UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EVERYTOWN FOR GUN SAFETY SUPPORT FUND, Plaintiff, -v- BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, Defendant.	18 Civ. 2296 (AJN)

DEFENDANT BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendant Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this reply memorandum of law in further support of its motion for summary judgment, and in opposition to plaintiff Everytown for Gun Safety Support Fund's ("Plaintiff") cross-motion for summary judgment.

ARGUMENT

A. ATF is Prohibited By Statute from Disclosing the Contents of the Firearms Trace System Database

1. The 2012 Appropriations Act is an Exemption 3 Statute

As set forth in ATF's opening brief, *see* Def. ATF's Mem. of Law in Support of Its Mot. for Summ. J. ("ATF Br.") at 12–13, Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3) authorizes an agency to withhold records that have been "specifically exempted from disclosure by statute." Courts have repeatedly held that iterations of the Tiahrt Amendment since 2005 exempt data in the Firearms Trace System database from disclosure pursuant to FOIA. *See, e.g., City of Chicago v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco, and Firearms*, 423 F.3d 777, 781 (7th Cir. 2005) ("[T]he 2005 [Appropriations] Act amounts to a change in substantive FOIA law in that it exempts from disclosure [trace] data previously available to the public under FOIA.") (citations omitted); *Reep v. U.S. Dep't of Justice*, 302 F. Supp. 3d 174, 183 (D.D.C. 2018) ("The appropriations bill leaves the ATF with no discretion. And courts have previously held that Exemption 3 protects ATF firearms trace data.") (citations omitted).

Plaintiff unpersuasively asserts on various grounds that the information sought by its FOIA Request—which seeks aggregate data relating to the numbers of firearms used in attempted or completed suicides across numerous variables—can be released despite this clear prohibition on disclosure. Pl.'s Mem. of Law in Support of Its Cross Mot. for Summ. J. and in

Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Br."), at 9–18. First, Plaintiff argues that the most recent iteration of the Tiahrt Amendment found in the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112–55, 125 Stat. 552 (2011) ("2012 Appropriations Act") "is not an Exemption 3 statute" because it was enacted after the OPEN FOIA Act of 2009, but does not "specifically cite" to 5 U.S.C. § 552(b)(3)(B). Pl.'s Br. at 9.

As the cases addressing this issue have explained, the Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, 118 Stat. 2809, 2859–60 (2004) ("2005 Appropriations Act") and the Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, 121 Stat. 1844, 1903–04 (2007) ("2008 Appropriations Act"), which were enacted prior to 2009, satisfied the requirements of Exemption 3. *See* ATF Br. at 14–15 (citing cases). The 2005 Appropriations Act explicitly states "[t]hat no funds appropriated *under this or any other Act with respect to any fiscal year* may be used to disclose part or all of the contents of the Firearms Trace System database." 118 Stat. 2809, 2859 (emphasis added). The 2008 Appropriations Act similarly states: "[t]hat, beginning in fiscal year 2008 *and thereafter*, no funds appropriate *under this or any other Act* may be used to disclose part or all of the contents of the Firearms Trace System database." 121 Stat. 1844, 1903–04 (emphasis added). Accordingly, courts which have considered this very issue since the OPEN FOIA Act of 2009 have held that "the disclosure prohibitions set forth by Congress in the 2005 and 2008 [versions of the Tiahrt Amendment] are still effective prospectively and beyond those fiscal years as a permanent prohibition, until such time as Congress expresses the intent to repeal or modify them." *Ctr. for Investigative Reporting v. U.S. Dep't of Justice*, No. 17-cv-06557, 2018 WL 3368884, at *8 (N.D. Cal. July 10, 2018) (quoting *Abdeljabbar v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 74 F. Supp. 3d 158, 175 (D.D.C. 2014) (alteration in original)). *See also McRae v. Dep't of Justice*, 869 F.

Supp. 2d 151, 163 (D.D.C. 2012) (2005 Appropriations Act was proper Exemption 3 statute which justified ATF's holdings of information derived from Firearms Trace System database); *Skinner v. Dep't of Justice*, 744 F. Supp. 2d 185, 204 (D.D.C. 2010) (same).

Nonetheless, Plaintiff argues that the 2012 Appropriations Act "repealed" earlier versions of the Tiahrt Amendment as set forth in prior Appropriations Acts. Pl.'s Br. at 10–14. As the Supreme Court has held, "repeals by implication are not favored . . . and will not be found unless an intent to repeal is 'clear and manifest.'" *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (citations omitted). As Plaintiff acknowledges, "a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two." *See* Pl.'s Br. at 13 (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)). There is no evidence in the statutory text or in the legislative history of the various iterations of the Tiahrt Amendment that Congress intended to repeal the 2005 and 2008 Appropriations Acts' prohibitions against disclosure by passing virtually identical prohibitions in 2010 and 2012. As the district court noted in *Abdeljabbar*, "Congress's decision to incorporate similar language into appropriations bills after 2009 demonstrates its intent to continue the disclosure prohibition; to find otherwise would require this Court to reach the implausible conclusion that Congress intended to repeal by implication a disclosure prohibition, at least with respect to FOIA, by reiterating that very prohibition in subsequent legislation." 74 F. Supp. 3d at 175–76 (citation omitted).

2. The Tiahrt Amendment's Exceptions to the Prohibition on the Release of Tracing Data Do Not Apply to FOIA Requests

Plaintiff argues that its FOIA Request seeks "statistical aggregate data," which is "specifically excepted from the Tiahrt Rider's ban on disclosure." Pl.'s Br. at 14–15. Contrary to Plaintiff's assertion, the Tiahrt Amendment makes no mention of FOIA or the "release" of agency records pursuant to FOIA. As discussed in ATF's opening brief, *see* ATF Br. at 8–9, the

2012 Appropriations Act contains the following proviso ("Subpart C") to the prohibition on releasing tracing data:

> [T]his proviso shall not be construed to prevent: . . . (C) the publications of annual statistical reports on products regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives, including total production, importation, and exportation by each licensed importer (as so defined) and licensed manufacturer (as so defined), or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations . . . .

125 Stat. at 552. Subpart C first appeared in the 2008 Appropriations Act, *see* 121 Stat. 1844, 1903–04, and permits the "publication" by ATF of "annual statistical reports." Consistent with that statutory authorization, ATF publishes a limited number of aggregate statistical reports derived from trace data that the agency believes will provide helpful insights to the public without disclosing sensitive law enforcement or other material. *See* Declaration of Charles J. Houser, dated Oct. 1, 2018 ("Houser Decl.") ¶ 18; https://www.atf.gov/resource-center/data-statistics.

However, Plaintiff asserts that, to the extent the dictionary definition of "publishing" can mean "the action of making something generally known," *see* Pl.'s Br. at 15, the "publication" provision in subpart C overrides the 2012 Appropriations Act's (and its predecessor Acts') unequivocal prohibition against "disclos[ing] part or all of the contents of the Firearms Trace System database maintained by the [ATF] . . . ." 125 Stat. 552, 609–610. Plaintiff's interpretation of the term "publication" is unsupported by the legislative history of subpart C, which makes clear that the purpose of this exception to the disclosure prohibition had nothing to do with FOIA disclosures. As explained in the House Report accompanying the passage of the 2005 Appropriations Act:

> At the same time, the Committee is concerned that the previous language has been interpreted to prevent publication of a long-running series of statistical reports on products regulated by ATF. This was never the intention of the Committee, and

> the new language should make clear that those reports may continue to be published in their usual form as they pose none of the concerns associated with law enforcement sensitive information.

H.R. Rep. No. 108–576, at 30 (2004), *available at* 2004 WL 3044771. To address this issue and to permit the publication of statistical reports by ATF, the 2005 Appropriations Act included the following language: "except that this proviso shall not be construed to prevent the disclosure of statistical information concerning total production, importation, and exportation by each licensed importer . . . and licensed manufacturer . . . ." 118 Stat. 2809, 2860. As noted above, that language was further revised in the 2008 Appropriations Act, and was reproduced verbatim in the 2012 Appropriations Act. The House Report concerning this provision in the 2008 Appropriations Act similarly explained:

> At the same time, the Committee is concerned that the previous year's language has been interpreted to prevent publication of a long-running series of statistical reports on products regulated by ATF. This was never the intention of the Committee, and the fiscal year 2008 language makes clear that those reports may continue to be published in their usual form as they pose none of the concerns associated with law enforcement sensitive information.

H.R. Rep. No. 110–240, at 63 (2007), *available at* 2007 WL 2075231. Thus, the legislative history of subpart C shows that Congress intended "publication" to refer to the "publication of a long-running series of statistical reports" by ATF, not to FOIA disclosures.

Because nothing in Subpart C mentions disclosures under FOIA, there is no "clear and manifest" intent expressed in the 2008 or 2012 Appropriations Acts to open up the trace database to FOIA requests and undo the "change in substantive FOIA law" effected by the 2005 Consolidated Appropriations Act. *See City of Chicago*, 423 F.3d at 781. The ATF's statutory authority to compile and publish certain aggregate statistical data in the public interest under subpart C cannot reasonably be interpreted to imply that a FOIA request can compel the agency to create a customized statistical analysis of the Firearms Trace System database at the direction

of a FOIA plaintiff or requester. This Court should therefore reject Plaintiff's erroneous interpretation of the "publication" clause in subpart C, because it contradicts the general prohibitions against disclosure in the 2012 Appropriations Act, and would lead to the absurd result of permitting Firearms Trace System data to be disclosed to anyone under FOIA.

Plaintiff also argues that ATF "has produced statistical, aggregate data in response to litigation, citing Subpart (C) for the authority to do so." Pl.'s Br. at 15. The Tiahrt Amendment expressly permits the disclosure of the contents of the FTS database in a narrow category of cases:

> [A]ll such data shall be immune from legal process, shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State (including the District of Columbia) or Federal court or in an administrative proceeding *other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to enforce the provisions of chapter 44 of such title [18 U.S.C. §§ 921–931], or a review of such an action or proceeding . . . .*

2012 Appropriations Act, 125 Stat. 552, 609–610 (emphasis added). The two cases cited by Plaintiff involve challenges under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*, to ATF's authority under the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*, and thus fall squarely within the scope of this provision. *See* Supplemental Declaration of Charles J. Houser, dated November 16, 2018 ("Supp. Houser Decl."), ¶¶ 6–10 & Exs. D and E. Accordingly, ATF's production of trace data as part of the administrative records in these cases was authorized under the terms of the Tiahrt Amendment. By contrast, the statute precludes the release of Firearms Trace System data in response to FOIA requests.

B. Plaintiff's FOIA Request Requires ATF to Create New, Customized Statistical Reports, Which Cannot Be Compelled Under FOIA

The parties agree that ATF cannot be compelled to create a new document or record in response to the FOIA Request. *See, e.g., Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*,

421 U.S. 132, 161–62 (1975). The dispute in this case is whether the FOIA Request for "records containing aggregate trace data that document" the numbers of firearms recovered after attempted or completed suicides that also satisfy numerous other combined criteria, *see* Houser Decl. Ex. A, at 2–3, would require ATF to create new records. Other than the two numbered items in Plaintiff's FOIA Request that are publicly available on ATF's website, *id.* at ¶¶ 25, 30, there is no existing record, report, or publication at ATF that contains the requested statistical data in the remaining ten numbered items of the FOIA Request, *id.*, and FOIA does not compel ATF to create new records to satisfy the remainder of Plaintiff's request.

Plaintiff argues that the 1996 Electronic FOIA Amendments ("E-FOIA Amendments"), Pub. L. No. 104–231, § 5, 110 Stat. 3048, 3050 (1996), compel the release of records stored in electronic databases like the Firearms Trace System database, because the E-FOIA Amendments require an agency to conduct electronic database searches, and such searches are not regarded as involving the creation of new records. Pl.'s Br. at 18–19 (citing *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012); *People for the Am. Way Found. v. U.S. Dep't of Justice,* 451 F. Supp. 2d 6, 14 (D.D.C. 2006)). But this argument attacks a strawman. ATF's position is not that aggregate statistical data in the Firearms Trace System database are immune from production under FOIA because they are stored in an electronic database or can only be retrieved by an electronic search of that database, but rather that the process of responding to Plaintiff's FOIA Request entails the creation of records that presently do not exist. In the *National Security Counselors* case cited by Plaintiff, *see* Pl.'s Br. at 19, the district court considered an analogous FOIA request and held that it amounted to the creation of a new record:

> Producing a listing or index of records . . . is different than producing particular points of data (*i.e.,* the records themselves). This is because a particular listing or index of the contents of a database would not necessarily have existed prior to a given FOIA request . . . .The same would be true of paper, rather than electronic,

> records. For example, if a FOIA request sought 'an inventory of all non-electronic records created in 1962 regarding the Cuban Missile Crisis,' an agency need not create an inventory if one did not already exist, though the agency would need to release any such non-electronic records themselves if they were requested and were not exempt from disclosure. Therefore, a FOIA request for a listing or index of a database's contents that does not seek the contents of the database, but instead essentially seeks information about those contents, is a request that requires the creation of a new record, insofar as the agency has not previously created and retained such a listing or index.

Nat'l Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 271 (D.D.C. 2012) (citation omitted). Here, Plaintiff is seeking customized statistical reports similar to indexes of specific firearm trace records, which do not presently exist and which ATF cannot be compelled to create under FOIA.

Plaintiff's unsupported assertion that the work needed for ATF analysts to create customized statistical reports responsive to the FOIA Request is merely "a simple search" that "will yield both the responsive database entries and the requested numbers thereof," Pl.'s Br. at 21, is refuted by the record. The Houser Declaration, which is entitled to a presumption of good faith, explains that ATF must take the following exhaustive steps to *create* the reports requested by Plaintiff: (1) run searches on the database to identify the relevant trace data, Houser Decl. ¶ 31; (2) clean up the raw data pulled from these searches by performing at least six levels of data filtering—a process which requires analysts to evaluate the data and fill in gaps by making educated assumptions based on other fields associated with the same entry, by performing research on missing fields, *id.* ¶¶ 21, 30, and by conducting comparative analyses of possessor and purchaser information, *id.* ¶ 31; (3) inserting the resulting statistics into applicable software and creating a visual depiction of the data, *id.* ¶¶ 21, 30; and (4) subjecting the resulting product to multi-level reviews to ensure the accuracy of the data and the format in which it is presented. *Id.* ¶¶ 21, 30, 32. FOIA only requires ATF to go as far as step (1)—which is to run a reasonable search—and then produce the records located by the searches. *See, e.g., Schladetsch v. U.S.*

Dep't of Hous. and Urban Dev., No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) ("an electronic search of computer databases does not amount to a creation of records"). What Plaintiff seeks here—customizing statistical reports that would require ATF to undertake not only step (1) but also steps (2) through (4)—is not compelled by FOIA. *See Frank v. U.S. Dep't of Justice*, 941 F. Supp. 4, 5 (D.D.C. 1996) ("The Justice Department is not required, by FOIA or by any other statute, to dig out all the information that might exist, in whatever form or place it might be found, and to *create* a document that answers plaintiff's question.") (emphasis in original). Indeed, a recent district court case which considered a similar FOIA request for statistical aggregate data derived from the Firearms Trace System database described the *same* process—*e.g.*, "the individual data elements in the database must be searched for and then extracted, compiled, analyzed, and manipulated using 'statistical software' to create statistical trace data suitable for publication"—as "necessarily entail[ing] the creation of a new record" which "the Court cannot compel [ATF] to do under the FOIA." *Ctr. for Investigative Reporting*, 2018 WL 3368884, at *10.

By contrast, the cases cited by Plaintiff do not establish an entitlement under FOIA to the information sought by their FOIA Request, because those cases either concern requests for existing records maintained in electronic databases, not the creation of customized statistical reports derived from the contents of those databases, or are otherwise distinguishable from this case. *See Kensington Research & Recovery v. U.S. Dep't of Hous. & Urban Dev.*, 620 F. Supp. 2d 908, 913 (N.D. Ill. 2009) (directing HUD to reproduce a form that was previously sent to a homeowner, because it "seems highly unlikely that the recreation of a personalized HUD-27050-B form requires more than a few strokes on a keyboard"); *Long v. Immigration and Customs Enforcement*, No. 17-cv-01097, 2018 WL 4680278, at *5–6, 8 (D.D.C. Sept. 28, 2018) (holding

that ICE had not met its burden of demonstrating that data requested was not subject to FOIA disclosure, "where ICE previously has provided fields and data elements in response to virtually identical requests" from the same FOIA requester in the past, and "the court [was] not convinced that the reasons offered by ICE in this case justify its change of heart"); *People for the Am. Way Found.*, 451 F. Supp. at 15 (directing DOJ to search court records using PACER, an outside database, "as a means of identifying those pre-existing agency records that are indisputably within defendant's control and are responsive to the narrowed FOIA request"); *Schladetsch*, 2000 WL 33372125, at *3 (computer programming necessary for agency to search its databases for information sought by FOIA request was a "search tool" permitted under FOIA, "and not the creation of a new record").

Finally, Plaintiff asserts that ATF is capable of responding to the FOIA Request because ATF's Internet-based "eTrace" application, which is available only to law enforcement officials, *see* Houser Decl. at ¶ 14; Supp. Houser Decl. ¶ 11, allows law enforcement to "generate statistical reports." *See* Pl.'s Br. at 21. Once again, the Tiahrt Amendment expressly permits disclosures of the Firearms Trace System database to law enforcement. *See, e.g.,* 2012 Appropriations Act, 125 Stat. 552, 609–610 (permitting disclosures to "a Federal, State, local, or tribal law enforcement agency . . . or . . . a foreign law enforcement agency solely in connection with or for use in a criminal investigation or prosecution"). Moreover, eTrace is not capable of generating the statistical reports sought by Plaintiff in this case. Supp. Houser Decl. ¶ 11. Permitting law enforcement agencies to query firearms trace-related data for law enforcement purposes is not the same as directing ATF to do so at the direction of a FOIA requester, and accordingly, this Court should not compel ATF to produce the statistical analyses sought by Plaintiff.

CONCLUSION

For the foregoing reasons, defendant ATF respectfully requests that the Court grant summary judgment in its favor, as set out above, and deny Plaintiff's cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Dated: New York, New York
November 16, 2018

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