

Lawful storage of flash/sound diversionary devices for state and local law enforcement agencies: A six-year project

By Don Whitson

Editor's note: NTOA uses the term flash/sound diversionary device (FSDD). ATF and some manufacturers use the term noise flash diversionary device (NFDD).

On July 24, 2012, the ATF issued ruling 2012-4. This ruling allows, for the first time (with the exception of individual variances), state and local law enforcement agencies to store flash/sound diversionary devices (FSDDs) and other tactical munitions lawfully and practically in their police vehicles. The ruling was issued to improve safety and to mitigate confusion on proper storage. (This ruling is currently classified by ATF as law enforcement sensitive. Dissemination of the contents should be restricted to known and secure law enforcement contacts to mitigate countermeasures.)

An industry ruling is a paper document published by the ATF to clarify or modify certain conditions or procedures from previous rulings or regulations. ATF publishes rulings to promote uniform application of the laws and regulations it administers. Rulings interpret the requirements of laws and regulations and apply retroactively unless otherwise indicated. Rulings do not have the force and effect of Department of Justice regulations, but they may be used as precedents. In applying published rulings, the effect of subsequent legislation, regulations, court decisions and rulings must be considered. Concerned parties are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.¹

NTOA learned there was little to no consistency on storage throughout United States law enforcement agencies. It was our mission to define and educate the proper and lawful requirements for storage of FSDDs.



The NTOA requested the ruling on behalf of all state and local law enforcement agencies. (Federal agencies are exempt from the federal laws pertaining to the storage of FSDDs). Our request asserted that authorization to store explosive materials in official response vehicles would increase public safety and ensure that responses to critical incidents are conducted more efficiently. The ruling reflected our concerns in the following statement:

“State and local law enforcement agencies have informed ATF that ready access to such devices is essential to the success of tactical response operations. They assert that if officers cannot maintain these devices in their response vehicles, they must travel to a central storage location to retrieve them. This could delay their response to emergency situations requiring the use of these devices. Such delays could prove detrimental to the safety of the public in circumstances of civil unrest and to persons involved in hostage situations...”

NTOA'S INVOLVEMENT BEGINS

In 2007, the NTOA began investigating and researching proper storage for FSDDs, especially in police response vehicles. Sgt. Jim Clark, NTOA's Legal Section Chair, became closely involved, interpreting the federal code and associated laws. Special Agent Rob Redd, NTOA's Federal Liaison for ATF, also became involved.

There was much confusion and misinformation about this topic, even within ATF. NTOA learned there was little to no

BACKGROUND – CASE STUDY

In August 2004, a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a warrant for Charles A. Malouff, Jr. in violation of Title 26 United States Code; Section 5861 (d) and (e). The warrant alleged that Malouff illegally possessed flash/sound diversionary devices from Precision Ordnance Products, which he kept following his employment with a Texas police agency. Malouff transferred possession of the devices to Eugene Harper Williams, Jr. to be used in tactical medic training. Both Malouff and Williams had private enterprises that conducted contractual training for police tactics to various agencies in Texas.

ATF was notified following two events involving Williams. In the first, Williams used one of the illegally obtained devices in a prank at a restaurant in Hempstead, Texas. He placed the device under the car tire of a colleague's marked patrol unit. The second incident involved another prank in which Williams threw one of the devices at the foot of a Huffman, Texas, firefighter during a bachelor party hosted by Williams. The incident resulted in a permanent injury to the firefighter's right foot.

ATF agents located 78 illegally obtained FSDDs under Williams' desk in his office. Williams was indicted by a grand jury and was ultimately convicted in U.S. District Court.² Williams was sentenced on six counts of illegally storing and possessing the devices, resulting in the statutory maximum sentence of 10 years of federal imprisonment.

The main defense at the trial and by law enforcement witnesses was the confusion over storage requirements for these devices. Notwithstanding the actions by Williams, lawful storage of these devices had been debated for years with much confusion about how to interpret the law. Ultimately, the court ruled there was no ambiguity about the proper transfer and storage of FSDDs.

consistency on storage throughout United States law enforcement agencies. It was our mission to define and educate the proper and lawful requirements for storage of FSDDs.

The most common practice by law enforcement officers was to consider the devices "in use" while they were stored in the trunk of the individual police vehicle or special response vehicle, which was not allowed according to the Code of Federal Regulations. Many police agencies were under the

impression that they were exempt from storage requirements, but that was part of the confusion and miscommunication which was identified in the Williams case. (See case study.)

Agent Redd put us in contact with the person at ATF who could provide counsel on proper storage requirements and to obtain an industry ruling. I began to work with ATF's Explosive Industry Programs branch for a solution. They worked tirelessly to understand the mission requirements by law enforcement, particularly with regard to the need for quick access to the devices by tactical officers.

For three years, NTOA worked with ATF to obtain an industry ruling. At one point in 2009, NTOA went so far as to write a bill for the U.S. Congress requesting the Code of Federal Regulations be amended to allow for altered requirements. We were unable to find a congressman to sponsor the bill because it was too time-intensive to battle the Department of Justice over such a narrow topic.

There was a personnel rotation within the ATF Explosives Industry Programs Branch in late 2009, and in 2010 I was introduced to an ATF Explosives Industry Liaison Analyst. We began to work on the project where the previous ATF Industry Operations Investigator left off, and continued this work for two more years.

Therein was the challenge: simply allowing police officers to store these devices in their kit in the trunk of a police car was not an option. Convincing ATF there was a compelling need was not the obstacle. Finding an alternative method to meet everyone's needs was the challenge.

CHALLENGES FACED

The process of obtaining a ruling was complicated by two major issues. First, there are some 18,000 law enforcement entities in the United States. There are no specific rules or laws governing the way in which they all conduct business. Finding a universally appropriate method for all the different agencies proved difficult.

Second, although FSDDs are classified as high explosives due to their flash powder content, other Explosive Actuated Tactical Devices (EATDs) contain only low explosives or other explosive pyrotechnic materials that may otherwise be stored in a type 4 magazine. These devices typically expel smoke or an irritant such as CS and are commonly known as pyrotechnic smoke and gas grenades, aerosol grenades and

blast grenade irritants. As a result, there was an effort to eliminate the need for a type 4 magazine for low explosive devices and a type 3 magazine for FSDDs and stingball grenades.

The Director of ATF, under 27 CFR 555.22, can approve an alternate method or procedure in lieu of a method or procedure specifically prescribed in Part 555. ATF may approve an alternate method or procedure when: (1) good cause is shown for the use of the alternate method or procedure; (2) the alternate method or procedure is within the purpose of, and consistent with, the effect intended by the specifically prescribed method or procedure and that the alternate method or procedure is substantially equivalent to that specifically prescribed method or procedure; and (3) the alternate method or procedure will not be contrary to any provision of law, or result in an increase in cost to the government or hinder the effective administration of part 555.

Therein was the challenge: simply allowing police officers to store these devices in their kit in the trunk of a police car was not an option. Convincing ATF there was a compelling need was not the obstacle. Finding an alternative method to meet everyone's needs was the challenge.

The Code of Federal Regulations is clear and has been reiterated in the ruling. The regulations state that while law enforcement entities are exempt from the requirement to obtain an explosives license, they are not exempt from storing explosive materials in approved magazines. (See Title 18)

TITLE 18

Under Title 18, United States Code (USC), Section 842 (j), all persons must store explosive materials in compliance with regulations issued by the Attorney General. The Attorney General has delegated authority to administer and enforce the Federal explosives laws to the Director, ATF; 28 CFR 0.130. The regulations are contained within Title 27, Code of Federal Regulations (CFR), Part 555, Subpart K, and state that unless they are in the process of manufacture; being physically handled in the operating process of a licensee or user; being used; or being transported to a place of storage or use by a licensee or permittee, or by a person who has lawfully acquired explosive materials under section 555.106. The construction requirements for type 1, type 2, and type 3 magazines used for the storage of high explosives are found at 27 CFR 555.207, 555.208 and 555.209, respectively. The requirements for type 4 magazines used for the storage of low explosives are at CFR 555.210. While state and local government agencies are exempt from the requirement to obtain an explosives license or permit for the transportation, shipment, receipt or importation of explosive materials, they are not exempt from the requirement to store explosives in conformity with ATF regulations; 18 U.S.C. 845(a)(3); 27 CFR 555.141(a)(3).³



Commercially available weapon storage box, approved by ATF, that can be used for storing FSDDs in police response vehicles.

REQUIREMENTS FOR COMPLIANCE

The following is a list of requirements for compliance with the new ATF ruling:

EATDs stored in official response vehicles parked inside a secured building

The building must be a department-owned or leased facility not accessible by unauthorized personnel. The secured building has law enforcement or other government personnel present at all times, or the building has an additional security feature such as an alarm, camera or card entry system. Official response vehicles and buildings must be locked and secured at all times when not in use. The combined net explosive weight stored in response vehicles and other magazines located in the same secured building must not exceed 50 pounds, and the EATDs must not be stored in the same magazine as detonators (such as blasting caps).

EATDs stored in official response vehicles parked at any outdoor location

Unattended official response vehicles must be locked and secured with at least one additional security feature such as a vehicle alarm, vehicle tracking device, vehicle immobilization mechanism, steering wheel lock or other equivalent alternative. Official response vehicles located at an outdoor location are subject to the following net explosives weight limitations:

- Sedans and SUVs may not hold more than two devices containing flash powder (FSDDs, stingers) and 2.5 pounds total net explosive weight, including the flash powder devices.
- Multi-personnel response vehicles (large personnel, cargo or utility vehicles) may not hold more than 10 devices containing flash powder, and 2.5 pounds total net explosives weight, including the flash powder devices.

DEFINITIONS

Explosive Actuated Tactical Devices (EATD) — Munitions that have a mechanical M201A1 (or similar) mechanical fuze assembly, such as flash powder grenades, smoke and other tactical devices containing an explosive/pyrotechnic compound. Most of these devices, specifically stingball-type grenades, contain small amounts of flash powder or other pyrotechnic material which are closely regulated by ATF.

Official law enforcement vehicle — State and local law enforcement department-issued vehicles designated for use by tactical response teams and officers. Allowing state and local tactical response personnel the flexibility to store these devices overnight in official response vehicles, whether or not attended, would increase public safety by facilitating quick and efficient incident responses for law enforcement operations. Storing these devices in unoccupied vehicles and near occupied structures was not allowed prior to this ruling.

Commercially manufactured magazines — These are specifically designed for weapons/munitions and ballistic protection equipment storage by law enforcement personnel within duty vehicles. They substantially meet the level of security prescribed in the regulations for type 3 and type 4 magazines. (Until this ruling, magazines had to meet specific regulations in type, materials and structure). The thought was that these storage boxes are designed to secure police high-powered rifles, ammunition, ballistic vests and other tactical equipment. If the box is secure enough for these weapons and tools, then it was reasonable to assume they are substantial enough to secure FSDDs and EATDs.

NTOA does not promote or recommend any specific brand of vehicle storage magazine. One company that was instrumental in guiding ATF to the final ruling was Truck Vault. They provided technical data and information to ATF upon request. The specifics for magazine design were supplied by Sales and Marketing Director Don Fenton.

Daily summary — Agencies storing EATDs within official response vehicles must maintain a daily summary of magazine transactions (inventory storage record). The record must contain the name of the explosive material's manufacturer, the quantity on hand and the dates that the materials are received, removed and used. Officers must maintain a copy of this record within the vehicle and at an off-site location, such as with their supervisor.

Annual inventory — Agencies must conduct an annual inventory of the EATDs stored in their official response vehicle and compare it to the inventory storage record.

Weekly inspection — Agencies must inspect the magazine every seven days. This inspection need not be an inventory, but must be sufficient to determine whether there has been any unauthorized entry or attempted entry into the magazine or unauthorized removal of the contents of the magazine.

While there are some additional steps to take to remain in compliance with this ruling, the major hurdles have been overcome to allow for the safe and efficient storage of FSDDs. Prior to this ruling, it was impossible to be in compliance and ready to respond to critical incidents at the same time. We believe this was a compromise that solves the problem for state and local law enforcement agencies.

Explosives used by bomb techs and tactical response teams (Ruling 2009-3)

Under specific conditions, state and local bomb technicians and explosives response teams may store a limited amount of explosive materials within official response vehicles.

ATF ruling 2012-4 should not be confused with ATF ruling 2009-3, which pertains to explosives used by bomb technicians and tactical response teams who use explosives for breaching operations. Explosives stored for their purposes must be kept in a type 3 magazine and follow regulations within the ruling.

Due to the quantity and type of explosives used by bomb technicians, the ruling has different requirements. In 2005, the ATF ruled that certain explosive breaching charges are not destructive devices (water impulse charges, strip charges, oval charges and hinge charges). Destructive devices are defined, in part, at 27 CFR 479.11, as “(a) Any explosive, incendiary, or poison gas (1) bomb, (2), grenade, (3) rocket having a propellant charge of more than 4 ounces, (4) missile having an explosive or incendiary charge of more than one-quarter ounce, (5) mine, or (6) similar device; (b) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of the explosive or other propellant, the barrel or barrels of which have

a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the director finds is generally recognized as particularly suitable for sporting purposes, and (c) any combination of parts either designed or intended for use converting any device into a destructive device as prescribed in paragraphs (a) and (b) of this definition and from which a destructive device may be readily assembled.”

Definition for explosive breaching charges not classified as destructive devices

In 2005, the director of ATF specifically responded to an inquiry from the NTOA questioning whether certain explosive breaching charges are considered destructive devices. The director determined that the breaching charges mentioned above are not designed or used as weapons and are not destructive devices under 27 CFR, Part 479. The breaching charges are explosive materials under the provisions of the Organized Crime Control Act of 1970 (18 U.S.C. Chapter 40) and the implementing regulations at 27 CFR, Part 555. Even though these breaching charges are not classified as destructive devices, they must be stored in accordance to provisions within 27 CFR, Part 555.

CONCLUSION

Complying with these regulations is likely to vary from current protocols in most agencies. It is important to note that Congress has directed ATF to closely regulate the explosives industry. There have been far too many thefts of explosive materials, many from law enforcement agencies.

For many agencies, the hardened storage of tactical equipment in response vehicles is already in place. This requires only some minor modifications. For agencies without storage capabilities, it should be considered a best practice to secure explosives as

well as expensive and dangerous tactical tools.

Each agency should contact its individual state or local regulatory agency for counsel on any further restrictive laws pertaining to the storage of explosives.

To request a copy of ATF's Federal Explosives Laws and Regulations, ATF P5400.7, you may contact the ATF Distribution Center at 202-648-6420, or your local ATF office.

An electronic version of this publication can be found at www.atf.gov/publications/download/p/atf-p-5400-7.pdf. NTOA members can access the PDF copy of this ruling as well as the others mentioned in this article in the Less-Lethal Discussion Forum at www.ntoa.org.

Your feedback, comments and questions are welcome. Contact me at dwhitson@fcgov.com.

Special thanks to Sgt. Jim Clark for his guidance and research on this project. ▄

ENDNOTES

1. <http://atf.gov/regulations-rulings/rulings/>
2. United States of America v. Charles A. Malouff, Jr., et al, H06-456M (United States District Court June 26, 2006).
3. Codified Regulations. CFR Title 27, Chapter II, Part 555. Commerce in Explosives