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.	Case No. 18-CV-2296 (AJN) **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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ATF has not met its burden of showing that it is justified in denying Everytown's FOIA request. As detailed herein, ATF wrongly asserts that the Tiahrt Rider is an Exemption 3 statute, despite the appropriations statute's noncompliance with the Open FOIA Act of 2009, based on the untenable claim that multiple versions of the Rider exist simultaneously. ATF is also incorrect that, even if the Rider qualifies as a withholding statute, it applies to the statistical aggregate data at issue here. And finally, although ATF insists that Everytown's FOIA request would entail the creation of new records, the E-FOIA Amendments of 1996 hold otherwise. Accordingly, Everytown respectfully submits that the Court should order ATF to disclose the requested data.

ARGUMENT

I. The 2012 Tiahrt Rider Is the Only Rider Currently in Effect.

As explained in Everytown's opening brief, the 2012 Tiahrt Rider does not contain language that "specifically cites" to 5 U.S.C. § 552(b)(3) and so fails to qualify as an Exemption 3 statute under the Open FOIA Act of 2009. *See* Everytown Br. at 9–10. ATF responds that, nonetheless, pre-Open FOIA Act versions of the Rider qualified as Exemption 3 statutes, and because there is no "clear repugnancy" between those earlier versions and the 2012 Rider, the 2012 Rider did not repeal the earlier ones, and they all remain in effect concurrently. *See* Gov't Reply at 2–3. In so contending, however, ATF ignores that courts recognize implied repeals not only in cases of "clear repugnancy," but also where a later statute serves as a comprehensive substitute for an earlier one. *See Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). Thus, ATF's contention that there is "no evidence" of congressional intent to repeal earlier Riders misses that such intent is properly inferred when a later enactment "covers the whole subject of the earlier one and is clearly intended as a substitute." *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (quoting *Posadas*); *see also Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). As the leading treatise on statutory construction notes:

> [W]ill a revision repeal by implication previous statutes on the same subject, though there be no repugnance? The authorities seem to answer emphatically, Yes. The reasonable inference from a revision is that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject-matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments.

J.G SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 208 (Chicago, Callaghan & Co. 1891); *accord* N. SINGER & S. SINGER, *SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION* § 23:13, AT 489-91 (7TH REV. ED. 2014) ("Legislation which operates to revise the entire subject to which it relates gives strong implication of a legislative intent to repeal former statutory law . . .").[1]

Here, there is no dispute—and ATF raises none—that the 2012 Rider covers the entire subject matter of previous iterations. Further, an inference of congressional intent to repeal is even stronger here than in a typical case because Congress has passed at least six versions of the Rider which are largely redundant but contain substantive modifications over subsequent years. *See* Exhibit A to the Supplemental Declaration of Alla Lefkowitz (compendium of all Tiahrt Riders, including the six versions from 2005 to 2012 that ATF contends are in effect).[2] It is simply implausible that Congress intended that six overlapping statutes would be in effect at once, especially when the adjustments of subsequent version were obviously intended to replace perceived shortcomings of earlier ones. Indeed, ATF only argues to the contrary in an attempt to circumvent the Open FOIA Act.

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[1]This Circuit, among others, routinely relies on the Sutherland treatise on matters of statutory construction. *See, e.g., Fernandez v. Zoni Language Ctrs., Inc.*, 858 F.3d 45, 52 (2d Cir. 2017); *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 654 F.3d 276, 291 (2d Cir. 2011).

[2]The principle of repeal by substitute legislation makes particular sense in the appropriations context, where new riders on the same subject are commonly passed on an annual basis.

ATF relies heavily on *Abdeljabbar*, but the court in that case made the same error as ATF does here, failing to recognize that a later statute repeals an earlier one when it covers the same subject matter and is an obvious substitute. *See Abdeljabbar v. Bureau of Alcohol, Tobacco & Firearms*, 74 F. Supp. 3d 158, 175 (D.D.C. 2014) (stating categorically that "a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two"). And as Everytown noted in its principal brief, decisions that have merely repeated *Abdeljabbar*'s flawed conclusion add nothing to ATF's argument, as these opinions reflect no additional or persuasive reasoning. *See* Everytown Br. at 12–13. Finally, the new cases cited on this issue in ATF's reply, *McRae v. United States Department of Justice*, 869 F. Supp. 2d 151 (D.D.C. 2012) and *Skinner v. United States Department of Justice*, 744 F. Supp. 2d 185 (D.D.C. 2010), *see* Gov't Reply at 2–3, are irrelevant given that neither mentions the Open FOIA Act of 2009 or addresses the effect of subsequent Tiahrt Riders on earlier versions.

In the end, the question is not, as ATF suggests, whether Congress intended to do away with the disclosure prohibition of earlier Tiahrt Riders. *See* Gov't Reply at 3. The question is whether Congress intended the 2012 Tiahrt Rider to be a comprehensive and standalone law that replaced earlier iterations. Clearly, it did. As a result, because of the intervening event of the Open FOIA Act, if Congress wanted the 2012 Rider to be an Exemption 3 statute, it needed to say so expressly. Accordingly, ATF may not rely on the Tiahrt Rider to withhold the requested data.

II. Subpart C of the Tiahrt Rider Is Not Limited to Reports Compiled by the ATF.

ATF has the burden of demonstrating not only that the Tiahrt Rider is an Exemption 3 statute—which it has failed to do—but also that the Rider expressly prohibits disclosure of the "statistical aggregate data" that Everytown seeks. On this point, ATF argues that Subpart C of the Tiahrt Rider permits disclosure of such data only in the context of ATF reports. Gov't Reply at 4-5. But this position is belied by ATF's own repeated acknowledgement that Subpart C authorizes

two kinds of releases: ATF's "annual statistical reports" and "statistical aggregate data." *See*, *e.g.*, Houser Decl. ¶ 28 (explaining that the Tiahrt Rider does not prevent ATF from "publishing 'annual statistical reports' or certain 'statistical aggregate data'"); Reply Ex. B (ATF's Br. in Supp. of Summary Judgment, *Ctr. for Investigative Reporting, v. U.S. Dep't of Justice*, ("*C.I.R.*") Case No. 17-cv-6557 (N.D. Cal. Apr. 26, 2018)), at 12 ("Significantly, subpart (C) permits the 'publication of annual statistical reports . . . or statistical aggregate data' by ATF." (alteration in original)); Reply Ex. C (ATF's *C.I.R.* Reply) at 6 n.1 ("The most natural reading of subpart (C) is that it concerns 'publication' by the ATF of either 'annual statistical reports or 'statistical aggregate data' as these categories are further defined in the subpart."); Everytown Br. Ex. F (ATF's Br. in Opp. to Pl's Mot. to Supp. the Admin. R. in *Ron Peterson Firearms, LLC v. Jones*, Case No. 11-CV-678 (D.N.M. Mar. 30, 2012)) at 5 n.1 ("[T]he unredacted information that was included in the Administrative Record . . . constitutes 'statistical aggregate data regarding firearms traffickers and trafficking channels,' 125 Stat. at 610, the disclosure of which is permitted by statute."); Everytown Br. Ex. G (ATF's Br. in Opp. To Intervenor Pl's Mot. to Supp. the Admin. R. in *10 Ring Precision, Inc. v. Jones*, Case No. 11-cv-00663 (W.D. Tex. Mar. 26, 2012)) at 5 n.2 (same).

And as explained in Plaintiff's opening brief, ATF has, in fact, disclosed statistical aggregate data outside the confines of its own annual reports, specifically by relying on Subpart C's exemption for statistical aggregate data. Everytown Br. at 15–16. ATF attempts to revise history by claiming that in *Ron Peterson* and *10 Ring Precision* (the "Demand Letter Cases"), it disclosed statistical aggregate trace data because the Tiahrt Rider permits the disclosure of all trace data in APA litigation. Gov't Reply at 6 ("The Tiahrt Amendment expressly permits the disclosure of the contents of the FTS database in [APA cases] . . . ."); Suppl. Houser Decl. ¶ 10. In fact, ATF took the exact opposite position in the Demand Letter Cases. There, ATF expressly stated that it

could not disclose individualized trace data in APA cases, but it could disclose statistical aggregate trace data specifically because it was authorized to do so under Tiahrt's Subpart C. *See* Everytown Br. Ex. F at 2-5; Ex. G at 2-5. Nowhere in the Demand Letter Cases did ATF ever assert that its disclosure was authorized because the cases came under the APA.[3]

ATF argues that Subpart C must nonetheless bar production here because that proviso does not specifically reference FOIA or use the word "release." Gov't Reply at 3–4. But ATF has it backwards. No express language is required to permit *release* of documents under FOIA; it is the Open FOIA Act of 2009, as previously discussed, that mandates specific terms to authorize *withholding*. In this vein, as Everytown has argued, courts employ strong presumptions favoring disclosure and construing FOIA exemptions narrowly. *See* Everytown Br. at 8.

ATF next refers to the legislative history of the Tiahrt Rider to argue that Congress did not intend the word "publish" to include production under FOIA. Gov't Reply at 4–5. Because the plain text of Subpart C is clear, and because ATF has repeatedly acknowledged that this clause permits disclosure of statistical aggregate data, reference to legislative history is unnecessary. *N.Y. ex rel. Office of Children & Family Servs. v. U.S. Dep't of Health and Human Servs.' Admin. for Children & Families*, 556 F.3d 90, 97 (2d Cir. 2009) (holding, "we begin with the statutory text," but if that is ambiguous, courts should next "turn to canons of construction and, if that is unsuccessful, to legislative history") (internal citations omitted). But in any case, ATF confuses the legislative history upon which it relies. The 2005 legislative history cited by ATF refers to a

[3]Although the Tiahrt Rider contains an exception for the disclosure of trace data "in a proceeding commenced by [ATF] to enforce the provisions of [18 U.S.C. § 921 *et seq.*], or a review of such action or proceeding," neither party raised this issue in the context of the Demand Letter Cases, likely because they did not involve "a proceeding" commenced by ATF or a "review of such action or proceeding." 125 Stat. at 609-610 (Reply Ex. A at 5).

different exception to the Rider, one that is currently contained in Subpart A. *See* Gov't Reply at 4-5.[4] The exceptions in Subpart C (and for that matter Subpart B) did not exist in 2005, *see* 118 Stat. 2809 (Reply Ex. A at 3), and therefore could not have been addressed in the 2005 legislative history. In any case, the reference to statistical reports in the legislative history cited by ATF does not lead to the conclusion that ATF is prohibited from disclosing statistical aggregate data in response to FOIA requests. Indeed, directly to the contrary, the quoted history makes clear that Congress' concern regarding release was tied to the nature of the trace data at issue (*i.e.*, individual trace data or statistical aggregate data), not the format of the disclosure (*i.e.*, an ATF annual report, or in response to a FOIA request). *See* Gov't Reply at 4–5 (quoting legislative history explaining that reports could continue to be published because "they pose none of the concerns associated with [release of] law enforcement sensitive information"). As Everytown has argued, Everytown Br. at 17–18, and ATF does not dispute, the statistical aggregate data that Everytown seeks will likewise pose no risk of harm related to sensitive law enforcement matters.

III. Everytown's FOIA Request Does Not Entail Creation of New Records.

In its reply brief, ATF cites *National Security Counselors v. CIA* for the proposition that "'a FOIA request for a listing or index of a database's contents . . . requires the creation of a new record[.]'" Gov't Reply at 8 (quoting 898 F. Supp. 2d 233, 271 (D.D.C. 2012)).[5] But, of course, Everytown has not requested a list or index—it seeks only numbers, *i.e.* the numbers of firearms

[4]Contrary to ATF's claim, that exception was not "further revised" in 2008, Gov't Reply at 5, but was reproduced virtually verbatim in 2008. *Compare* Consol. Approp. Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004) (2005 Rider) (Reply Ex. A at 1) *with* Consol. Approp. Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007) (2008 Rider) (Reply Ex. A at 3).

[5]ATF later cites *C.I.R. v. U.S. Dep't of Justice*, 2018 WL 3368884, at *10 (July 10, 2018) for the same proposition. Gov't Reply at 9. Because *C.I.R.* rests entirely on *National Security Counselors*, it should be rejected for the same reasons, discussed below.

meeting various criteria for which the FTS database is specifically coded. That said, and more fundamentally, *National Security Counselors* was wrongly decided. There, the district court held that an agency cannot be compelled to produce a list or index because such a record "would not necessarily have existed prior to a given FOIA request." *Id.* at 271. But the E-FOIA Amendments supplanted this understanding of record creation—rooted in whether the agency previously maintained the information in the specific form requested—in favor of a burden-based limitation on agencies' electronic search obligations.

Specifically, the E-FOIA Amendments, enacted in 1996, expanded the definitions of "record" (to include information "in any format, including an electronic format") and "search" (to include review "by automated means"), 5 U.S.C. §§ 552(a)(3)(D), (f)(2)(A), because Congress understood that electronically-stored data, which can, for example, be coded for easy manipulation, is not like paper records. Thus, Congress required agencies to "use new technology to enhance public access to agency records and information." Elec. Freedom of Info. Act Amends. of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996); *see also* H.R. Rep. No. 104-795, at 22 (1996) (absent expanded definitions, "it would be virtually impossible to get records maintained completely in an electronic format . . . because some manipulation of the information likely would be necessary"). The E-FOIA Amendments, then, rendered obsolete the notion of record creation as turning on whether the agency already had the relevant information in the form requested; now, information has to be provided unless the process "would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C).

Accordingly, contrary to *National Security Counselors*, courts have consistently required compliance with requests for electronic data in a form not previously maintained by an agency. *See, e.g.*, *Schladetsch v. U.S. Dept. of Hous. & Urban Dev.*, 2000 WL 33372125, at *3 (D.D.C.

Aug. 23, 2018) ("The fact . . . that the net result of complying with the request will be a document the agency did not previously possess . . . does [not] preclude the applicability of [FOIA]."); *see also id.* ("Because [agency] conceded that it possesses in its databases the discrete pieces of information which [FOIA-requestor] seeks, extracting and compiling that data does not amount to the creation of a new record."); *Kensington Research & Recovery v. U.S. Dep't of Hous. & Urban Dev.*, 620 F. Supp. 2d 908, 913 (N.D. Ill. 2009) ("Although [agency] did not save the data in the precise format [requested], the *de minimis* outlay of time, energy, and resources required . . . does not constitute creation of a new record."); *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 231, 254 (D. Conn. 2012) ("[I]n the case of electronic data, 'the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent.' Agencies should 'apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed.'") (quoting 32 C.F.R. § 286.4(g)(2)) (internal citation omitted).[6]

Moreover, the "all-important line between searching a database . . . and [] creating a record" drawn by *National Security Counselors* is nonsensical. *Id.* at 270–71. By holding first that "[s]orting a database by a particular data field . . . does not involve creating new records . . . [but]

[6]ATF attempts to distinguish *Kensington* and *Schladetsch*, without success. ATF emphasizes that *Kensington* required an agency to recreate a form that it had created previously. Gov't Reply at 9. But it is undisputed that the agency did not possess the record at the time of the request, and that the court was persuaded to order the production because it would not likely "'require[] more than a few strokes on a keyboard,'" as ATF concedes. *See* Gov't Reply at 9 (quoting 620 F. Supp. 2d at 913). Thus, *Kensington* confirms that an agency must compile electronic data in the form requested, though it does not possess the data in that form, provided that there is no undue burden imposed. With regard to *Schladetsch*, ATF characterizes the case as holding only that the "computer programming necessary for [the] agency to search its databases" was "'not the creation of a new record.'" Gov't Reply at 10 (quoting 2000 WL 33372125, at *3). But *Schladetsch* also held that the agency was required to produce the requested information in its possession even though it did not possess a record of the kind requested. 2000 WL 33372125, at *3.

is just another form of searching," while then holding that an agency cannot be compelled to produce the list or index that may result from such a search, the court arbitrarily bifurcated the agency response process. *See id.* at 270. Indeed, "[t]he Court pause[d] . . . to note the perverse practical consequences" that an agency could be compelled under FOIA to produce the (more voluminous) records underlying a list or index, but not the summary documents themselves. *Id.* at 272. Nothing in the language of the E-FOIA Amendments supports this construction, and "[a] statute should be interpreted in a way that avoids absurd results." *S.E.C. v. Rosenthal*, 650 F.3d 156, 162 (2d Cir. 2011) (alteration in original) (internal citations and quotation marks omitted). In sum, this Court should reject the holding of *National Security Counselors*.

Finally, ATF disputes Everytown's claim that ATF could identify the requested records through a "simple search," citing the four-step process outlined in the Houser Declaration. Gov't Reply at 8–9. Leaving aside that this argument fails to meet ATF's burden of establishing that Everytown's request is unreasonably burdensome, *see Schladetsch*, 2000 WL 33372125, at *3, ATF is also wrong that Everytown's claim is "refuted" by the Houser Declaration. As Everytown argued in its principal brief, the 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. *See* Everytown Br. at 23-24 (citing, *e.g.*, *Halpern v. FBI*, 181 F.3d 279, 285 (2d Cir. 1999)). ATF does not confront this challenge in its reply, but simply rehashes the original Houser Declaration, despite its lack of specificity or tailoring to the particular requests at issue here.[7] ATF fails to explain why the additional steps, which include analysis using "statistical

[7]ATF does not dispute Everytown's argument that the eTrace platform available to law enforcement shows that statistical aggregate data can easily be pulled from the FTS database. *See* Everytown Br. at 21. Instead, ATF argues that "eTrace is not capable of generating the statistical reports sought by Plaintiff." Gov't Reply at 10. But this argument is flawed. Everytown never

software," multiple tiers of review, and creation of a "visual depiction," among others, are in any way necessary to respond to Everytown's specific requests. Houser Decl. ¶¶ 18–21.[8] Accordingly, ATF fails to carry its burden of demonstrating that the production Everytown seeks would impose anything other than a *de minimis* burden.

CONCLUSION

For the foregoing reasons, ATF should be ordered to produce the requested records.

Respectfully Submitted,

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suggested that the eTrace platform could provide the specific records requested by Everytown—the point is simply that eTrace shows that the FTS database can generate numbers easily.

[8]In fact, the Administrative Records from the Demand Letter Cases demonstrate that ATF is capable of producing statistical aggregate data from the FTS database without the visual depictions that the ATF now insists are a vital part of the process. *See, e.g.*, Administrative R., *Ron Peterson Firearms, LLC v. Jones*, Case No. 11-CV-678 (D.N.M.) (ECF No. 36), filed Feb. 27, 2012 (relevant excerpts provided herewith as Reply Ex. D).