19-3438

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 19-3438

EVERYTOWN FOR GUN SAFETY SUPPORT FUND,

Plaintiff-Appellee,

—v.—

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
VOLUME II OF II
(Pages JA-301 to JA-423)

EVERYTOWN LAW
Attorney for Plaintiff-Appellee.
450 Lexington Avenue
P.O. Box 4184
New York, New York 10017
(646) 324-8220

GEOFFREY S. BERMAN,
United States Attorney for the Southern District of New York,
Attorney for Defendant-Appellant.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2721

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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EVERYTOWN FOR GUN SAFETY SUPPORT FUND,

Plaintiff,

v. 18 Civ. 2296 (AJN)

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Oral Argument

Defendant.

----------x

New York, N.Y.
August 12, 2019
10:07 a.m.

Before:

HON. ALISON J. NATHAN,

District Judge

APPEARANCES

EVERYTOWN LAW
Attorneys for Plaintiff
BY: ALLA LEFKOWITZ
JAMES E. MILLER
-and-
GIBBONS P.C.
BY: LAWRENCE S. LUSTBERG

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
TOMOCO ONOZAWA
Assistant United States Attorney

(Case called)

THE COURT: I will take appearances of counsel, starting with counsel for the plaintiff.

MS. LEFKOWITZ: Good morning, your Honor. Alla Lefkowitz, Everytown Law, for Everytown for Gun Safety Support Fund. And with me I have my counsel James Miller, also of Everytown Law, and Eric Tirschwell, also of Everytown Law.

MR. LUSTBERG: And Lawrence Lustberg, Gibbons P.C., also on behalf of plaintiff.

THE COURT: Good afternoon, counsel.

On behalf of defendants?

MS. ONOSAWA: On behalf of defendant ATF, Tomoco Onosawa from the U.S. Attorney's Office for the Southern District of New York.

THE COURT: Good morning, Ms. Onosawa.

We are here for oral argument on cross-motions for summary judgment in this FOIA case. Since it's cross-motions, I suppose either side could go first, but somebody has to. Any reason for plaintiff not to argue first?

MS. LEFKOWITZ: I'm happy to do so, your Honor.

THE COURT: Thank you.

I think we'll do 25 minutes per side. If I run substantially over with questions, which I doubt, then I'll make sure we have equal time for both sides.

Ms. Lefkowitz, would you like to reserve time?

MS. LEFKOWITZ: I would like to reserve some time, yes.

THE COURT: Ten minutes?

MS. LEFKOWITZ: Ten minutes is good.

THE COURT: OK. So 15 minutes to start. I'll try to give you a warning as your time is running out. Perhaps the podium is best because the microphone is close to you there. Thank you. If you could just pull the microphone.

MS. LEFKOWITZ: Yes.

THE COURT: Thank you.

MS. LEFKOWITZ: Good morning, your Honor.

THE COURT: Good morning.

MS. LEFKOWITZ: There are three central questions that are at issue here. The first is whether the Tiahrt rider qualifies as a withholding statute under FOIA. If so, then do Everytown's requests fall into the exception to the Tiahrt rider, and that is specifically subsection (c which refers to statistical aggregate data.

THE COURT: Application of.

MS. LEFKOWITZ: Yes, correct.

If the Court determines that the Tiahrt rider is not a withholding statute or that Everytown's requests fall into subsection (c), then the third question is whether the ATF has met its burden of showing that the requests require the production of new -- the creation of new documents.

If I may, I'll begin with the first question of whether the Tiahrt rider qualifies as a withholding statute under FOIA. There's no question that it is a fundamental principle of statutory construction that repeals by implication are disfavored.

THE COURT: Lots of precedent for that and a lot less modern precedent for it actually having the effect of repeal by implication.

MS. LEFKOWITZ: Absolutely, you're right, though I would note, actually, that the Second Circuit just issued a decision, I believe, a few days ago which once again did apply the *Branch* decision which acknowledges that repeal by implication, when there's a substitute statute, can operate as repeal by implication.

THE COURT: What was the circuit case?

MS. LEFKOWITZ: The case number -- the case is --

THE COURT: It was an actual application of the doctrine, not just an invocation of it as in *Branch*?

MS. LEFKOWITZ: It was just an invocation that *Branch* still applies. And I have the case, which is *Force v. Facebook*, 2019 U.S. at Lexis 2296 -- 22698.

THE COURT: OK.

MS. LEFKOWITZ: However, an equally fundamental principle of statutory interpretation is that exemptions to FOIA are to be construed narrowly and that all doubts are to be

resolved in favor of disclosure when we're talking about FOIA. I think that's very important with regard to the Tiahrt rider because I think there's agreement among the parties that if the 2012 version of the Tiahrt rider was the only version that was ever passed, it would not qualify as a withholding statute.

THE COURT: Right.

MS. LEFKOWITZ: So, for this reason, the government has to go back to the 2005 rider six versions ago.

THE COURT: 2005? What about 2008?

MS. LEFKOWITZ: 2005 or 2008. I think 2005, I use that as an example because that's the one where the Second Circuit expressly held that it did qualify as a withholding statute.

THE COURT: The 2008 wouldn't also?

MS. LEFKOWITZ: Yes, absolutely. Absolutely.

The only reason that the ATF ever has to rely on the 2005 or 2008 rider is to avoid disclosing documents under FOIA, that's it. For every other purpose, when it -- everything that the ATF has is in the 2012 version. So, for example, if the ATF wanted to put out a statistical annual report, for example, on the importation of bump stocks, all it would have to look for is the 2012 rider to see which exemptions apply there. It wouldn't look at the 2005 or the 2008 or the 2009 or the 2010 rider. So the only reason for this Court to hold that that 2005 and 2008 rider are still in effect would be to avoid

disclosure under FOIA. And I would argue that that is not a situation in which all doubts are being resolved in favor of disclosure, and I certainly acknowledge that there are cases that have -- in other circuits that have held otherwise, that have said that the Tiahrt rider does qualify as a withholding statute because of the 2005 and 2008 rider.

THE COURT: Many cases say that, whether they're well-reasoned or not or following a reasoned decision. You have no precedent on your side of the ledger for concluding that only the 2012 rider is applicable and therefore, as a result of the 2009 act, the exemption does the apply.

MS. LEFKOWITZ: That's accurate. The cases that have been decided on the specific issue -- on the specific issue of whether the 2005 rider's still in effect agree with the government's position. I would argue that -- would point out, though, that none of those decisions, with the exception of the *CIR* decision that was recently -- that recently came down from the district court in California, which is now on appeal, none of those cases dealt with statistical aggregate data. And the vast majority of them, I believe, with the exception of CIR, were pro se litigants where I think in some cases even, most importantly, the *Abdeljabbar* decision out of the D.C. circuit, in that case the plaintiff did not submit any opposition to the ATF's motion for summary judgment.

So I do think that the 2012 rider is the kind of

law -- is the kind of legislation that the Supreme Court and the Second Circuit and the Fourth Circuit had in mind when they said that a statute that comes later can repeal by implication an earlier statute if it covers the whole subject area and is --

THE COURT: What's the test for that? I mean, obviously, if we're dealing with identical language passed each year, it's sort of an irrelevant question, right, although it would be relevant here. Do you have repeal by substitution if the exact same language is passed one after the other?

MS. LEFKOWITZ: Well, the versions of the Tiahrt rider that have been passed since 2008 don't have the exact same language in all regards.

THE COURT: That's the next question. The first question is if you have the exact same language, does that fall within the canon of repeal by substitution?

MS. LEFKOWITZ: I think if there's the exact same language and no other factor had occurred, such as the passage of the OPEN FOIA Act which dealt with this exact situation, with this type of situation that if agencies are going to withhold documents under FOIA, they have to rely on a statute that expressly cites to FOIA, if that had not happened and the exact language -- there was the exact language in the 2012 rider as in the 2005 and 2008, then I guess it would be wholly redundant, and there would be absolutely no reason for that new

law to either repeal or to -- I think the situation would stay the same in those cases, but here --

THE COURT: Right, but you've added -- I guess I just want to -- let's assume the 2009 act did pass and you have one statute before and one after, and the language of the two acts is the same. Would you argue that the latter repealed the former by substitution? That's the question.

MS. LEFKOWITZ: I think, just looking at the case law, I think the case that's most on point here is the *United States v. Lovely* out of the Fourth Circuit which says that it is a universally accepted rule of statutory construction that where a later act purports to cover the whole -- it is a universally accepted rule of statutory construction that where a later act purports to cover the whole subject area covered by an earlier act, embraces new provisions, and plainly shows that it was intended not only as a substitute for the earlier act but also to cover the whole subject area involved, then we're talking -- then there is a repeal by implication.

So, to answer your question, I think there does have to be some change, and there was some changes within the 2012 rider as compared to the 2008 and the 2005 rider.

THE COURT: Has to be some change, and the reason there has to be some change is because that later language in *Lovely* suggests something in addition to covering the areas required. Is that the idea?

MS. LEFKOWITZ: I think that's right, and I think what *United States v. Lovely* acknowledges is that I don't -- there's really no point, I think, to passing literally word for word the exact same statute over and over and over again.

THE COURT: That's interesting because that might have happened here, right? Congress did do that for a number of years, but then there's changes between 2008 and 2012. But it's interesting because I thought your argument would be, yeah, if you had this case, this same case, but the language between 2008 and 2012 were identical, I would think you'd say, well, no, the 2009 act requires a clear statement from Congress, and obviously Congress in 2012 intended to cover the exact same area as in 2008. So 2008 is repealed by implication and 2012 is operative, and therefore it's not operative.

MS. LEFKOWITZ: So --

THE COURT: OK. That's what I thought you'd say. So the next question, then, was going to be, so then what do you do if there is a difference between the two provisions?

MS. LEFKOWITZ: I think if there is a difference between the two, the case law from the Supreme Court does seem pretty clear that second statute operates as a repeal of the previous statute.

THE COURT: Is the doctrine, the canon, such that it's the whole act? So there's one -- a change to one provision and therefore the whole act substitutes, or isn't it

the task of courts to read them together where they can be read together?

MS. LEFKOWITZ: I think the most logical interpretation and what's indicated by the case law is that it is the whole act that becomes -- that now becomes the new and only effective act that is in effect. I think the reason there is practical. You know, we wouldn't expect, for example, the ATF, if it was putting out some statistical trace data, to refer to five different versions or six different versions of an act to make sure that it met within the 2012 rider and the 2006 rider and the 2007 rider. I think that would be too confusing. I think the most logical thing is when you look at the last act that was passed that is clearly intended to cover the whole subject area, which the 2012 rider does, and then you bring in the fact that it was passed in the context of an appropriations rider where it is common for there to be legislation year after year that is similar to previous litigation, but it's the legislation from the latest year that governs what ATF or any other agency can do or not do.

THE COURT: What counts -- this is a little bit in the same area -- but what counts as covering the whole subject area? How do we know? Because it seems like that, as you've interpreted, might suggest a high level of frequency of repeal by implication, which runs counter to the umbrella doctrine that you agree exists, which is that it's not favored.

MS. LEFKOWITZ: Well, I think here, as far as I'm aware, there is only one set of legislation that deals with what the ATF can and cannot disclose from the trace database. There's no other applicable law. It's just the Tiahrt rider that's in these various appropriations riders. So I think we're talking about the general -- the general subject area here is disclosure and prohibition -- from the trace database and instances in which such disclosure is prohibited.

THE COURT: All right. Do you want to move to -- I would suggest a short amount of time on the second issue and the remainder of your time on whether you're asking the agency to create a new record.

MS. LEFKOWITZ: Absolutely. With respect to the second issue, if the Court does hold that the Tiahrt rider qualifies as a withholding statute, then of course there's not an exemption to the Tiahrt rider, which is subsection (c), which refers to the publication of statistical annual reports on importation, exportation, production of certain products covered by the Gun Control Act, such as ammunition and firearms, and then says, comma, "or statistical aggregate data," publication of statistical aggregate data with respect to things like firearms misuse.

And I would point here to not only the text, of course, uses the disjunctive "or," but also to the fact that even the declaration that the government submitted in support

of its own motion for summary judgment by Charles Houser in paragraph 28 refers to this subsection as referring to two sets of records, which is statistical annual reports and statistical aggregate data. And that's how the ATF has interpreted this provision previously in what we've referred to as the demand letter cases.

So unless your Honor has a question on that specific issue, I will go to the third issue, which is whether what Everytown is requesting is the creation of new documents. First, I would point out that the burden is on the agency to show that the materials sought are not agency records; that it is being required to produce new records.

I think in this case, frankly, the ATF hasn't even really come close. The declaration submitted by Charles Houser does not address each of the requests made by Everytown, the specific request. It talks in general terms. Specifically, it says all of the data that Everytown requests is within the trace database. There's no dispute about that. It doesn't say we don't code by those fields. It doesn't dispute that. It says that to pull all of the data, it would take each two analysts one hour each to pull this data. I think there's case law on the fact that querying a database and sorting a database to make the results intelligible does not -- is not creating a new record.

THE COURT: Seems like there's agreement up to that

point, and then the question is what have you requested from that? And what you've requested is the number that that search result creates.

MS. LEFKOWITZ: Absolutely.

THE COURT: I think the question is whether that number is a record that the agency has decided to create and retain.

MS. LEFKOWITZ: Absolutely. I think there's a -- well, there's two points that I would make here. The first is the ATF hasn't shown here that when you put in several queries -- let's take, I think, the first example, the first thing that we ask for, which is --

THE COURT: Use the first one, so successful 2012/2013 traces, completed suicides, and let's pick pistol.

MS. LEFKOWITZ: Exactly. So we have approximately four filters.

THE COURT: Right.

MS. LEFKOWITZ: I assume you hit enter and that produces a certain amount of results. I'm not aware of any database that wouldn't give you the number of search hits that come from doing that search. And the ATF hasn't said in its declarations that its database is not capable of spitting out that number along the lines of if I was preparing for this hearing and I search on Lexis, I would put in certain queries, I would hit enter, and the result I would get is five cases

that are the result of the corresponding search. And that's what we're asking.

THE COURT: If you'd ask for the cases, if you ask for the records of the cases that were created as a result of that search, you'd be entitled to those unless for other reasons you're not, which here you're not, which is why you're asking for the number, right?

MS. LEFKOWITZ: That's exactly right. I would just say that it's not clear from the declaration what the output is of running that query.

THE COURT: Yes.

MS. LEFKOWITZ: If it's a number, I would say that's what we ask for, and if the search can be done to just produce the number, we would be entitled to that. If the output is an Excel spreadsheet or a CSV file, or something along those lines, I understand that if the Tiahrt rider's considered to be a withholding statute, then we wouldn't be allowed to get the information that's within the Excel spreadsheet. We would certainly be allowed to see the number of rows that have the corresponding material. So it's if 33 pistols, for example, I think if you look at the case that's very similar to this --

THE COURT: So analytically you want to say, OK. You run the search using these variables. If it works like any Excel spreadsheet, we can imagine what that looks like, which includes the number of resultant cells, and you want to say

that's a record now under the electronic -- under the eFOIA Act. Hit print. Redact what we're not entitled to. Show us the number.

MS. LEFKOWITZ: Exactly, absolutely. I think the case that I found to be the most similar to this one is the *Service Women's Action Network v. Department of Defense* case from the District of Connecticut. In that case, there was a nonprofit that was asking the military for the number of certain statistics related to sexual assaults in the military, and the court had no trouble finding that many of the DOD FOIA requests appear to anticipate statistical or aggregate responses. And it talked about the fact that the Army, for example, had -- it had run a database for a certain number of years, certain kinds of sexual assaults that were sent to court-martial and a few other factors, and then it produced -- and it queried the database for that, it produced an Excel spreadsheet, and that was disclosed to the plaintiffs. Now, in that particular case, the agents -- the FOIA requests also asked for a breakdown by race, and the Army didn't do that. That's not how its database was coded, so that information could not be provided to the plaintiffs.

THE COURT: The question I had escaped me. Go ahead.

MS. LEFKOWITZ: I would just point out --

THE COURT: I know what it was. My clerk will give me a time check. You're at 20 minutes, so I've run you over, but

I'll still give you ten minutes on rebuttal and add time to the government.

You take this on -- I'm going to ask the government about it -- but both the Houser declaration and the government's briefs say that what you've just described is step one of a four-step process to answer responses to your questions. Why isn't that right or at least some of it? I don't know about the visualization part, but the cleaning of the data. I mean, you're asking for a number. You're not asking for the number of records; you're asking for the number. So, in a sense, you've asked the agency to tell you what the real number is in the world, and so why aren't they right that at least some amount of cleaning of the data is required?

MS. LEFKOWITZ: Well, I think, if you look at an analogy in the paper form as well, the requirement on agencies under FOIA is to do a reasonable search. So if we're talking about looking in file cabinets among various offices throughout the ATF, for example, and one document gets misfiled, that wouldn't mean that the ATF doesn't have to disclose the information that is available in the files where one would expect the information to be. And I think that's similar here because what the ATF points to, well, there may be a situation where a particular trace request wasn't properly coded, a field may be missing. Of course, I would love to have the most accurate data, but we understand that it's possible that a

trace request was incorrectly maybe missing some fields. And we're not expecting perfection, but I don't think that means that the ATF is not required to disclose what it has that's correctly coded. I think, just to speak a little bit --

THE COURT: Is it, in part, the suggestion that they do responsive to your specific request, which was not identify the number of instances in which the database contains this information, but you asked for the number of each -- the number of pistols used in a completed suicide successfully traced in 2012 to 2013. Doesn't that suggest some sort of objective assessment beyond what's contained in the database?

MS. LEFKOWITZ: I think the way that the FOIA request was written was to try to get the most accurate information available, which we understand to be present in the database, and we understand that it's only possible to search by the field codes that each piece -- each trace request is coded by. So I think inherent in the FOIA request is the data -- is that we would want the data pulled that would result from putting in the queries that coincide with the information that we've asked for.

THE COURT: OK. Thank you.

MS. LEFKOWITZ: Thank you, your Honor.

THE COURT: All right. Ms. Onosawa, I ran Ms. Lefkowitz over about ten minutes, so I'll give you 35 minutes, and then -- if you need it, and then ten minutes in

rebuttal from the plaintiff. Go ahead.

MS. ONOSAWA: Thank you. Good morning, your Honor.

THE COURT: Good morning.

MS. ONOSAWA: This case involves a FOIA request, or a demand, that ATF create ten sets of customized statistical summaries from data drawn from ATF's Firearm Tracing System database. I'm going to refer to it as FTS. FOIA does not compel ATF to provide or create the requested statistical summaries for the three reasons articulated -- well, for three reasons. We disagree, obviously, with plaintiff's position.

First, in a provision in the 2003 appropriation act that has been renewed almost verbatim for every year since -- and we refer to this provision as the Tiahrt rider -- Congress has clearly and consistently prohibited ATF from disclosing firearm trace information system from that database. And throughout the various iterations of the Tiahrt rider, Congress has stated during a current fiscal year and in each fiscal year thereafter no funds appropriated under this or any other act may be used to disclose part or all of the contents of the FTS database.

THE COURT: If I understand it, your basic proposition is in some ways it doesn't matter that they've repeated it. I mean, even if they had repeated it or hadn't repeated it verbatim, you would say I should look to, what, all of the past -- courts should look to all of the past riders? They're

all in effect, all of the past riders?

MS. ONOSAWA: So the --

THE COURT: Maybe let's just take an example. I asked about 2008. Is the 2008 rider, Tiahrt rider, in effect?

MS. ONOSAWA: The permanent prohibition in that rider is in effect, your Honor.

I wanted to take a step back and point your Honor to, actually, the General Accountability Office, which is tasked with providing legal opinions on appropriations acts specifically like this one has actually issued two legal opinions in response to congressional inquiries asking whether the ban in disclosure that's set forth in the Tiahrt rider is actually a permanent one. And in so doing, the GAO cited to a Second Circuit case that is cited in plaintiff's briefs. I believe it's called *Auburn Housing Authority v. Martinez*. It's a 2002 Second Circuit case in which the Second Circuit acknowledged that appropriations acts, although they're generally limited to the fiscal year in which they are -- or for which they were enacted, Congress is authorized to and has included permanent legislation in appropriations acts. And in determining whether Congress intended to enact permanent legislation in a specific appropriations act, the Second Circuit and the Supreme Court, actually, has looked to whether Congress has expressed a clear intent by way of what's called "words of futurity."

In the *Auburn* case, the Second Circuit expressly held that a provision similar to what we have in the Tiahrt rider which refers to the fiscal year and every fiscal year thereafter constituted permanent legislation that expressed Congress' permanent intent to make the ban on public disclosure a permanent one, irrespective of the fact that it has appeared in multiple versions of the Tiahrt rider.

THE COURT: But the futurity language -- I've learned a new word -- it applies to all of the act, does it not?

MS. ONOSAWA: Well, it applies to -- it applies to the provision of the Tiahrt rider which provides for -- which, sorry, bars public disclosure of trace data except for certain enumerated circumstances which we contend don't apply here.

THE COURT: And to know whether they apply here, I look to -- you say don't apply here, but to know whether they apply here, what act do I look to?

MS. ONOSAWA: I'm sorry?

THE COURT: What act do I look to, to know whether -- what exceptions I should apply?

MS. ONOSAWA: So the operative -- so the 2012 appropriations act is the current act, and it's subparts (a), (b), and (c), in addition to other allowances for disclosure to law enforcement that do apply.

THE COURT: So I look --

MS. ONOSAWA: The issue here -- I'm sorry to cut you

1 off.
2 THE COURT: No, that's the issue. The issue is what
3 act? I have to decide what act applies, and you tell me now, I
4 think, at least to understand what exceptions apply, I look to
5 the 2012 act. Do I also look to the 2008 act?
6 MS. ONOSAWA: So the 2008 act is relevant insofar as
7 plaintiff contends that the change in FOIA law requires,
8 specifically requires, Congress to invoke 5 U.S.C.
9 Section 552(b)(3) in order for a specific legal provision to be
10 a ban -- sorry, a specific statute to be an Exemption 3
11 statute, but we look to this and other prior 2009 enactments of
12 the Tiahrt rider to see that Congress always, from the
13 beginning since 2003, intended this public disclosure ban to be
14 a permanent one.
15 To the extent that plaintiffs argue that there is a
16 repeal by implication, there is nothing incongruent about the
17 various versions of the Tiahrt rider which make clear that at
18 some point Congress changed its mind and decided that FOIA
19 disclosure would be appropriate.
20 THE COURT: I want to understand if your position is
21 that, sort of the same question, I look to the 2012 act only
22 for some things and the 2008 act and 2003 act and 2005 act for
23 other things, or I take them as a whole. So just as an
24 example, I don't know if you have the language to the 2008 act
25 in front of you, but you have the basic prohibition language

"except to," and if you look at (1) of that, "a federal, state, local, tribal, or foreign law enforcement agency or a federal, state, or local prosecutor, solely in connection with and for use in a criminal investigation or prosecution."

Do you see that?

MS. ONOSAWA: I do.

THE COURT: If I had a case about disclosure or if the agency -- I suppose a better way to ask, if the agency is faced with a question of whether it can disclose, for example, to a federal law enforcement agency, does the agency ask whether it is solely in connection with and for use in a criminal investigation or prosecution?

MS. ONOSAWA: I'm sorry. I'm not sure I'm understanding the question.

THE COURT: So does that proviso apply now? Under the 2008 act, the agency was permitted to make a disclosure to a federal law enforcement agency, for example, "solely in connection with and for use in a criminal investigation or prosecution." Do you see that language?

MS. ONOSAWA: OK. Yes.

THE COURT: So that language was taken out of the 2012 rider with respect to a federal, state, local, or tribal law enforcement agency or a federal or local prosecutor. So if you're the agency or you're advising the agency, you tell them that they're still bound by the proviso -- they're limited in

what they may provide to the agency by what's included in 2008 or, no, because Congress clearly changed it with 2012?

MS. ONOSAWA: I see. I understand, your Honor. So you would take the position that the difference between the 2008 clause that you just read to me and the 2012 is that the limitation on use in a criminal investigation or prosecution was removed and, in fact, broadened for any use to a federal, state, local, or tribal law enforcement agency or a federal, state, or local prosecutor.

THE COURT: So you're saying --

MS. ONOSAWA: Broadening that.

THE COURT: -- that proviso, shall we say, was repealed by implication? And pursuant to what canon of statutory interpretation?

MS. ONOSAWA: But I don't see a clear repugnancy between these two provisions insofar as --

THE COURT: Right, so not repealed by implication. So it's still good law?

MS. ONOSAWA: We take the position -- well, this is just one clause in the Tiahrt rider. I just wanted to focus generally on the Tiahrt rider's prohibition on public disclosure under FOIA. Nothing about that has changed in any version of the Tiahrt rider. It has since 2005 provided that no funds appropriated under this or any act may be used to disclose part or all the contents of the FTS database except

for these certain exceptions. None of these override the prohibition on FOIA.

I also wanted to point out that the original 2003 Tiahrt rider did state that no funds appropriated under this or any other act shall be available to take any action based upon any provision of 5 U.S.C. 552, and that has been broadened since to not just include FOIA specifically but to include basically any public disclosure in civil litigation, except for litigation involving challenges to ATF enforcement action more broadly.

So there is no intent, either expressed or implied or otherwise, in this plain language of the statute or in the legislative history of the statute which indicates that Congress at some point decided that maybe FOIA disclosure might be appropriate.

THE COURT: Except the 2009 act which says we need a clear statement going forward in order to exempt it from disclosure statutorily.

MS. ONOSAWA: Right.

THE COURT: That's the question. So you want me to ask, did Congress intend in passing this language to prohibit the disclosure from the database? And it just seems like, analytically, if the 2012 statute is what's in effect and only in effect, then the answer to that is whatever -- no, because they didn't include a clear statement rule.

MS. ONOSAWA: But that clear statement is set forth in the 2012 Tiahrt rider, the first sentence -- well, the first few lines -- I guess it's a long sentence -- going back to 2009 is the same version of the Tiahrt rider that says that public disclosure is not allowed, and at least eight district courts and the Seventh Circuit have held that the Tiahrt rider is not a Exemption 3 statute, and plaintiffs have cited no cases to the contrary, nor are we aware of any.

THE COURT: Right. You have authority on your side, there's no question about that, and they don't. But what I don't see an answer to, and I'm looking for it, is how to deal with this question. Just analytically, I don't see how the 2008 rider continues to exist for the purposes of this analysis given that the 2012 provision both occupies the field and changes the law.

MS. ONOSAWA: Yes, but, your Honor, substantively, as a matter of statutory construction, if you look to every version of the Tiahrt rider that was passed before 2009, the same prohibition has been there from the beginning, the same prohibition has continued to go forward, and --

THE COURT: And Congress in 2009 said if you want -- future Congresses, if you want to continue to do the same thing that you've been doing, you just need to add a clearer statement. Isn't that the right way to analyze it?

MS. ONOSAWA: We acknowledge that that is what the

2009 FOIA statute provides, but, again, we need to go back to pre-2009 versions of the Tiahrt rider which on a going-forward basis and on a permanent basis, applying the analysis set forth in the Second Circuit *Auburn Housing Authority* case shows that Congress, prior to 2009, intended to and clearly did state that this prohibition on public disclosure was meant to be a permanent one.

THE COURT: And then 2009 happened. I just want to make sure I understand. Is your point that it's the 2012 rider -- it's the 2012 statute that applies, but what I should essentially interpret that as including is Congress' clear intent to prohibit disclosure from the database?

MS. ONOSAWA: That is correct.

THE COURT: OK. It's not that the 2000 -- that the old statutes are still in existence and need to be applied?

MS. ONOSAWA: Well, the ban on disclosure applies on a going-forward basis with each statute that has invoked that language. So the ban on disclosure has remained unchanged up through 2012. Up to and including 2012, I should say.

THE COURT: OK. So what, then, do you make of the canon invoked by your colleagues on the other side of repeal by comprehensive revision or complete substitution or something, whatever you want to call it? Is that good law?

MS. ONOSAWA: So the legal principles are good law, but they don't apply or they don't mesh with the facts here.

THE COURT: So you agree there is a canon -- there's a version of repeal by implication which includes that a new provision completely occupies the field or completely -- it's a comprehensive revision?

MS. ONOSAWA: It can, but the key thing here is that, as the Supreme Court held in *Rodriguez v. United States*, a repeal by implication is not favored unless the intent to repeal is clear and manifest, and the Court also held in *United States v. Fausto* that a later statute will not be held to have implicitly repealed an earlier one unless there's a clear repugnancy between the two statutes. There is no --

THE COURT: So apply that -- how, then, is the language I was asking you about in the 2008 rider no longer operative, the "solely in connection with and for use in a criminal investigation or prosecution"?

MS. ONOSAWA: So I would submit there's no clear repugnancy between limiting disclosure to law enforcement for law enforcement purposes to limiting disclosure to law enforcement for any purpose. There's no repugnancy.

THE COURT: So there's no clear repugnancy; therefore, the older provision still applies?

MS. ONOSAWA: No, the older provision has been expanded. I guess maybe I'm not --

THE COURT: Well, which narrows an exemption, narrows an exception to an exemption.

MS. ONOSAWA: But there's been no narrowing of the exemption as it relates to FOIA disclosures in civil litigation, except for the subparts that are set forth.

THE COURT: I'm not asking about its applicability here. I'm just asking as a matter of statutory interpretation does that provision, that narrow provision later expanded, but does that narrow provision still exist as law?

MS. ONOSAWA: I submit that to the extent it's been broadened by subsequent statute, it has not been.

THE COURT: Has not. Even though it has not been expressly repealed?

MS. ONOSAWA: Correct.

THE COURT: And it's not directly repugnant, as you said, so some other canon is at work here. What canon is at work?

MS. ONOSAWA: Let me pose it a different way.

THE COURT: Canon for everything, so --

MS. ONOSAWA: It would be a clear repugnancy and clearly stated intent to repeal if Congress in one year -- in a prior year said disclosure is not permitted under any circumstances and then in a later year Congress said disclosure is permitted under FOIA. There's a clear repugnancy between that, and so the operative -- the prior prohibition on disclosing FTS database data under FOIA would no longer exist. That's not the case here. In every version of the Tiahrt

amendment, that public disclosure provision has been present and not changed substantively, at least as it relates, again, to Freedom of Information Act requests like we have here.

THE COURT: Let's move to the other issues briefly on the publication exemption and then let's spend the remainder of our time on the new records issue.

MS. ONOSAWA: So subpart (C) authorizes ATF to use the data to publish annual statistical reports on products regulated by ATF or statistical aggregate data regarding firearms traffickers, firearms misuse, felons, and the like. The 2008 House Report cited in the government briefs provides that subpart (C) was never intended to authorize disclosure of Firearm Tracing System data to anyone under the Freedom of Information Act but, rather, was designed to allow ATF to continue to publish its long-standing series of annual statistical reports at its discretion to inform the public about firearm misuse.

I also wanted to address directly a point made by plaintiff about ATF's disclosure of data in two lawsuits, one in Texas, one in the District of New Mexico. Those were cases under the Administrative Procedure Act which is permitted under the Tiahrt rider, and that exception to the disclosure bar carves out enforcement proceedings commenced by ATF to enforce provisions of the Gun Control Act or review of such an action or proceeding. In other words, ATF is expressly allowed to use

FTS data as a sword and a shield. Otherwise, without it, it wouldn't be able to carry out its statutory enforcement activities and to defend challenges to the agency's enforcement activities under the APA.

Plaintiff's reply brief makes the point that we actually took a different position with respect to subpart (C). I think plaintiffs are mischaracterizing the record in those two cases. Let me just take a step back.

These were -- plaintiffs brought APA challenges to demand letters issued by ATF to certain federal firearms licensees under the APA, and in both cases --

THE COURT: I'm with you on that argument. I got it from your brief. Just going to the core of the argument, as a statutory interpretation matter, emphasis is on publication, correct, and that that need be interpreted to mean publication by the agency?

MS. ONOSAWA: Yes.

THE COURT: That's the basic argument, right?

MS. ONOSAWA: "Publication" meaning to put out for public information. It doesn't mean release under FOIA.

THE COURT: I guess what does it mean? What is the agency's understanding of what that publication -- use of the "publication" word means? What are the bounds of it?

MS. ONOSAWA: "Publish" means to put out to the public annual statistical reports relating to certain enumerated

subject matters that Congress has recognized ATF has always done before the Tiahrt rider and should continue to do under the Tiahrt rider.

THE COURT: All right. Let's move to the new record issue.

MS. ONOSAWA: To the?

THE COURT: Whether you're being asked to create a new record.

MS. ONOSAWA: OK. So plaintiff wants ATF to basically answer ten questions or multiple subparts which seek various numbers relating to nationwide and state by state -- on a state-by-state level the number of firearms used in attempted and completed suicide that weren't traced to the original buyer or were in the possession of original buyer, and on and so forth. There's no existing statistical summary, report --

THE COURT: Let's just take the one that I used with your colleague just as our operative example. So a sub-question of question one, they want the number of -- make sure I'm not messing with the language -- the number of, I'll start with the first one, pistols that were used in a completed suicide and successfully traced in 2012 to 2013, right? So can, I think, because it's not -- I think it's conceded in the Houser declaration that is a search that could be run in the database?

MS. ONOSAWA: A search for raw data can be done in the

database. That was step one of the Houser declaration.

THE COURT: Yes. Just as a very practical matter, what does that look like when one runs that search?

MS. ONOSAWA: Sure. Let me just take a step back and explain how this data ends up in the database in the first place.

So there's a portal to the FTS database called e-Trace that's available to, I think, about 23,000 law enforcement agencies -- federal, local, domestic, overseas. And every time a law enforcement agency wants ATF to start a trace of a gun, they log into e-Trace, and they have to populate a number of fields, like where the gun was located; the make; the model; the serial number; the date of recovery; the crime, to the extent they know; the location of the firearm, and then all of that gets sent to ATF electronically. ATF -- and, by the way, whatever the law enforcement agency enters is automatically populated into the database. Now, you can imagine with 23,000 law enforcement agencies having access to the portal, not everybody fills it in correctly or not everybody fills it in in the same way. So oftentimes you have fields that should be filled in that are completely missing and left blank, you have mistypings, you have numbers that are transcribed or letters that are transposed.

THE COURT: That could be true if one were filling out a paper document that was the equivalent of a query of those

fields.

MS. ONOSAWA: That is true. And in the past, I think tracing requests were faxed in as opposed to electronically submitted.

But ATF takes the information provided, and they run a trace by contacting, first, the manufacturer and going all the way down until they've traced the gun to the first retail purchaser. ATF enters that data into the database. So it's a combination of data provided by ATF and data at least initially provided by the law enforcement agency that has errors in it -- prone to errors.

So when the raw data -- ATF runs searches for data, oftentimes because of the improper entries or the incorrect entries, location fields are blank, recovery dates can be blank or they're not filled in properly, so it's not just enough for ATF to get this raw data dumb. In order to figure out, for example, answer the questions, the number of firearm type used in an completed suicide and successfully trace, they have to make educated guesses for missing data fields that would otherwise help ATF figure out if a certain piece of data is responsive to a request. So that's, in essence, sort of what -- the data filtering and analysis that goes into it. And on a nationwide level, to the extent you have nationwide data with missing data fields, it is a significant number, and it's not just a matter of --

THE COURT: The agency doesn't regularly clean the overall data? There's no process for dealing with missing fields or redundancies, I mean, kind of standard data management cleaning services?

MS. ONOSAWA: Not that I'm aware of. To the extent ATF is looking at a particular trace and notes that there's an error in it, it will obviously correct the error on the spot, but I'm not aware of any sort of systematic sort of data cleansing process that happens on like a weekly or quarterly basis.

The other thing I wanted to point out is that you have sometimes multiple law enforcement agencies putting in trace requests for the same gun. So you also have multiple tracing requests that don't reside sort of lumped together in the first consecutive three rows. They're sort of in different parts of the database. To the extent an ATF person becomes aware of that, they will correct it, but sometimes those go uncorrected.

THE COURT: So, therefore, the Houser declaration and your brief say you can't just run the search. There have to be at least some additional steps?

MS. ONOSAWA: That's correct.

THE COURT: If the request had been not for sort of number, period, but the number of entries in the database in which it is shown that a pistol was used in a completed suicide and successfully traced, 2012 to 2013, would that make a

difference? You wouldn't need to clean the data to respond to that query, would you?

MS. ONOSAWA: We would because it's seeking data for a specific time period. And, again, oftentimes date fields are not entered correctly or left blank, in which case an ATF data analyst seeing, for example, a row of missing date fields would have to make -- look back at the other data --

THE COURT: Then it just wouldn't be included. If the date field isn't included, then it's not responsive to the query.

MS. ONOSAWA: But the query, again, it's asking a question about how many guns were recovered from 2012 to 2013 that were used in completed suicides.

THE COURT: Right. My hypo is would it matter if the query had been how many entries in the database show a pistol used in a completed suicide from 2012 to 2013? Whether that is correct or not, the answer would be the number of entries that the database shows. I think there's still the question of whether you'd be required to provide the number.

MS. ONOSAWA: Right.

THE COURT: But you wouldn't have to do any -- I don't understand what the position would be that you have to do further cleaning in order to get to that.

MS. ONOSAWA: Well, to get to the correct number, one would need to analyze the data to see if the information

recovered from the pull actually reflects what's being sought by the request. It's not just, again, a data dump.

THE COURT: If they had asked for -- I mean, what about sort of the underlying -- if they asked for the underlying records responsive to -- we want the records of every pistol used in a completed suicide that's successfully traced 2012 to 2013?

MS. ONOSAWA: But there's no such record that reflects that. It's different points of data that would be pulled together initially through a raw search, but then you would have to look at it to see which of those relate specifically to the parameters that your Honor set forth, and not only that, to go back and try to correct and see whether a particular entry actually fits that criteria. That's the second level of analysis that FOIA -- and going forward, that FOIA doesn't require. Again, it's an answer to a question, what does your database tell us about the number of firearms by each type that were used in a completed suicide over these two years?

THE COURT: But, again, you said take a step back. Let's just take pistols from question one. So can you run a search in the database that isolates the number of times it's contained in the database of a pistol being used in a completed suicide that was successfully traced in 2012 to 2013? Is that a search that can be run in the database?

MS. ONOSAWA: I believe -- I'm going by the Houser

declaration.

THE COURT: And the answer's yes?

MS. ONOSAWA: The answer, I think, is yes.

THE COURT: What does that look like? Does it look like what I imagine, which is an Excel spreadsheet that's got --

MS. ONOSAWA: I'm not sure what visually it looks like, your Honor, although I'm happy to inquire.

THE COURT: Let's imagine it looks like an Excel spreadsheet, and it's been set for the variables successfully traced 2012 to 2013, completed suicide, pistol -- sounds like we're play Clue, unfortunately -- and that produces -- on my screen I'd be looking at an Excel spreadsheet. First thing I'd see on the left would be numbers, presumably, with a total down at the bottom and then populated fields of information for each of those other categories, right?

MS. ONOSAWA: I have not -- having not seen it myself, I'm not quite sure.

THE COURT: Isn't that a problem given your burden here because -- I mean, I'm not a Luddite, but I rely on my clerk to create our spreadsheets, but then I manipulate them. So my mind goes to what does this look like? I know, from the Houser declaration and from your brief, there's a concession that FOIA does require you to make that search and that the search using those variables is possible. So the question

then, I think, is does that resultant spreadsheet, is that a record? Does that -- what I would see on my screen, as I imagine it there, is that a record? And if you can't answer that, how is the declaration sufficient to have met your burden here?

MS. ONOSAWA: So, again, hypothetically speaking, there may be instances where there may not be an entry for pistol or the entry for pistol may have been omitted or typed as something else, and that's --

THE COURT: Meaning every instance or in some instances?

MS. ONOSAWA: In some instances. I can't quantify it, but there are instances where -- or I've been told several times that there are many data fields that are left blank and that the processing of the raw data is absolutely necessary in order to ensure the accuracy of the end result.

THE COURT: What do you mean by "the accuracy of the end result"?

MS. ONOSAWA: So the accuracy that the --

THE COURT: If the question, for example, is how many times has "pistol" been entered, the accuracy of that is how many times it's been entered, not how many times ought it have been entered, right?

MS. ONOSAWA: I think -- I think I understand where your Honor's coming from, but again, as I mentioned before, for

example, there may be instances where multiple law enforcement agencies have put in a search for the same pistol.

THE COURT: So then you might have a duplicate.

MS. ONOSAWA: Right. And someone needs to go and sort of figure out --

THE COURT: De-dupe it?

MS. ONOSAWA: Or whether it's actually a different --

THE COURT: I think there the wording of the question might matter. I think if the question is "What is the number?" In some abstract, it seems to suggest -- that does suggest some analysis. But I guess what I wonder is what is the agency's position if the request is just the number of entries? Those entries might be duplicative, they might be under-inclusive, they might be misidentified, but what is the agency's position if the request were just for the number of entries?

MS. ONOSAWA: I don't know. I would submit that I don't know, your Honor.

THE COURT: OK.

MS. ONOSAWA: I think we would still rely on Exemption 3.

THE COURT: Well, of course. That tells me a lot.

MS. ONOSAWA: I just wanted to point out something. So there were analogies made to like a Lexis search for types of cases or an electronic search for a specific record like, say, an email search. So those are searches for existing

records that are responsive to the request, and we would submit that those types of searches are required under FOIA. Just because something is housed in electronic format does not mean it's immune from FOIA release. We get that.

What we're seeing here is these are multiple points of data sort of in this very, very large database that is prone to error, that has missing fields, that needs correction, that needs filtering, that needs analysis, and there are people trained in mathematical statistics that actually look through and clean up and need to clean up this raw data to ensure that it is essentially responsive to the question that's being asked. That is not something that FOIA requires us to do.

THE COURT: So then I guess is it an appropriate analogy -- you say these used to be faxed in, right? So then I imagine a room of file cabinets. So walk with me through this hypothetical.

We've got file cabinets for 2012 to 2013 successful traces, OK. Imagine the paper comes in, and it's going to go into that file cabinet. And when you pull out the drawer, and in that file cabinet you see subfolder by weapons. I should say further, successful traces. We've got a room of cabinets, and one of the cabinets is for completed suicides, unfortunately. We pull out the drawer, and there's subfolders by weapons, and the first folder we have is for pistol. And every one of those sheets that comes in goes into that

subfolder.

Would you be required to answer what the number of those sheets are?

MS. ONOSAWA: Yes, to the extent we're talking about the -- just the number of sheets that are maintained in a particular folder.

THE COURT: Yes.

MS. ONOSAWA: Yes.

THE COURT: Thank you.

MS. ONOSAWA: But, again, it's different because the sheets are discrete records. Here you have -- and you're presuming that -- again, the electronic entries, I think, are distinct insofar as we don't know if a particular entry -- it's not siloed in a folder the way your Honor described with paper documents. It's in a vast database.

THE COURT: But in this room full of file cabinets, things could be misfiled. You might have gotten reports in from multiple agencies. That all goes into that folder, right? They could be -- all of the same things. That's the question, whether really what this database does is substitute for and manage data and information and records in a way that we can analogize to paper where it would be clear, I think as you've indicated, you would be required to turn over the number.

MS. ONOSAWA: Then, again, that presumes that the records are stored in a neat silo in the way that your Honor's

hypothetical described. I don't think the Firearms Trace System database is organized that way. There is a raw pull that can be done, but there's --

THE COURT: I'm sorry, there's a raw?

MS. ONOSAWA: Pull, data pull.

THE COURT: OK.

MS. ONOSAWA: Just because you've obtained raw data from a pull doesn't mean that everything that you've got from that data pull is responsive to the request. There's a significant amount of analysis and educated guesses and research that needs to be done to determine whether really what came out of the data pull is answering the question that's being asked. That's --

THE COURT: Why wouldn't that be the case with the paper analogy?

MS. ONOSAWA: I'm sorry?

THE COURT: Why wouldn't that be the case with the paper analogy?

MS. ONOSAWA: I don't think that system exists, but if -- I feel like the paper analogy is somewhat different in that it presumes that things are properly siloed and organized in a way --

THE COURT: You've never seen my files, if that's the assumption.

MS. ONOSAWA: I would be surprised if firearms tracing

data looked like your files, your Honor.

THE COURT: I guess the point is there's nothing -- both require human inputs. So the suggestion that you get duplicative entries, whether it's paper or electronically inputted, just common sense tells you there's no difference. To the extent that you get misidentified entries, I think common sense tells you there's no difference. To the extent that you get misfiled information, again, I think common sense tells you there's no difference. It's just the electronic form makes it easier to maintain and search, and that's what the agency has done.

MS. ONOSAWA: Can I just point out one thing? So a lot of these -- most of these FOIA requests ask for a breakdown by each state, for example, the number of guns that were used in completed suicide, successfully traced, etc., etc. So a lot of what I understand and what we have in the Houser declaration is a primary example is that recovery locations are not properly entered in the ATF Firearm Tracing System database.

So, an example, some law enforcement agency will report that a gun was found at 123 Main Street, Springfield, but forget to enter the state. So you get -- say, you do a query of firearms tracing data for guns recovered in 2012 and 2013. Someone is now looking through that data and asking for a breakdown by state. Someone needs to go through each missing entry that has a state and try to do research to try to figure

1 out, OK, where was this gun recovered? Was it Springfield,
2 Massachusetts, or Springfield, Illinois, and you have to do
3 that by looking at other contextual information from that
4 single trace. Let's look at which fire -- sorry, police
5 department made the request or let's find out where the gun --
6 so that's sort of the secondary level of analysis that needs to
7 be done in order to answer these questions.
8 THE COURT: So at least that point wouldn't apply to
9 question one or question two, but looks like it would apply to
10 the others.
11 MS. ONOSAWA: The same goes with the dates, your
12 Honor. Sometimes the dates, as Houser declaration states, the
13 dates are missing. So you have to look at sort of the dates in
14 which other incidents or other related FTS events occurred to
15 decide whether something happened in 2011 versus 2012 or 2013.
16 THE COURT: So, just as an example, sometimes the
17 dates are missing, but sometimes they're not?
18 MS. ONOSAWA: Correct.
19 THE COURT: So with respect to where they're not
20 missing, what's the argument for being required to produce the
21 number of entries?
22 MS. ONOSAWA: So the request is for breakdown by state
23 and a breakdown by date. Well, sometimes they're combined. So
24 the agency is not going to, under FOIA, produce just everything
25 that comes out of the data. It might be unresponsive to the

request if it's outside a certain geographic location or outside a temporal location, in which case it's not bound to produce it or it might be a complaint duplicate data or missing data. In which case, again, to determine whether a firearms tracing demeanor entry is responsive, it needs to do the secondary research and analysis to plug in the holes and see whether it falls within or outside the scope of the request.

THE COURT: OK. Last question -- it just circles back a little bit, but I want to make sure I understand your answer -- if the question weren't phrased as "the number," but -- would the analysis be different from your perspective if the question were the number of entries with this information included?

MS. ONOSAWA: I don't know the answer to that, your Honor, and I would like the opportunity to confer with the agency to see if that's even feasible, again, assuming Exemption 3 doesn't apply.

THE COURT: I think, on the face of the Houser declaration, it's feasible.

MS. ONOSAWA: I would think so, but we haven't addressed that specific issue about number of entries. We were focused on the actual FOIA request as written.

THE COURT: Thank you.

I've taken Ms. Onosawa over five minutes. So, Ms. Lefkowitz, you've got 15 minutes if you need it.

MS. LEFKOWITZ: Thank you.

I'd like to begin with what the government's counsel ended with, which is whether the request required the production of new documents or whether it's feasible or unduly burdensome. I think counsel admitted at a certain point that if we were talking about paper records with individual firearms trace requests that were put in file cabinets for 2012 and 2013, and so forth, then the government would have to produce -- putting aside the Tiahrt rider, the withholding statute aspect -- the number of sheets. Then I think she said that because this is data, it becomes somehow more complicated or more burdensome.

I would just say that, having done a number of FOIA requests to several agencies, you put in the request, and sometimes it's for paper records and they pull -- and the agency's general practice, in my experience, is to get, let's say, 5,000 documents and then to go through those 5,000 paper documents and decide what is responsive, and if it's not responsive, it's not included. And then, of course, if some of the information in those 1,000 documents or 5,000 documents are subject to some exception, to redact that information.

So, here, if what we're talking about is, you know, we put in several queries and we get, you know, a number of, let's say, 500 pistols or 500 firearms that were traced in New York that were used in a suicide in 2012, and you get an Excel

spreadsheet with, let's say, 50 rows, I think it's perfectly acceptable to expect the government to look through those 50 rows, just like it would with paper records, and say, you know, this is not responsive, this is not responsive, this is not responsive; it's out. And then you're left, for example, with, say, 30 rows and to redact information that's exempt from disclosure, which is the specific entries, and to produce the amount of rows. I think that's analogous to the paper record.

I also think it's important to keep in mind, you know, the purpose underlying the e-FOIA amendments, which is that Congress was to use new technology to enhance public access to agency records and information. So much information is now stored in databases, and I think if agencies are now going to say, well, looking through a spreadsheet and deciding whether all the data fields were correctly entered makes this too burdensome, I think the end result is going to be that less information is now going to be available from agencies, and that goes against what FOIA stands for and it goes against what the e-FOIA amendments are all about.

THE COURT: I want to understand if the first point you're making is, in a sense, that you do expect the agency to do some amount of cleaning of the data in responding to this query?

MS. LEFKOWITZ: We don't expect that. We asked for the numbers or, as your Court -- as your Honor characterized

it, the number of entries.

THE COURT: That does seem different, doesn't it, the number versus the number of entries?

MS. LEFKOWITZ: Truthfully, your Honor, I think when the request was drafted, it presumably -- it had the database -- the FTS database in mind, and the way that it would be searched was, to get that number, you would have to look at the number of entries. Those are really one -- when the request was drafted, those were really the same thing.

THE COURT: So you want the agency to interpret when you ask for the number to mean the number of entries in the database regardless of whether they're obvious duplicates, misidentified, etc., is that the idea?

MS. LEFKOWITZ: If your Honor holds that the Tiahrt rider applies --

THE COURT: Doesn't work that way. You answer the question first, and then I hold.

MS. LEFKOWITZ: OK. Yes, what we would want the ATF to produce is the number of entries, and we don't expect any cleaning.

THE COURT: Procedurally, if I think the question didn't ask for that sufficiently, what then?

MS. LEFKOWITZ: I think we potentially could -- can I ask for one second?

(Counsel confer)

MS. LEFKOWITZ: I think we would be able to submit a new FOIA request in that regard. But I think, if possible, it would still be helpful for the Court to make holdings on other aspects of the arguments that were made in this case so that we're not here again in a couple of years making the same argument.

I did want to go back to, I think, the very first point that --

THE COURT: I'm sorry. Before we leave that point, because I think Ms. Onosawa made a good point that I don't know the answer to, I've been using as my example the question from (1), which is nationwide, but most of your queries are state by state. Same sort of question, what would the expectation be if that information required additional steps to determine, so if a town name is entered without a state name, but it's ascertainable through additional effort?

MS. LEFKOWITZ: Actually, hold on just one second. I actually prepared what I thought may be the queries that would be required for each of the requests. And I think, if we're talking about for, let's say, number 11, our request was for each state the number of guns that were used in an attempted suicide and successfully traced.

THE COURT: Slow down. Whenever we read, we put our foot on the gas.

MS. LEFKOWITZ: For each state the number of guns that

1 were used in an attempted suicide and successfully traced in
2 2012 and in 2013 that were originally purchased in the same
3 state as in which they were recovered.
4 My understanding of how that would work by the --
5 THE COURT: I'm sorry. That's eight, right?
6 MS. LEFKOWITZ: That's 11. Oh, I'm sorry. I
7 think I'm looking at the numbers in the original request as it
8 was submitted.
9 THE COURT: OK. I think I have it after the --
10 anyway, I see the query. Go ahead.
11 MS. LEFKOWITZ: So to run that query, my understanding
12 is what ATF would have to do is filter by the category, which
13 is attempted suicide; the year, 2012, for example; and the
14 state. Then once you get -- once the agency would get those
15 results, to filter it one step further to indicate, for
16 example, if we're looking at New York, then to filter it one
17 step further, all gun purchases -- in that field, all guns that
18 were purchased in New York.
19 So it's not clear to me why that particular field
20 would require additional research in any other way than request
21 number one or request number two. I certainly understand, I
22 guess, that it's possible that --
23 THE COURT: If it just included the street address or
24 something or the town but not the state, you're not seeking
25 that information?

MS. LEFKOWITZ: We're not seeking that information.

THE COURT: You're not seeking that to be included in the number response that that question calls for?

MS. LEFKOWITZ: No, we're not. I would just say that it's not clear at all from the declaration that the state of where the gun came from is something that's frequently missing. I understand it's possible that the state is sometimes missing. There's no indication that that happens more than once or twice. And, again, that only speaks to the reasonableness of the search that we expect.

THE COURT: But you're not asking them to put together that information from somewhere else, to figure out --

MS. LEFKOWITZ: No.

THE COURT: -- and add that information to the database so that the number of entries you're getting is more accurate, in a sense? You're not asking for that?

MS. LEFKOWITZ: No, we're not. We're asking for the searches to be run and to be provided with the results of those searches.

THE COURT: OK.

MS. LEFKOWITZ: I did just want to address something that the DOJ counsel indicated at the very beginning of her argument. I think she referenced two opinions from an agency. I don't remember the -- I am aware of the opinions. I can't remember which --

THE COURT: The GAO.

MS. LEFKOWITZ: GAO, exactly.

THE COURT: On the language of futurity.

MS. LEFKOWITZ: Exactly. What those opinions were addressing were not the issues here. I think the question -- it was the meaning of whether the phrasing that was used in those statutes were sufficient words of futurity. Because, of course, appropriation riders, the standard is a new one is passed every year, and that's -- but because, for example, the 2012 rider has words of futurity in this year and every other fiscal year, that's why the 2012 rider applies in 2019. That was the point of those two opinions. It had nothing to do with whether FOIA was still -- whether somehow the 2005 rider -- which, by the way, does not mention FOIA specifically but only -- it's only the Seventh Circuit decision that held that FOIA -- the 2005 rider was a FOIA withholding statute. Those two opinions did not engage with that conversation.

THE COURT: So let me ask, if the 2008 language -- and I'm just picking the 2008 because it's the one before 2009 -- just as it is, it says beginning in fiscal year 2008 and thereafter and then the 2012 rider said only during the current fiscal year and didn't have the future language, would you think the 2008 rider then continues to apply to all years but 2012?

MS. LEFKOWITZ: I'm sorry. I just want to make sure I

1 understand the question. If the 2012 version of the rider did
2 not have the words of futurity?
3 THE COURT: Correct.
4 MS. LEFKOWITZ: No, I don't think the 2008 version
5 would still apply because I think, in the context of
6 appropriations riders, the expectation -- the general
7 expectation is that a new rider is passed every year and --
8 THE COURT: But if in 2008 Congress says clearly,
9 beginning in the year 2008 and all years thereafter, so it has
10 that clear futurity language, and then 2012 just speaks to this
11 year, it seems as though the 2008 rider would apply to every
12 year but 2012.
13 MS. LEFKOWITZ: Well, I think -- I don't agree with
14 that. I think that if you have the 2008 rider and it has the
15 words of futurity, Congress is free to then leave that 2008
16 rider going forward in perpetuity, but when it takes the action
17 of passing a new rider, the 2012 rider, with or without the
18 words of futurity, and it covers the exact same subject area,
19 the whole subject area, then that by implication repeals the
20 prior rider.
21 THE COURT: Covers the subject area for that year?
22 MS. LEFKOWITZ: For that year. So I --
23 THE COURT: I'm not sure it has bearing here, but it
24 just occurs to me that that's -- I mean, maybe your argument is
25 strengthened by the fact that that's not what we have here, but

instead what we have is Congress legislating for both 2012 and all future years, just as it was doing in 2008. But it seems to me that Congress is doing something important when it says, for all future years. It's essentially trying to bind -- require future Congresses to act affirmatively to do something different, right, as opposed to needing to act in order -- as opposed to, yes, the default is that the exemption's in place.

MS. LEFKOWITZ: Yes, I think that's accurate, and I think that, again, those words are generally put in there, were put in there in this case, because appropriations riders are generally understood to only apply to the year of the specific appropriations rider.

There was discussion with defense counsel about what the intent was of Congress when it passed the 2012 rider, and according to the government, the intent that matters, would have to matter, is that there would have to be an intent for the Tiahrt rider to be read a different way, I think. But I would argue that the intent that matters in 2012 when that appropriations rider was passed was whether that particular law -- was whether the Tiahrt rider was meant to cover the whole subject area and meant as a substitute, and I think that is clear from the text of the Tiahrt rider and --

THE COURT: It's also the case that it's clear that Congress intended to exempt information from the database from FOIA.

MS. LEFKOWITZ: That is what the Seventh Circuit held in 2005, but given the fact that in 2009 Congress passed the OPEN FOIA Act specifically saying that that language that was used in 2005 -- I mean, the OPEN FOIA Act was not specifically referring to the Tiahrt rider, but that the language used in 2005 was no longer valid, was no longer sufficient to be a withholding statute. After that, Congress knowing that, Congress passed two more appropriations riders. If it had at that point just left the 2008 rider alone, then we would be stuck with that.

THE COURT: Yes.

MS. LEFKOWITZ: So I do just want to address one last thing, and that's because I think the government -- I took out too many pages. I apologize.

The characterization of the demand letter cases in the APA litigation, I just want to address that because it was stated that the plaintiff's counsel was mischaracterizing the record on that. What happened in that case was certain -- the government -- the ATF took an action seeking certain information from certain gun dealers. The gun dealers sued the government under the APA and -- under the APA, and in that litigation, the ATF had to produce the administrative record as is normal in an APA litigation. But there was a whole bunch of briefing where the plaintiffs in that case were saying, no, we want the raw data; we want the raw trace data. And the

government explicitly said we can't give you the raw trace data because the Tiahrt rider applies, but we can give you the statistical data because of subpart (C).

So there was just no argument made in that APA litigation that the reason why the statistical aggregate data was made available was because it was an APA litigation. It was -- the government was only relying on subpart (C).

THE COURT: Aside from that argument, just the basic argument, why doesn't the plain meaning of "publication" here demonstrate that what we're talking about are the agency's publication of aggregate statistical data?

MS. LEFKOWITZ: Well, I think when we're talking about FOIA and keeping in mind that all doubts are to be resolved in favor of disclosure and exemptions are to be construed narrowly, this is exactly why the OPEN FOIA Act was passed, so that we wouldn't be having this debate over whether "publication" is the right word, which means -- which can mean to make available to the public.

THE COURT: We'd be having the exact same debate, right, because Congress said -- made a clear statement that it wanted the 2012 rider to apply to FOIA. You'd still be arguing that under subsection (C) you'd get the data. So it doesn't help.

MS. LEFKOWITZ: I think --

THE COURT: I would ask the same question: Why

doesn't "publication," just as a plain language statutory interpretation, mean the agency's publication of the data?

MS. LEFKOWITZ: Well, the dictionary definition of "publication," one of the definitions, is the action of making something generally known.

THE COURT: There are other definitions.

MS. LEFKOWITZ: I'm sorry?

THE COURT: There are other definitions.

MS. LEFKOWITZ: There are other definitions, and that's why I go back to, you know, construing exemptions narrowly in that regard.

But then even taking a step back further, when we're talking about why the Tiahrt rider was passed in the first place, and that was to preserve privacy concerns and law enforcement investigation concerns, and Congress explained that statistical aggregate data or statistical annual reports didn't implicate either of those two concerns. There's no -- of course, there's no argument that the information that Everytown is seeking would implicate either privacy concerns or law enforcement concerns, and there hasn't been any argument made in any of the briefing, in general, statistical aggregate data would implicate those concerns. When we look at why the Tiahrt rider was passed in the first place, there's no reason to limit statistical aggregate data to just reports as opposed to making it available publicly through the FOIA Act.

THE COURT: All right. Thank you.

MS. LEFKOWITZ: Thank you.

THE COURT: Motions are submitted, and I thank counsel for your excellent briefs and argument. Couple of tricky issues here, and I appreciate you helping me think through it. We're adjourned.

(Adjourned)

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-cv-2296 (AJN)

OPINION & ORDER

ALISON J. NATHAN, District Judge:

Plaintiff Everytown for Gun Safety Support Fund ("Everytown") brought this Freedom of Information Act ("FOIA") action to compel Defendant Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to release statistical data from its Firearms Tracing System database. Now before the Court are the parties' cross-motions for summary judgment. For the reasons that follow, the Court DENIES Defendant's motion and GRANTS Plaintiff's.

I. BACKGROUND

Plaintiff Everytown seeks statistical data from the ATF's Firearms Tracing System database pertaining to firearms used in suicides or attempted suicides that were recovered by law enforcement and traced by ATF. Below, the Court summarizes Everytown's request and ATF's response. The undisputed facts described here are drawn from the parties' submissions, including the agency affidavit submitted by ATF, which is accorded a presumption of good faith for purposes of these summary judgment motions. *See Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

Below, the Court also explains the statutory and procedural background relevant to both motions.

A. The FOIA Request

ATF's Firearms Tracing System database houses every law-enforcement-requested record of an attempt to track a weapon from its manufacturer or importer into the distribution chain, through purchases made in the distribution chain, until ATF can identify the first retail purchaser. Houser Decl., Dkt. No. 21 ¶¶ 8-9. Trace searches are generally conducted on firearms recovered at a crime scene or from the possession of a person prohibited from owning the firearm. *Id.* ¶ 9. The database codes these trace searches by a variety of searchable fields. *Id.* ¶ 29.

On December 14, 2016, Everytown submitted a FOIA request to ATF seeking records related to traces of firearms used in suicide across several variables, including the length of time between purchase and use; the type of gun used; the state of use relative to state of purchase; and whether the user was the individual buyer. Everytown FOIA Request, Dkt. No. 1-1. In relevant part, this was the FOIA request:

> We respectfully request that ATF provide us with records containing aggregate trace data that document the following:
>
> i. Nationwide, the number of each firearm type (pistol, revolver, rifle, shotgun, other) that were used in a completed suicide and successfully traced in 2012 and in 2013;
> ii. Nationwide, the number of each firearm type (pistol, revolver, rifle, shotgun, other) that were used in an attempted suicide and successfully traced in 2012 and in 2013;
> iii. For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013;
> iv. For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013 that were in the possession of the original buyer.

v. For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013 that were in the possession of someone other than the original buyer.

vi. For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013 that that were originally purchased in the same state in which they were recovered.

vii. For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013 that were traced less than 3 months after first purchase; that were traced between 3 and 6 months after first purchase; that were traced between 6 and 12 months after first purchase; that were traced between 1 and 2 years after first purchase; that were traced between 2 and 3 years after first purchase; and that were traced more than 3 years after first purchase.

viii. For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013.

ix. For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013 that were in the possession of the original buyer.

x. For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013 that were in the possession of someone other than the original buyer.

xi. For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013 that that were originally purchased in the same state in which they were recovered.

xii. For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013 that were traced less than 3 months after first purchase; that were traced between 3 and 6 months after first purchase; that were traced between 6 and 12 months after first purchase; that were traced between 1 and 2 years after first purchase; that were traced between 2 and 3 years after first purchase; and that were traced more than 3 years after first purchase.

Id. at 3-4.

ATF rejected Everytown's request on the basis that the above-requested documents were exempt from disclosure pursuant to Exemption (b)(3), FOIA's statutory exemption. The Department of Justice's Office of Information Policy upheld ATF's determination. It later clarified that two of the requested categories—(iii) and (viii)—were publicly available on ATF's website, and accordingly no longer asserts Exemption 3 as to those two categories. Houser Decl. ¶¶ 25, 30 & Ex. C. This action concerns the remainder.

B. Statutory Background

Three statutes are relevant to the parties' cross-motions: the E-FOIA Amendments, the OPEN FOIA Act of 2009, and the so-called Tiahrt Rider. The Court summarizes each below.

1. The E-FOIA Amendments and the OPEN FOIA Act

The present motions implicate two recent changes to substantive FOIA law: the Electronic Freedom of Information Act Amendments of 1996 (the "E-FOIA Amendments), Pub. L. No. 104-231, 110 Stat. 3048 (1996); and the OPEN FOIA Act of 2009, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009).

The E-FOIA Amendments revised various FOIA provisions to accommodate the increased use of computer technology in managing agency business. For example, the E-FOIA Amendments altered FOIA's definition of "search" and agency "record" to specifically address automatic review of electronic files and required courts to "accord substantial weight" to agency affidavits concerning the "technical feasibility" of providing records in the requested format. *See* 5 U.S.C. §§ 552(a)(3)(B), (C), & (D); *id.* § 552(a)(4)(B); *id.* § 552(f)(2)(A).

The OPEN FOIA Act of 2009 substantively altered the third exemption agencies may raise in response to public records requests. Exemption 3 previously allowed agencies to assert an exemption for "matters that are . . . specifically exempted from disclosure by statute . . . if that statute:

> (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

5 U.S.C. § 552(b)(3)(A). With the OPEN FOIA Act of 2009, Congress added the following subsection, which added the further requirement that a qualifying statute:

> if enacted after the date of enactment of the Open FOIA Act of 2009, specifically cites to this paragraph.

Id. § 552(b)(3)(B). Accordingly, to enact a statute that qualifies as an Exemption 3 statute following the enactment of OPEN FOIA, Congress must include a clear statement identifying section 552(b)(3).

2. The Tiahrt Rider

Between 2003 and 2012, Congress attached to each of its appropriations resolutions and continuing resolutions a provision known as the Tiahrt Rider or Tiahrt Amendment. *See* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 644, 117 Stat. 11, 473-74 (2003) ("2003 Rider"); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2859-60 (2004) ("2005 Rider"); Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2295-96 (2005) ("2006 Rider"); Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, § 20928, 121 Stat. 8, 44 (2007) ("2007 Provision"); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1903-04 (2007) ("2008 Rider"); Consolidated Appropriations Act, 2010, Pub.L. No. 111-117, 123 Stat. 3034, 3128-29 (2009) ("2010 Rider"); Department of Defense and Full Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38, 102 (2011) ("2011 Provision"); Consolidated and Further Continuing Appropriations Act, Pub. L. No. 112-55, 125 Stat. 552, 609-10 (2011) ("2012 Rider").

In varying forms over time, the Tiahrt Rider has limited the use of appropriated funds to disclose part or all of the contents of the Firearms Trace System database. For example, the 2003 Rider provided that "[n]o funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based upon any provision of [FOIA] with respect to records collected or maintained pursuant to [the statutes creating the Firearms Tracing

System database], except that such records may continue to be disclosed to the extent and in the manner that records so collected, maintained ,or obtained have been disclosed under [FOIA]" prior to the Rider's enactment. The 2005 Rider, in contrast, provided that "[n]o funds appropriated under this or any other Act may be used to disclose to the public the contents or any portion thereof of any information required to be kept by [the statutes creating the Firearms Tracing System database]." The 2006 Rider altered the language of the provision again, requiring that "[n]o funds appropriated . . . may be used to disclose [ATF trace data] to anyone other than a . . . law enforcement agency or a prosecutor . . . solely for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency . . . and not for use in any civil action . . . and all such data shall be immune from legal process and shall not be subject to subpoena or other discovery."

Although Congress never expressly repealed earlier iterations of the Tiahrt Rider, over the course of the following seven years, Congress continued to enact new versions of the Rider. In some years, the newly enacted text reflected minor revisions from the previous year, while in other years Congress added or subtracted whole provisions. *Compare* 2012 Rider *with* 2010 Rider *and* 2008 Rider. Congress has never simply amended the existing provision, but rather has continually reenacted the entire provision with varying levels of changes from year to year. The currently operative iteration of the Tiahrt Rider is the 2012 Rider. As discussed below, that provision does not contain a citation to section 552(b)(3) of the 2009 OPEN FOIA Act.

C. Procedural Background

Everytown submitted its FOIA request on December 14, 2016. *See* Everytown FOIA Request. ATF rejected the request on April 6, 2017. *See* ATF Response, Dkt. No. 1-2.

Everytown appealed this denial in June 2017, and the Office of Information Policy upheld ATF's determination on July 6, 2017 (although Everytown received the determination letter on January 30, 2018). *See* OIP Decision, Dkt. No. 1-3. On March 15, 2018, Everytown commenced this action pursuant to 5 U.S.C. § 552(a)(4)(B) asking this Court to enjoin ATF from withholding agency records and to order the production of records improperly withheld. Dkt. No. 1.

Pursuant to a briefing schedule approved by the Court, ATF filed its motion for summary judgment on September 28, 2018. Dkt. No. 17. Everytown filed its response and cross-motion for summary judgment on November 2, 2018. Dkt. No 24.[1] Both motions were fully briefed. Dkt. Nos. 26, 32. Oral argument was held on August 12, 2019.

II. STANDARD OF REVIEW

The Freedom of Information Act entitles members of the public "to have access to any record maintained by a federal agency, unless that record is exempt from disclosure." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). Federal courts review agency assertions that records are exempt from disclosure *de novo*. *Id.* Upon such review, the burden of proof rests with "[t]he agency asserting the exemption," with all doubts as to the applicability of the exemption resolved in favor of disclosure. *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009).

FOIA actions challenging agency exemption determinations are typically resolved on summary judgment. *See Adamowicz v. IRS*, 552 F. Supp. 2d 355, 360 (S.D.N.Y. 2008). As a general matter, a court may not grant summary judgment unless the parties' submissions, taken together, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "the district court may forgo discovery and award summary judgment [for the defending agency] on the basis of

[1] Everytown later re-filed its motion papers to correct an ECF filing error. *See* Dkt. No. 29.

affidavits" or declarations that are sufficient to sustain the agency's burden of proof. *Carney*, 19 F.3d at 812 (quotation omitted). Because such affidavits or declarations are "accorded a presumption of good faith," they meet this standard if, on their face, they "supply[ ] facts indicating that the agency has conducted a thorough search and given reasonably detailed explanations why any withheld documents fall within an exemption." *Id.*; *see also ACLU v. U.S. Dep't of Defense*, 901 F.3d 125, 133 (2d Cir. 2018), ("Summary judgment is appropriate where the agency declarations describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record or by evidence of agency bad faith.") (quotation omitted).

Conversely, "[s]ummary judgment in favor of the FOIA plaintiff is appropriate when an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption." *NRDC v. U.S. Dep't of Interior*, 36 F. Supp. 3d 384, 398 (S.D.N.Y. 2014) (quotations omitted). If the agency defendant fails to meet its burden of showing that the requested information falls under an exemption or may otherwise be withheld, the court may grant summary judgment. *See id.* at 406; *Schladetsch v. Dep't of Hous. & Urban Development*, No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. 2000) ("[I]f the [agency] affidavits do not meet this standard, not only is summary judgment not appropriate in favor of the government, but such remedy may well be called for, as a matter of law, for those persons seeking the information.") (quotation omitted).

III. ANALYSIS

ATF articulates two primary bases for rejecting Everytown's FOIA request. First, ATF argues that the information sought is exempt from disclosure under Exemption 3, FOIA's

statutory exemption. Second, ATF maintains that Everytown's request falls outside the scope of its FOIA disclosure obligation because responding to the request would require ATF to create an agency record. The Court disagrees on both points, and accordingly grants summary judgment for Everytown.[2]

A. ATF Has Not Identified a Valid Exemption Statute

At first blush, the analysis is simple. Under FOIA Exemption 3, as amended in 2009 by the OPEN FOIA Act, agencies may withhold information "specifically exempted from disclosure by statute," so long as the statute:

> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
>
> (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3).

Thus, pursuant to the unambiguous text of subsection (B), any effort by Congress after 2009 to enact legislation statutorily exempting matters from FOIA disclosure *must* include express citation to section 552(b)(3). Here, the potential statutory bar to disclosure is the current provision of the Tiahrt Rider, which was passed in 2012—three years after the 2009 OPEN FOIA Act. Yet, the 2012 Tiahrt Rider contains no specific citation to section 552(b)(3). Without that, the 2012 Tiahrt Rider cannot qualify as an Exemption 3 statute.

In an effort to complicate this simple application of the plain text of the 2009 OPEN FOIA Act, ATF argues that the pre-2009 versions of the Tiahrt Rider remain in effect. ATF Br.,

---

[2] Everytown also argues that, even if one or all of the Tiahrt Riders qualify as valid exemption statutes, the 2012 Rider's allowance for "publication . . . of statistical aggregate data regarding . . . firearms misuse, felons, and trafficking investigations" permits disclosure of the information sought by its disclosure request. Everytown Br. at 14–18; Everytown Reply at 4–6. Because the Court concludes that ATF has not identified a valid exemption statute, it need not address this argument.

Dkt. No. 18 at 13-15; ATF Reply, Dkt. No. 26 at 1-3; Oral Argument Transcript ("Tr.") at 18:11-19:6. And because they were enacted prior to 2009, they do not need to cite to section 552(b)(3) in order to effectuate the statutory exemption. *See* ATF Br. at 14; ATF Reply at 2. The core of the argument is that the pre-2009 provisions continue to apply because Congress intended their prohibition on public disclosure to be permanent, as exemplified by the use of language of futurity, that is, language that applies the statute into the future. *See* Tr. at 19:5-20:7. For example, the 2008 Rider begins with the preface "beginning in fiscal year 2008 and thereafter . . . ," and the 2012 Rider begins with the preface "during the current fiscal year and in each fiscal year thereafter . . . ."

This argument by the government fails because Congress's subsequent acts, including the currently operative 2012 Rider, cover the whole subject of the earlier acts and are a substitute for the earlier acts. As a result, the pre-2009 versions of the Tiahrt Rider that the government seeks to rely upon are no longer operative. The Court reaches this conclusion for several reasons.

First, although implied repeal of statutory provisions is disfavored, the Court is bound by Supreme Court and Second Circuit precedent to apply what is sometimes referred to as the canon of repeal by comprehensive revision. *See Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) ("An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.") (internal quotation marks omitted); *id.* at 293 (O'Connor, J., concurring in part and dissenting in part) (similar); *id.* at 286-87 (Stevens, J., concurring in the judgment) (similar); *Force v. Facebook, Inc.*, No. 18-397, -- F.3d --, 2019 WL 3432818, at *14 (2d Cir. July 31, 2019) (similar). Pursuant to this canon, congressional intent to repeal an earlier act by substitution or comprehensive revision may be found when the "later act purports to cover

the whole subject covered by [the] earlier act, embraces new provisions, and plainly shows that it was intended not only as a substitute for the earlier act but also to cover the whole subject involved and to prescribe the only rules with respect thereto." *United States v. Lovely*, 319 F.2d 673, 679-80 (4th Cir. 1963).

A comparison of the text of the 2008 and 2010 Riders demonstrates that the canon applies here. In relevant part, the 2008 Tiahrt Rider, the last Rider enacted before the OPEN FOIA Act's enactment, provides that:

> [B]eginning in *fiscal year 2008 and thereafter*, no funds appropriated under this or any other Act may be used to disclose part or all of the contents of the Firearms Trace System database . . . except to
>
> (1) a Federal, State, local, tribal, or foreign law enforcement agency, or a Federal, State, or local prosecutor, *solely in connection with and for use in a criminal investigation or prosecution*; or
>
> (2) a Federal agency for a national security or intelligence purpose;
>
> and all 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 . . . Federal court or in an administrative proceeding other than a proceeding commenced by the [ATF] . . . ;

2008 Rider (emphasis added). The Rider goes on to specify further exceptions, including allowing "the publication of annual statistical reports on products regulated by the [ATF] . . . or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations." *Id.*

The 2010 Rider, passed following the 2009 OPEN FOIA Act, maintains the same basic text and structure but includes substantive changes. It provides that:

> [B]eginning in *fiscal year 2010 and thereafter*, no funds appropriated under this or any other Act may be used to disclose part or all of the contents of the Firearms Trace System database . . , except to:

> (1) a Federal, State, local, or tribal law enforcement agency, or a Federal, State, or local prosecutor; or
>
> (2) *a foreign law enforcement agency solely in connection with or for use in a criminal investigation or prosecution*; or
>
> *(3)* a Federal agency for a national security or intelligence purpose;
>
> *unless such disclosure of such data to any of the entities described in (1), (2) or (3) of this proviso would compromise the identity of any undercover law enforcement officer or confidential informant, or interfere with any case under investigation; and no person or entity described in (1), (2) or (3) shall knowingly and publicly disclose such data*;
>
> and all 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 . . . Federal court or in an administrative proceeding other than a proceeding commenced by the [ATF] . . . ;

2010 Rider (emphasis added to illustrate changes). The currently operative 2012 Rider repeats the language of the 2010 Rider, altering only the first line. *Compare id.* ("[B]eginning in fiscal year 2010 and thereafter . . .") *with* 2012 Rider ("[D]uring the current fiscal year and in each fiscal year thereafter . . .").

This comparison plainly demonstrates that Congress intended each Rider to comprehensively replace its predecessor. The use of express repetition of language of futurity in every enactment indicates that Congress understood each Rider to provide specific, ongoing rules for Firearms Trace System database disclosure that did not necessitate examining prior enactments on the subject. Similarly, the Riders' comprehensive treatment of identical subject matter makes clear that Congress intended each Rider to cover the entire field of Firearms Trace System database disclosure. This understanding is confirmed by Congress's inclusion of incongruent changes in enacting new versions of the Rider. For example, the 2008 Rider provides greater limits on disclosure than the later Riders because it does not allow disclosure to Federal, State, local, or tribal law enforcement agencies for purposes other than "in connection

with and for use in a criminal investigation or prosecution," while the 2010 and 2012 Riders impose no limit on disclosures to such agencies. At the same time, the 2008 Rider provides fewer limits on disclosure because it does not prohibit disclosure that might compromise the identity of an undercover officer or informant. There is nothing in either the text or structure of the various Tiahrt Riders to support the position that Congress intended two slightly different versions of the Tiahrt Rider, each of which purports to cover the field of disclosure, to remain in effect simultaneously. Instead, the Riders' text and structure makes clear that Congress intended to revise and replace the earlier statutes with the new ones.

Second, acknowledging the changes in language reproduced above, the Government concedes that some portions of the pre-2009 Tiahrt Riders have in fact been impliedly repealed. Tr. at 28:4-12. It therefore argues that the Court should look to the most recent Rider passed to understand what exceptions may apply to such disclosure, while looking to the versions of the Tiahrt Rider passed prior to 2009 to determine whether any Rider qualifies as a valid Exemption 3 Statute. Tr. at 20:18-23; 21:6-25:5. There is no textual basis for this position. To the contrary, an act that comprehensively covers identical subject matter to an earlier act and alters several of its provisions indicates a clear legislative intent to impliedly substitute the later act for its earlier counterpart. *See Force*, 2019 WL 3432818, at *14; *see also Lovely*, 319 F.3d at 679-80.

Third, to conclude that any pre-2009 Tiahrt Rider remains in effect would require the Court to effectively ignore Congress's unambiguous textual language and intent in passing the 2009 OPEN FOIA Act. This language prescribes clear rules for designating congressional enactments as exemption statutes: acts "enacted after the date of the enactment of the OPEN FOIA Act of 2009" must include a citation to section 552(b)(3), while earlier enactments require no such citation. If Congress intended to ensure that no citation to section 552(b)(3) was

required for reenactment of new versions of earlier statutes, it could have clarified that Congress was not required to include a clear statement rule in such circumstances. It did not do so.

Legislative history confirms this understanding. The OPEN FOIA Act's preamble and remarks made by its sponsor indicate that Congress's purpose in passing OPEN FOIA was to prevent Congress from shirking its duty to fully consider FOIA exemptions in any subsequently passed legislation. *See* 155 Cong. Rec 3175 (2009) (remarks of Senator Leahy); OPEN FOIA Act of 2009, S. 612, 111th Cong. (noting statutory purpose of "ensur[ing] an open and deliberative process in Congress by providing for related legislative proposals to explicitly state such required citations"). Yet this is precisely what ATF's position allows. ATF's argument to the contrary is that failing to identify the Tiahrt Rider as a qualifying Exemption 3 statute frustrates a competing statutory purpose: protecting Firearms Trace System database information from FOIA disclosure. But insofar as Congress wished to enact statutes that would exempt Firearms Trace Database data from disclosure following the enactment of the OPEN FOIA Act, it gave itself explicit instructions for how to do so. In light of the obligation to construe FOIA Exemptions narrowly, finding that Congress failed to meet those requirements in the present case vindicates rather than frustrates congressional purpose. *See Local 3, Int'l Bhd. Of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988) (requiring that FOIA Exemptions be "narrowly construed with all doubts resolved in favor of disclosure").

In reaching this conclusion, which is an issue of first impression in this Circuit, the Court is mindful that it is contrary to the decisions of other courts to have considered it. *See Ctr. for Investigative Reporting v. U.S. Dep't of Justice*, No. 17-cv-6557-JSC, 2018 WL 3368884, at *8 (N.D. Cal. July 10, 2018) ("[T]he disclosure prohibitions set forth by Congress in the 2005 and 2008 [versions of the Tiahrt Rider] 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.") (quoting *Abdeljabbar v. ATF*, 74 F. Supp. 3d 158, 175-176 (D.D.C. 2014)); *see also P.W. Arms, Inc. v. United States*, No. C15-1990-JCC, 2017 WL 319250, at *4 (W.D. Wash. Jan. 23, 2017) ("[T]he Court . . . adopts the holding of the vast majority of cases addressing [whether the ATF may rely on the 2005 and 2008 Riders as Exemption 3 statutes]."); *Smith v. ATF*, No. 13-13079, 2014 WL 3565634, at *5 n.2 (E.D. Mich. July 18, 2014) (concluding that the court "need not . . . address" the Open FOIA Act because the 2008 Rider "provide[d] a permanent prohibition"); *Penn v. U.S. Dep't of Justice*, No. CIV S-10-2494 GEB EFB PS, 2012 WL 761741, at *6 n.3 (E.D. Cal. Mar. 7, 2012) (concluding that the 2005, 2008, and 2010 Riders all qualified as Exemption 3 statutes, and that the Court "need not . . . address" the Open FOIA Act because the 2005 and 2008 Riders "also apply here"), *R&R adopted*, 2012 WL 1131537 (E.D. Cal. Mar. 28, 2012); *Higgins v. U.S. Dep't of Justice*, 919 F. Supp. 2d 131, 144-45 (D.D.C. 2013) (concluding that the 2005 and 2008 Riders qualified as Exemption 3 statutes); *Caruso v. ATF*, 495 F. App'x 776, 778 (9th Cir. 2012) (concluding that the 2010 Rider qualified as Exemption 3 statute); *Reep v. U.S. Dep't of Justice*, 302 F. Supp. 3d 174, 183 (D.D.C. 2018) (concluding that the 2012 Rider constituted Exemption 3 statute); *McRae v. U.S. Dep't of Justice*, 869 F. Supp. 2d 151, 163 (D.D.C. 2012) (concluding that the 2005 Rider qualified as Exemption 3 statute); *Skinner v. U.S. Dep't of Justice*, 744 F. Supp. 2d 185, 204 (D.D.C. 2010) (same).[3]

[3] One district court initially concluded that the 2012 Rider did not constitute an Exemption 3 statute because it failed to cite section 552(b)(3), but later granted summary judgment for the ATF on the same grounds as the *Abdeljabbar* court. *See Fowlkes v. ATF*, 67 F. Supp. 3d 290, 300–01 (D.D.C. 2014); *Fowlkes v. ATF*, 139 F. Supp. 3d 287, 291–92 (D.D.C. 2015) (accepting ATF's argument that the pre-2009 Riders "remain active and enforceable" Exemption 3 statutes).

But the Court is not persuaded by these decisions. As an initial matter, several of the foregoing opinions do not examine the effect of the OPEN FOIA Act at all. *See, e.g.*, *McRae*, 869 F. Supp. 2d at 163; *Skinner*, 744 F. Supp. 2d at 204; *Reep*, 302 F. Supp. 3d at 183; *Caruso*, 495 F. App'x at 778. Those opinions that do analyze the issue presented here have not wrestled with the arguments discussed above. For example, in *Abdeljabbar*, the district court reasoned—as ATF does here—that Congress's decision to incorporate similar language into successive appropriations bills "demonstrate[d] its intent to continue the disclosure prohibition" and rejected as implausible any conclusion that Congress intended to repeal by implication a disclosure prohibition by reiterating it, particularly given the presumption against implied repeals. 74 F. Supp. 3d at 175. This argument, which certainly has strong intuitive sway, fails to examine at all the persuasive evidence that Congress intended to comprehensively replace each prior version of the Tiahrt Rider. In particular, it does not examine how the pre-2009 enactments may remain in effect after Congress passed new, comprehensive versions altering the applicable exceptions.

* * *

In sum, the Court concludes that ATF has not carried its burden of identifying a qualifying Exemption 3 statute. The 2012 Tiahrt Rider, which all parties agree is the operative rider for purposes of determining what information the ATF may or may not disclose, is not a qualifying Exemption 3 statute because it does not reference section 552(b)(3). And because the 2010 Tiahrt Rider replaced the 2008 Tiahrt Rider by complete substitution—indeed, because each Tiahrt Rider replaces its predecessor by complete substitution—the Tiahrt Riders enacted prior to 2009 are no longer operative law. In light of this conclusion, the Court turns to ATF's second contention: that Everytown's request requires creation of a record.

B. Everytown's Request Does Not Require the Creation of a Record

FOIA obligates agencies to, "upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . [,] make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). Pursuant to the 1996 E-FOIA Amendments, agencies responding to such records requests "make reasonable efforts to search for the [requested] records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C). The required "search" includes reviewing by "automated means," while "record" is defined to include "information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(a)(3)(C) & D, § 552(f)(2)(A).

In interpreting this statutory language, courts have long held that FOIA requires agencies to search for, but not to create, responsive records. As the Supreme Court put it, FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975). It does not require agencies to "produce or create explanatory material," *id.* at 161-62, or to "answer questions" posed by FOIA requests, *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). *See also Pierce & Stevens Chem. Corp. v. U.S. Cons. Prod. Safety Comm.*, 585 F.2d 1382, 1388 (2d Cir. 1978) ("[U]nder the FOIA, an agency does not rewrite a document or create informational material. It discloses existing documents, which it has already prepared."); *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 159 n.2 (1980) (explaining that FOIA does not "compel[ ] the Government to conduct research on behalf of private citizens"). Courts have repeatedly reaffirmed the bar on record creation in response to FOIA requests following the enactment of the E-FOIA Amendments. *See, e.g.*, *ACLU v. DOJ*,

681 F.3d 61, 71 (2d Cir. 2012) (noting that replacing references to classified information with alternative language meant to preserve the text's meaning "would effectively be 'creating' documents—something FOIA does not obligate agencies to do.").

Here, ATF contends that it is not required to respond to Everytown's request because it has never prepared annualized reports summarizing the specific statistical information Everytown seeks. ATF Br. at 17-18 (citing Houser Decl. ¶ 30). While ATF maintains electronic records of individual traces conducted—coded by various criteria in the Firearms Tracing System database—its declarant affirms that it does not maintain, in any format, records of the complete number of traces of firearms that correspond to each of Plaintiff's specific sets of criteria, such as completed or attempted suicides for a given year or who possessed firearms used in such completed or attempted suicides. Houser Decl. ¶¶ 30-31. Instead, to generate accurate counts after (1) conducting searches to identify the relevant trace data, ATF would need to (2) clean up the raw data by performing six levels of data filtering and filling in gaps with educated guesses; (3) insert the resulting statistics into applicable software and create a visual depiction of the data; and (4) subject the resulting product to multi-level reviews to ensure the accuracy of the data and the format in which it is presented. ATF Reply at 8 (citing Houser Decl. ¶ 21, 30-33.). ATF concedes that the first step, which its declarant affirms would take one hour per year of data requested, Houser Decl. ¶¶ 31-32, is required by FOIA. But it argues that complying with the remainder, which would require four dedicated working days, Houser Decl. ¶¶ 31-32, would constitute record creation.

The Court concludes that this declaration fails to carry ATF's burden of demonstrating that Everytown's request requires ATF to create records.

The E-FOIA Amendments clearly require agencies to sort "a pre-existing database of information to make information intelligible" so that it may be transmitted to the public. *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 270 (D.D.C. 2012). Accordingly, conducting such a search cannot constitute creating new records or conducting research so as to fall outside of agency disclosure requirements. *Id.*; *see also, e.g.*, *People for the Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (requiring agency to conduct a PACER search of 44,000 electronically-stored fields to identify data targeted in FOIA request). Nor does it constitute creating a record to sort a database by a particular data field, *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 270, or to create the computer programming necessary to conduct a search, *Schladetsch*, 2000 WL 33372125, at *3. And an agency may be obligated to respond to a FOIA request even if "the net result of complying with the request will be a document the agency did not previously possess." *Id.*

Moreover, even before the passage of the E-FOIA Amendments, courts held or assumed that agencies could be obligated to disclose names and addresses even if the information sought was contained in numerous separate documents and responding would require the agency to compile such information into one. *See Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 456-57 (D.D.C. 1977) (concluding that compiling such information did not constitute creating records), *summarily aff'd*, 574 F.2d 636 (D.C. Cir. 1978); *Ditlow v. Shultz*, 517 F.2d 166, 169 (D.C. Cir. 1977) (assuming that uncompiled names and addresses may constitute a "file" for purposes of the § 552(b)(6) exemption). Taken together, these authorities suggest that a request for data entry counts may fall within agencies' obligations to "search" for an agency "record," although whether an agency is obligated to respond in a given case will depend upon the design and structure of its database.

Here, ATF's declarant fails to demonstrate that producing data entry counts from its Firearms Tracing System database would require it to create new records. Indeed, ATF concedes this much. In its briefs and at oral argument, ATF concedes that the search required to generate the raw data Everytown requests is required by FOIA and that producing equivalent data counts from a paper records system would not constitute record creation. *See* ATF Reply at 8 ("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."); Tr. at 31:25-32:1 ("A search for raw data can be done in the database."); *id.* at 41:2-6 (conceding that the agency would be required to respond to a request for the number of sheets stored in a paper records system); *id.* at 45:18-20 ("I would think [that it is feasible to produce the number of entries requested]."). It is only because ATF interprets Everytown's request to require ATF to clean up that data, generating a customized statistical report not maintained by ATF, that ATF argues the request requires record creation.

The problem with this argument is that, as Everytown represented in both its summary judgment briefing and at oral argument, Everytown's request does not require ATF to engage in any subsequent cleanup of the data generated by a Firearms Tracing System database search. *See* Everytown Br. at 21 ("Everytown here seeks aggregate numbers . . . and the data within the [Firearms Tracing System] database is coded according to these criteria, such that a simple search will yield both the responsive database entries and the requested numbers thereof," a search the Houser Declaration estimates "will take one hour to query [from] the Firearms Tracing System."); *id.* at 23 ("ATF entirely fails to explain why it cannot simply search its database by the applicable categories and provide Everytown with the resulting numbers."); *id.* at 24 ("ATF fails to show why Everytown's request requires any of the [cleanup] steps beyond the initial search."); Everytown Reply at 9 ("[T]he Houser Declaration fails to explain why ATF

cannot simply perform the first step of the four-step process it describes (the initial search) and produce the resulting numbers."); Tr. at 16:24-17:4 (explaining that, while Everytown would "would love to have the most accurate data," it "understand[s] that it's possible that a trace request was incorrectly maybe missing some fields" and seeks only a "reasonable search" for "what [ATF] has that's correctly coded"); *id.* at 17:17-20 ("[I]nherent in the FOIA request is that . . . we would want the data pulled that would result from putting the queries that coincide with the information that we've asked for."); *id.* at 48:2-9 (explaining that, when the request was drafted, Everytown had the Firearms Tracing System database in mind, and imagined that the numbers it requested corresponded to the number of entries stored in the database); *id.* at 51:17-19 ("We're asking for the searches to be run and to be provided with the results of those searches.").

ATF explained at oral argument that it interpreted Everytown's FOIA request to call for "the correct number" of items in each category sought, which it views as necessarily requiring each of the data cleanup steps its declarant describes. Tr. at 35:24-36:2, 36:8-18. Yet it offers no explanation for why, in the face of Everytown's statements to the contrary and given the wording of Everytown's request, it is entitled to rely on this interpretation.

To the contrary, agencies are obligated to construe FOIA requests liberally, *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995); requesters are required only to "reasonably describe[ ]" the desired records, and "the identification standard in the FOIA should not be used to obstruct public access to agency records," *Truitt v. Dep't of State*, 897 F.2d 540, 545 (D.C. Cir 1990) (quotation omitted); *see also Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985) ("[T]he agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form

from that anticipated by the requester."). For example, in *Nation Magazine*, the D.C. Circuit held that an agency could not interpret a request for information "pertaining to" Ross Perot, and with special interest in his efforts to assist in drug interdiction, to require the agency only to look for records indexed under Perot's name, but instead required the agency to include all "subject matter files on topics of interest to appellants." *Nation Magazine*, 71 F.3d at 890. Similarly, one court in this Circuit has held that, in light of the obligation to construe FOIA requests liberally, an agency could not interpose an objection that cleaning raw data to respond to a request constituted record creation if the agency could disclose a raw data sample for the requester to code itself. *See Immigrant Def. Project v. U.S. Immigration and Customs Enforcement*, 208 F. Supp. 3d 520, 532 (S.D.N.Y. 2016).

The foregoing case law stands in close parallel to the present case. Everytown's records request seeks "records containing aggregate trace data that document . . . the number of each firearm type" or "the number of guns" involved in completed and attempted suicides across various parameters. Everytown FOIA Request at 2-3. In other words, Everytown seeks the number of entries in the database corresponding to searches run using different sets of existing variables. *See* Tr. at 17:18-20; 48:2-9; 51:17-19. Although ATF's interpretation of this request as seeking "correct," cleaned-up numbers is not necessarily unreasonable, it falls short of ATF's obligation to construe Everytown's request liberally. Indeed, Everytown has repeatedly indicated that, in its view, searches for the raw data stored in the Firearms Tracing System database would be responsive to its records request. *See id.* Under these circumstances, the Court cannot conclude that ATF has carried its burden of demonstrating that Everytown's request requires record creation. As ATF conceded at oral argument, ATF has not supplied a declarant who has demonstrated that producing the raw data Everytown seeks would require

ATF to create responsive records; to the contrary, ATF's declarant indicated that it would take two of its analysts one hour to conduct the requested search, and in its briefing ATF conceded that this search was required by FOIA.

The Court acknowledges that other courts have reached differing conclusions about the production of aggregate data or descriptive information. For example, in *National Security Counselors*, the plaintiff requested database listings for all FOIA requesters for three fiscal years according to the fee categories to which the CIA assigned them and a record indicating the ten individuals responsible for the most FOIA requests submitted in each of those years. 898 F. Supp. 2d at 269-72. The district court reasoned that, under the E-FOIA Amendments, agencies were obligated to disclose "particular points of data (i.e., the records themselves)" from within a database. *Id.* at 271. However, a FOIA request for an index of a database that did not "seek the contents of the database, but instead essentially [sought] information about those contents, [was] a request that require[d] the creation of a new record, insofar as the agency [had] not previously created and retained such a listing or index." *Id.* In *Center for Investigative Reporting v. United States Department of Justice*, the district court applied the same logic to a FOIA request similar to the request at issue here, concluding that the fact that the plaintiff's request would have required ATF to derive statistical aggregate data from the records in the Firearm Tracing System database necessarily entailed the creation of a new record. No. 17-cv-6557-JSC, 2018 WL 3368884, at *9-10 (N.D. Cal. July 10, 2018).

As an initial matter, the Court notes that *National Security Counselors* is distinguishable from the present case, as producing an index may present distinct questions from producing aggregate counts of entries in an agency database. But insofar as these authorities should be read to hold that producing aggregate data or other descriptive information about an agency database

necessarily constitutes record creation, the Court disagrees. As explained above, whether producing raw entry counts housed in a database requires an agency to engage in record creation depends upon the structure of the underlying database. If such entry counts are apparent on the face of a database when searches required by FOIA are conducted, producing those readily apparent counts does not constitute record creation. That the agency might be required to compile the resulting information into a response is a standard feature of FOIA requests, not a basis for concluding that the request asks the agency to go beyond its FOIA obligations. After the E-FOIA Amendments, whether information in a database constitutes an agency record hinges not on whether the information is housed in the form requested, but whether generating the information requires the agency to engage in additional research or conduct additional analyses above and beyond the contents of its database.

For example, as ATF agreed at oral argument, if an agency stored Firearms Tracing System database information in physical file cabinets, collating trace results into drawers and subfolders by every possible set of criteria, it would be required to answer a request for the number of documents stored in each subfolder. Tr. at 40:13-41:6. As ATF acknowledged, it would be obligated to disclose such information even if the agency had stored duplicate files or papers had been misfiled or contained incorrect information. *Id.* at 41:16-43:11. These potential input errors could not serve as a basis to deny a FOIA request for a paper analog to the present request. The same conclusion applies with equal or greater force in the context of electronically stored data in a searchable database. *See* 5 U.S.C. § 552(f)(2)(A) (defining "record" to include "information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format").

The legislative history of the E-FOIA Amendments provide further support for the Court's conclusion. In passing the E-FOIA Amendments, Congress expressly found that government agencies should "use new technology to enhance public access to agency records and information" and stated that its purposes in passing the E-FOIA Amendments included "improv[ing] public access to agency records and information" and "maximiz[ing] the usefulness of agency records and information maintained, used, retained, and disseminated by the Federal Government." Pub. L. No. 104-231, §§ 2(a)(6), 2(b)(2) and (3), 110 Stat. 3048, 3048 (1996). Moreover, in a contemporaneous Report, the House explained that, "[u]nder the definition of 'search' in the bill, the review of computerized records would not amount to the creation of records[;] [o]therwise, it would be virtually impossible to get records maintained completely in an electronic format, like computer database information, because some manipulation of the information likely would be necessary to search the records." H.R. Rep. No. 104-795, at 22 (1996). These authorities make clear that the narrow interpretation offered by the *National Security Counselors* and *Center for Investigative Reporting* courts—placing emphasis on the form in which the data is stored—is not what Congress intended in amending FOIA to ensure the accessibility of electronic data.

* * *

In sum, ATF has not carried its burden of demonstrating that, given the structure of the Firearms Tracing System database, conducting a search to produce the raw data entry counts Everytown requests would require it to create records. As such, summary judgment for Plaintiff is required. *See NRDC*, 36 F. Supp. 3d at 406 (granting summary judgment for FOIA plaintiff when agency defendant had not met its burden of demonstrating that requested information fell under FOIA exception); *see also Schladetsch*, 2000 WL 33372125 (granting summary judgment

for plaintiffs when agency declarations failed to demonstrate that FOIA request required record creation or that the search would require unreasonable efforts that would interfere with agency's computer system).

IV. CONCLUSION

For the foregoing reasons, ATF's motion for summary judgment is DENIED, and Everytown's motion for summary judgment is GRANTED. The ATF is hereby ordered to produce the requested records. The Clerk of Court is respectfully requested to enter judgment and close this case.

This resolves Dkt. Nos. 17 and 29.

SO ORDERED.

Dated: August 19, 2019
New York, New York

ALISON J. NATHAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

Everytown for Gun Safety Support Fund,
Plaintiff,

-against-

Bureau of Alcohol, Tobacco, Firearms and Explosives,
Defendant.

----------X

18 **CIVIL** 2296 (AJN)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated August 19, 2019, ATF's motion for summary judgment is denied, and Everytown's motion for summary judgment is granted; the ATF is hereby ordered to produce the requested records; accordingly, this case is closed.

Dated: New York, New York
August 21, 2019

RUBY J. KRAJICK
Clerk of Court

BY:
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 8/21/2019

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) **NOTICE OF APPEAL**

Notice is hereby given that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on August 21, 2019.

Dated: New York, New York
October 21, 2019

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
Attorney for Appellant ATF

By: /s/ Tomoko Onozawa
TOMOKO ONOZAWA
Assistant United States Attorney
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2721
Fax: (212) 637-2686
E-mail: tomoko.onozawa@usdoj.gov

TO: Clerk of Court
United States Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Eric Tirschwell, Esq.
Alla Lefkowitz, Esq.
Everytown for Gun Safety Support Fund
132 East 43rd Street, No. 657
New York, New York 10017

Laurence S. Lustberg, Esq.
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102-5310