the underlying acts themselves. However, where the pardon was issued after approximately April, 1983, the licensing authority must have knowledge of the acts from some source other than a record maintained by "all proper officers," and therefore sealed pursuant to G.L. c. 127 § 152.

Records Sealed Pursuant to G.L. c. 94C § 34

Not useable for Disqualification
Police Department or Independent Unsealed Records Useable for Suitability

G.L. c. 94C § 34 generally allows for the dismissal of the charge and the sealing of court records related to the first offense of unlawful possession of certain controlled substances if the case has been continued without a finding to a certain date, or the defendant has been placed on probation, and he or she observes the terms & conditions thereof. In such cases, the Court "may order sealed all official records relating to his arrest, indictment, conviction, probation, continuance or discharge….provided, however, that **departmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed**…" G.L. c. 94C § 34. The statute further provides that "**[a]ny conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any disqualification or for any other purpose.** No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose."

In Chief of Police of Shelburne v. Moyer, 16 Mass. App. Ct. 543 (1983), the Appeals Court ruled on the effect of the aforementioned statute on firearms licensing. The Court acknowledged that records sealed pursuant to G.L. c. 94C § 34 could not be used to disqualify an applicant for a License to Carry Firearms. See G.L. c. 94C § 34 ("Any conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of disqualification or for any other purpose.")

However, determining whether an applicant is statutorily disqualified is only the first step in the licensing process. The second step requires the licensing authority to determine whether the applicant is "suitable" and has a "proper purpose" for requesting the license. Because G.L. c. 94C § 34 specifically provides that records maintained by police and other law enforcement agencies are exempt from the statute's sealing provision, such records are admissible in Court and can be considered when determining not whether an applicant is disqualified, but whether he is suitable to hold a LTC. "…[D]epartmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed." Moyer at 464, quoting G.L. c. 94C § 34. "Evidence concerning these records could properly have

been used by the chief of police in making his determination as to the defendant's fitness…Moreover, § 34 does not preclude the chief of police from testifying to whatever information he had from any other source which he relied upon in determining an applicant's fitness to be issued a license to carry firearms."

Note: Question 10 on the Massachusetts License to Carry Firearms Application asks the applicant, "[h]ave you ever appeared in court as a defendant for any criminal offense (excluding non-criminal traffic offenses?)." With respect to court appearances which resulted in sealed records pursuant to § 34, applicants can legally answer this question in the negative. See G.L. c. 94C § 34 ("[n]o person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose.")

ADMISSIBILITY OF SEALED RECORDS

As mentioned above, the use of a sealed record to deny a LTC applicant can present an interesting logistical problem if the aggrieved applicant files a Petition for Judicial Review of the denial. Specifically, all of the sealing statutes have provisions which render the sealed record inadmissible in court. Therefore, without use of the sealed record, the licensing authority may be unable to support its decision. For example, even adult sealed records, which are useable in firearms licensing and afforded the least protection, shall not "…be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions, except in imposing sentence in subsequent criminal proceedings." Similar provisions are found in G.L. c. 119 § 60; G.L. c. 276 § 100B, § 100C, G.L. c. 127 § 152, and G.L . c. 94C § 34. If a licensing authority denied an applicant on the basis of a sealed adult record, such use would be proper under Rezeznik v. Chief of Police of South Hampton, 374 Mass. 475 (1978). However, if the aggrieved applicant sought judicial review, the Court might declare the contents of the sealed record inadmissible. As is sometimes the case, because the applicant "let the cat out of the bag," by voluntarily disclosing his felony convictions, this issue was recognized but not decided in Rezeznik.

PERMITTED USES FOR SEALED RECORDS IN FIREARMS LICENSING

Sealed Record Type	Applicable Sealing Statute	Permitted Use in Firearms Licensing	Unsealed Records obtained from Independent Source
Adult Records	G.L. c. 276 § 100A & 100C	Suitability & Disqualification	Suitability & Disqualification
Juvenile Records	G.L. c. 276 § 100B	None	Suitability & Disqualification
94C Convictions	G.L. c. 94C § 34	None	Suitability
Pardon (before July, 1983)	G.L. c. 127 § 152	Suitability (records not sealed)	Suitability
Pardon (after July, 1983)	G.L. c. 127 § 152	None (records sealed)	? "all proper officers" required to seal

FINEMAN'S OPINION ON VIRGINIA TECH SHOOTING & GUN CONTROL

The shooting spree in Virginia will trigger the usual round of calls for tighter restrictions on gun traffic. But politically, that dog likely won't hunt, even now.
By Howard Fineman
Newsweek

April 17, 2007 - I don't know what I was thinking. It seemed to me that the gruesome tragedy at Virginia Tech might prompt a new wave of legislation—not just talk but legislation—to limit the sale of handguns in America. But a few calls and e-mails to people who know the politics of the issue led to a different conclusion: forget about it.

Whatever the rest of the world thinks, whatever Rosie O'Donnell thinks, whatever big city mayors, present and former, think—it remains unlikely that the murder of 32 innocents in Blacksburg will alter the basic guns-for-all equation of American life.

In the aftermath of the shooting, world leaders expressed condolences, but also took it upon themselves to comment on what Australian Prime Minster John Howard referred to as America's "gun culture." The British Home Minister, who happens to hold a degree from Virginia Tech, said he hoped the event would "prompt a serious and reflective debate on gun issues and gun laws in this states…." Doesn't he have enough homegrown versions of mayhem to worry about without taking on ours?

Handgun Control Inc. was on the case immediately as well, calling for new federal and state restrictions on handguns and automatic weapons. They took special note of Virginia's paper-thin control measures, based primarily on an "instacheck" system designed to insure that a potential gun purchaser does not have a criminal record.

Former New Orleans Mayor Marc Morial, who spearheaded a lawsuit against gun manufacturers, was on the case again, too.

So I thought: this tragedy happened in Virginia, the home of the National Rifle Association and a bastion of purist allegiance to the Second Amendment. Maybe this would be such a shock to the Old Dominion system that it would lead to a paradigm shift in Richmond and, by extension, in Washington.

It only took a few calls to disabuse me. Top Democratic strategists agree on few things, but one of them is that taking on gun control as a defining issue is a bad—very bad—idea. They think it cost Al Gore in Florida and elsewhere in 2000, and Sen. John Kerry in Ohio (if for no other reason than it got Kerry to put on his neatly pressed camouflage hunting outfit).

I canvassed top leaders and aides of the Democratic establishment on the Hill and got a uniform response: are you kidding? Here's how one of them put it, bluntly: "The NRA still has a lock on Congress." A political consultant who works with the NRA seemed almost unable even to understand the question, so comfortable in his fortress did he seem.

And Virginia? No paradigm shifts in the offing, according to Larry Sabato, the well-known political scientist at the University of Virginia. It's not just the Republicans who would oppose any new restrictions (and there aren't many in Virginia); many Democrats would join them. "The prospects of new legislation are zero, absolutely zero," he said.

In fact, there's support in Virginia for the idea of MORE guns as a solution to the campus safety problem. Educators in the state years ago decided to ban guns on college campuses; there was a move in the legislature to reverse that by statewide law. Expect to see another such effort.

The beau ideal of Virginia is its junior senator, the volatile Jim Webb, a Democrat who wasn't hurt one whit when news got out that an aide was trying to carry one of Webb's pistols into the U.S. Capitol. Sabato says—only half-jokingly—that Webb's ratings back home went up after the incident.

The right to bear arms means more than its literal words imply: it means a way of life and thinking, involving independence, protection of land, and suspicion of federal—or all government—authority. Virginia is as close to the ground zero of that thinking as there is.

As a result, Sabato said, access to guns is easy—as the shooter in Blacksburg demonstrated. "Hell, I've got a clean record, only a few traffic tickets, so I could go out to Clark Brothers"—a famous gun emporium that always does a brisk business.

It's a way of life in Virginia, and much of America. And it isn't going to change anytime soon.

FIREARMS LITIGATION & ADVOCACY

Attorney Cohen and associate lawyers concentrate in the areas of firearms law, criminal defense, and civil litigation. Examples of their successes include:

- Obtaining Court Orders in District Court, ORDERING Chiefs of Police to issue Licenses to Carry
- Vacating offenses which are lifetime disqualifiers, so that clients can obtain LTCs
- Firearms Licensing Review Board Cases
- Preparing Convincing Application Packages resulting in the issuance of Class A Licenses to Carry Firearms for All Lawful Purposes
- Negotiating with Police Officials to obtain LTCs for clients without the need for hearings, even where the police department initially denied the client's application.

REAL ESTATE

The name you've come to trust for firearms legal services is also the name to trust for real estate brokerage.

In his real estate business, Attorney Cohen represents both buyers and sellers. Given his background in firearms law, he is sensitive to the needs of gun owners. He will research the firearms licensing policies of prospective cities and towns before you buy.

Contact Attorney Cohen at 508-654-5540.