

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAYOR AND CITY COUNCIL OF
BALTIMORE,
100 N. Holliday Street
Baltimore, Maryland 21202,

Plaintiff,

v.

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,
99 New York Avenue, NE
Washington, DC 20226,

Defendant.

Case No. 23-cv-03762-RDM

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant Bureau of Alcohol, Tobacco, Firearms and Explosives (“Defendant”) hereby respectfully moves for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). Accompanying this motion are a memorandum of points and authorities in support of the motion, a declaration and supporting exhibits, a statement of undisputed material facts, and a proposed order. Defendant respectfully requests that the Court grant the motion for the reasons described in the memorandum.

Dated: April 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 15, 2024, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF system.

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**DEFENDANT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Dated: April 15, 2024

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PRELIMINARY STATEMENT

Plaintiff Mayor and City Council of Baltimore (“Plaintiff”) bring this FOIA action to compel Defendant Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) to release from its Firearms Tracing System database a wide-ranging collection of aggregated and individualized statistical data related to firearms recovered in Baltimore as well as the underlying data pertaining ATF’s recent report on trace data in Baltimore. The information sought by Plaintiff’s FOIA Request, however, is exempt from disclosure under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), because it is protected by statute. In a series of appropriations bills from 2005 to the 2012, which apply broadly to “the current fiscal year and in each fiscal year thereafter,” Congress unequivocally prohibited ATF from disclosing any such tracing data, and the courts have repeatedly upheld that prohibition against similar claims brought by FOIA requesters. Moreover, parts of Plaintiff’s FOIA Request essentially require that ATF create new agency records by demanding that ATF produce customized reports; these demands conflict with FOIA’s mandate that an agency not be compelled to create new documents to satisfy a FOIA request. Accordingly, this Court should grant summary judgment in ATF’s favor.

BACKGROUND

A. The Freedom of Information Act

The Freedom of Information Act provides a right of public access to government records, *see* 5 U.S.C. § 552(a), limited by nine statutory exemptions, *id.* § 552(b). As relevant here, Exemption 3 covers “matters that are . . . specifically exempted from disclosure by statute . . . , if that statute” either “requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue” or “establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). Since the OPEN FOIA Act of

2009, later-enacted statutes must also “specifically cite[] to” Exemption 3 in order to come within its scope. 5 U.S.C. § 552(b)(3)(B).

B. ATF’s Firearms Trace System Database

ATF is a law enforcement agency within the U.S. Department of Justice and is responsible for enforcement of federal firearms laws, including the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921–930). *See* Declaration of Elizabeth A. Wood dated April 15, 2024 (“Wood Decl.”) ¶ 3. The Gun Control Act established a licensing system for persons or entities referred to as Federal Firearm Licensees (“FFLs”), who are engaged in manufacturing, importing, dealing, and collecting firearms, and are regulated by ATF. *Id.* Pursuant to the Gun Control Act, the United States Attorney General is authorized to administer firearms tracing. *Id.* ¶ 4. The Attorney General has designated ATF the sole federal agency authorized to trace firearms. *Id.*

To carry out its firearms tracing functions, ATF maintains the Firearm Tracing System database, which is a massive electronic database that serves to support criminal investigations by federal, state, local, and foreign law enforcement agencies. *Id.* ¶¶ 4-6. The database is maintained at ATF’s National Tracing Center (“NTC”). *Id.* ¶ 4. In response to requests from law enforcement, NTC provides ATF special agents and other law enforcement agencies with Firearms Trace Result Reports commonly referred to as “trace data,” as well as investigative leads obtained from the traced firearm. *Id.*

“Tracing” a firearm is the systematic tracking of a recovered firearm from its manufacturer or importer, through its subsequent introduction into the distribution chain, in order to identify an unlicensed purchaser. *Id.* ¶ 5. A firearm trace begins when NTC receives a request from a federal, state, local, or foreign law enforcement agency that has recovered a firearm or suspects that a

certain firearm has been used in a crime. *Id.* ATF also requests traces in connection with the investigations that the agency conducts itself. *Id.* Firearms for which traces are requested typically have been recovered at a crime scene or from the possession of a suspect, felon or other person who is prohibited from owning the firearm. *Id.* Law enforcement officers working in an undercover capacity may also purchase traced firearms. *Id.*

To conduct a trace, the requesting agency must provide NTC with information about the firearm, including the type of gun (*e.g.*, pistol, revolver or shotgun), the manufacturer, the caliber, and the serial number of the gun. *Id.* ¶ 6. In a typical case, after receiving a trace request, NTC personnel will contact the manufacturer or importer to determine when and to whom the firearm in question was sold. *Id.* When NTC contacts an FFL manufacturer or importer requesting information about a particular gun or guns, ATF informs the licensee only about the firearm involved in the trace; the FFL is not informed of any circumstances relating to the alleged criminal conduct nor the identity of the law enforcement agency that recovered the firearm. *Id.* In most instances, the manufacturer or importer has sold the firearm to an FFL wholesaler. *Id.* ¶ 7. NTC personnel then contact the wholesaler to determine when and to whom the firearm in question was sold, usually to an FFL retailer. *Id.* The tracing process continues as long as records allow and is considered successful when ATF can identify the first retail purchaser (a non-FFL). *Id.* ATF's tracing process generally stops at the first retail purchaser because any subsequent disposition of the firearm by a non-FFL is not subject to Gun Control Act record-keeping or reporting requirements. *Id.* The NTC forwards the firearms tracing results directly to the requesting law enforcement agency. *Id.*

The "trace data" is maintained in the Firearm Tracing System database, and includes the 8-digit identification number of the FFLs involved in the sale or transfer of the firearm, along with

any information about the retail purchaser of the firearm. *Id.* ¶ 6. The Firearm Tracing System database contains over 75 tables with a combined total of 800 columns/fields, not including subsystems and integrated or associated systems. *Id.* ¶ 23. The data elements related to firearms trace results in the Firearm Tracing System database can be grouped into six general categories: (i) information about the law enforcement agency requesting the trace, such as the agency's name, address, case number, and investigative notes provided by the agency; (ii) information provided by the requesting agency regarding its recovery of the firearm, such as the date and location where the traced firearm was taken into custody by the requesting agency; (iii) information about purchasers of the traced firearm; (iv) information about possessors of the traced firearm and any associates (*i.e.*, persons with the possessor of the firearm when the firearm comes into police custody), such as their names and addresses, driver's license information and social security numbers, and any related vehicle information; (v) information identifying each FFL that has sold the traced firearm; and (vi) information about the traced firearm, such as the manufacturer, importer, model, weapon type, caliber and serial number. *Id.* In addition to these categories of information, the Firearms Trace System database includes close-out codes for each trace, including those related to the law enforcement and government agencies requesting the trace. *Id.*

C. Tracing Data and Statistics

ATF regularly prepares statistical reports utilizing trace data in the Firearms Tracing System database to provide the public and law enforcement agencies with insight into firearms recoveries. *Id.* ¶ 8. These reports are prepared by ATF's Office of Intelligence Operations for internal ATF use and, in some instances, for external law enforcement agencies to include certain foreign jurisdictions where firearms were recovered and traced by ATF. *Id.* The statistical trace data provided by ATF, including these reports, help domestic and international law enforcement

agencies solve firearms crimes, detect firearms trafficking, and identify trends with respect to intrastate, inter-state and international movement of crime guns. *Id.* Of all the statistical reports prepared by ATF, the agency publishes a limited number of aggregate statistical reports that ATF believes will provide helpful insights to the public without disclosing any law enforcement or other sensitive material. *Id.* Those public reports are available on the agency’s website. *See Data & Statistics: Bureau of Alcohol, Tobacco, Firearms and Explosives*, available at <https://www.atf.gov/resource-center/data-statistics> (last visited on Apr. 15, 2024); *see also* Wood Decl. ¶ 8.

The statistical reports are prepared and created by experienced specialists in ATF’s Violent Crime Analysis Branch (“VCAB”) who utilize their experience and skills to prepare these reports in an accurate and timely manner. Wood Decl. ¶ 9. VCAB provides ATF and other federal, state, local and international law enforcement agencies with crime gun, explosives, and arson intelligence information in statistical and visual formats. *Id.* VCAB also collects, analyzes, and disseminates criminal intelligence information derived from various sources for the purpose of reducing violent crime and protecting the public. *Id.*

The data used to prepare each series of reports is extracted from the Firearms Tracing System and requires time-consuming and specialized queries pertinent to each series of reports. *See id.* ¶¶ 24–26. To date, ATF has never prepared any reports summarizing the specific statistical summaries sought in Plaintiff’s FOIA Request. *Id.* ¶ 24.

D. The Tiahrt Rider

Beginning in 2003, Congress enacted a series of appropriations riders commonly known by the name of their chief sponsor, Rep. Tiahrt of Kansas. Prompted by a Seventh Circuit ruling ordering ATF to disclose trace records, *City of Chicago v. U.S. Dep’t of Treasury*, 287 F.3d 628,

632 (7th Cir. 2002) (“*Chicago I*”), Congress generally prohibited the use of appropriated funds to respond to FOIA requests for such records. 5 U.S.C. § 552 note, Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 473–74 (2003); see *Everytown for Gun Safety Support Fund v. ATF*, 984 F.3d 30, 34–36 (2d Cir. 2020).

When the Seventh Circuit held that this funding restriction did not exempt trace records from FOIA, Congress enacted a modified Tiahrt Rider that also made the data in the Firearms Tracing System “immune from legal process.” 18 U.S.C. § 923 note, Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, 118 Stat. 2809, 2859–60 (2004); see *City of Chicago v. U.S. Dep’t of Treasury*, 384 F.3d 429, 432–33 (7th Cir. 2004) (“*Chicago II*”), *vacated on reh’g*, 423 F.3d 777 (7th Cir. 2005) (“*Chicago III*”). In light of “Congress’ obvious intention in adding the ‘immune from legal process’ language to the funding restriction,” the Seventh Circuit then recognized the Tiahrt Rider as an Exemption 3 statute. *Chicago III*, 423 F.3d at 780–82 (calling Congress’s intent “unmistakable”). Congress included versions of the Tiahrt Rider in subsequent appropriations bills through 2012. While Congress made modifications, the central prohibitions of the Rider remained constant—barring the use of appropriated funds “to disclose part or all of the contents of the Firearm Trace Systems database” and providing that “all such data” is “immune from legal process.” 18 U.S.C. § 923 note, Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011) (hereinafter “2012 Tiahrt Rider”); *Everytown*, 984 F.3d at 44–49 (reproducing earlier Riders).

Beginning with the 2008 Rider, Congress sought to address concerns that the provision “ha[d] been interpreted to prevent publication of [ATF’s] long-running series of statistical reports” by clarifying that “those reports may continue to be published in their usual form.” H.R. Rep. No. 110-240, at 63 (2007). Exception C, sometimes called the “publication exception,” specifies that

the Rider does not prevent “the publication of annual statistical reports on products regulated by [ATF] . . . or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations.” 18 U.S.C. § 923 note, Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, 121 Stat. 1844 (2007).

The most recent Tiahrt Rider—the 2012 version—was unchanged from 2008 in all respects relevant here. *See* 18 U.S.C. § 923 note, 125 Stat. at 609–10. Like prior Riders, it included words of futurity, making it applicable beyond that fiscal year. *See id.* at 609 (“thereafter”).

E. Second and Ninth Circuit Precedent

Since the enactment of the OPEN FOIA Act of 2009, *see* 5 U.S.C. § 552(b)(3)(B), two federal courts of appeals have addressed FOIA requests seeking the disclosure of information from the Firearms Tracing System.

In *Everytown for Gun Safety*, the Second Circuit correctly concluded that the 2012 Tiahrt Rider barred release of data from the Firearm Tracing System database. 984 F.3d. at 34–36 The court reasoned that because “ATF operates only with appropriated funds, and . . . FOIA disclosure occurs subject to legal process,” when the “rider . . . provides that no appropriated funds may be used to disclose ‘the contents of the [Firearm Tracing System] database’ . . . and that ‘all such data shall be immune from legal process,’” it thereby “exempts [Firearm Tracing System] data from FOIA disclosure.” *Id.* at 40 (citation omitted).

Although the 2012 Tiahrt Rider does not specifically cite FOIA Exemption 3, the *Everytown* court explained that Congress “was not bound to follow the specific-citation requirement it had adopted in the OPEN FOIA Act” when it enacted the 2012 Tiahrt Rider because “[w]hen enacting subsequent legislation, Congress ‘remains free . . . to exempt the current statute

from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.” *Id.* at 39 (quoting *Dorsey v. United States*, 567 U.S. 260, 274 (2012)).

The *Everytown* court also considered the argument that release of the requested information would constitute “publication of . . . statistical aggregate data regarding . . . firearms misuse, felons, and trafficking investigations” under Exception C to the Tiahrt Rider. But the court concluded that this “publication exception” merely “allows the ATF, at its own initiative, to release statistical aggregate data regarding firearms misuse, felons, and trafficking investigations to the public,” and does not authorize disclosure of such information to FOIA requesters. *Everytown*, 984 F.3d at 44.

The Ninth Circuit addressed a similar FOIA request in *Center for Investigative Reporting v. U.S. Dep’t of Justice*, 14 F.4th 916 (9th Cir. 2021). But the government in that case presented its case somewhat differently, in ways that shaped the opinion. Rather than arguing that the 2012 Tiahrt Rider barred release notwithstanding its failure to specifically cite FOIA Exemption 3, as it did in *Everytown*, the government argued that *earlier* Tiahrt Riders remained in effect, and barred release. (Those earlier riders predated the OPEN FOIA Act of 2009, and were therefore plainly exempt from its specific-citation requirement.) The court held that the earlier Tiahrt Riders had been implicitly repealed, and only the 2012 Tiahrt Rider remained in effect. *Id.* at 927–32.

From that point, the panel divided. Judge Bumatay would have held, with the Second Circuit, that the 2012 Tiahrt Rider was not bound to comply with the specific-citation requirement of the OPEN FOIA Act, because “where two statutes conflict, the later statute controls, regardless of attempts by past congresses to hobble the current legislature.” *Id.* at 942–43 (Bumatay, J., dissenting). But the majority chose not to reach that issue, because the parties had not raised it, and instead assumed “for purposes of this particular case” that the earlier OPEN FOIA Act controlled the later statute. *Id.* at 927 (“Because no party has disputed that the OPEN FOIA Act

applies in this case, we conclude that, for purposes of this particular case, Exemption 3 does not apply.”); *id.* at 932 (“Given that the government has advanced no argument suggesting that the 2010 or 2012 Riders satisfy the OPEN FOIA Act or that they do not need to satisfy the OPEN FOIA Act, . . . the data requested . . . is not exempted from disclosure . . .”).

The majority in *Center for Investigative Reporting* then went on to address the publication exception, reasoning that the Tiahrt Rider might “preclude the expenditure of funds to disclose any of the [Firearm Tracing System] database’s contents,” even if it did not exempt those contents from disclosure. *Id.* at 933. The majority erroneously concluded that the publication exception applied to allow the disclosure of information in response to plaintiff’s FOIA request because the request sought covered “statistical aggregate data” and “[t]urning over [the] data . . . to a reporter or a representative of the news-media like [the requester] . . . will make that data generally known to the public.” *Id.* at 934. Judge Bumatay dissented. With the Second Circuit, he would have rightly held that the publication exception “refers to ATF’s publication of prepared, formal documents of aggregated statistics—not ad hoc responses to FOIA requests.” *Id.* at 946 (Bumatay, J., dissenting).

F. Plaintiff’s FOIA Request

On September 12, 2023, Plaintiff submitted a FOIA request to ATF for certain records related to firearms recovered in Baltimore. Wood Decl. ¶¶ 13-14 & Ex. A. Plaintiff requested:

Part 1: Records sufficient to identify the federally licensed firearms dealers (“FFL”) that are the top ten sources of firearms recovered in Baltimore from 2018 through 2022. In addition, with respect to each of these ten FFLs, I request records sufficient to show the following:

- a. The number of firearms recovered in Baltimore annually from 2018 through 2022.
- b. The number of firearms recovered in Baltimore annually broken down by time-to-crime, i.e., the number of firearms recovered in each of the following categories: in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over; and average-time-to-crime.

- c. The number of firearms recovered in Baltimore in connection with each category of offense or other circumstance, e.g., Homicide, Homicide - Attempted, Carrying Concealed Weapon, Found Firearm.

I will accept the records requested by Part 1 on either an aggregate or individualized basis.

Part 2: I request records sufficient to show, with respect to firearms recovered in Baltimore on an annual basis from 2018 through 2022, in connection with the category of offense or other circumstance of Homicide, Homicide - Attempted, Aggravated Assault, Robbery, Suicide, and Suicide - Attempted, the following information:

- a. The total number of firearms recovered in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over.
- b. The total number of each firearm type by manufacturer, weapon type, and caliber.
- c. The total number of firearms from each source state.

I will accept records requested by Part 2 on either an aggregate or individualized basis.

Part 3: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Source Cities" for crime guns recovered in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 3 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Source Cities" table on page 3 of the report.

Part 4: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Recovery Cities" for recovered crime guns sourced in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 4 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-mdstate-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Recovery Cities" table on page 4 of the report.

Id. ATF denied Plaintiff's FOIA Request by letter dated September 30, 2023, on the grounds that the FOIA Request sought material that was exempt from disclosure pursuant to Exemption 3 of FOIA and the 2012 Tiahrt Rider. *Id.* ¶ 15 & Ex. B. On November 15, 2023, Plaintiff appealed ATF's final determination of its FOIA Request to the Department of Justice, Office of Information

Policy (“OIP”). *Id.* ¶ 16 & Ex. C. On March 15, 2024, OIP notified Plaintiff that the appeal was being closed without decision because Plaintiff was pursuing its claims before this Court. *Id.* ¶ 17 & Ex. D.

ARGUMENT

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). FOIA actions are typically resolved on summary judgment. *See Leopold v. CIA*, 106 F. Supp. 3d 51, 55 (D.D.C. 2015); *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). The court conducts a *de novo* review of the agency’s response to the challenged FOIA request(s). 5 U.S.C. § 552(a)(4)(B).

“A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records,” *i.e.* records that do “not fall within an exemption” established pursuant to 5 U.S.C. § 552(b). *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996) (emphasis omitted); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant”); *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (“Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) ‘improperly’; (2) ‘withheld’; (3) ‘agency records.’”).

“Summary judgment is warranted on the basis of agency affidavits when the affidavits 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 nor by evidence of agency bad faith.” *Larson v. Dep’t of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (citation omitted). “Ultimately, an agency’s justification

for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’” *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982), and *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979)). Agency declarations are accorded “a presumption of good faith, which cannot be rebutted by purely speculative claims[.]” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citation omitted).

A. The Tracing Data Sought by Plaintiff is Exempt from Disclosure Under FOIA Exemption 3

In denying Plaintiff’s request, ATF properly invoked FOIA Exemption 3, which exempts from disclosure records that are:

Specifically exempted from disclosure by statute . . . if that 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 (A)(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). The “purpose of Exemption 3 [is] to assure that Congress, not the agency, makes the basic nondisclosure decision.” *Ass’n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987); *see also id.* (“[T]he policing role assigned to the courts in a[n] Exemption 3] case is reduced.”). Following the Supreme Court’s decision in *CIA v. Sims*, courts apply a two-pronged inquiry when evaluating an agency’s invocation of Exemption 3. *See Sims*, 471 U.S. 159, 167-68 (1985). First, the court must determine whether the statute qualifies as an exempting statute under Exemption 3. Second, the court decides whether the withheld material falls within the scope of that exempting statute. *See id.*

The 2012 Tiahrt Rider plainly prohibits disclosure of “part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives,” and provides that “all such data shall be immune

from legal process, [and] shall not be subject to subpoena or other discovery” 18 U.S.C. § 923 note, 125 Stat. 552, 609–610. Plaintiff erroneously argues that the 2012 Tiahrt Rider does not qualify as an Exemption 3 statute because it does not expressly cite to FOIA as required by the OPEN FOIA Act of 2009, *see* 5 U.S.C. § 552(b)(3)(B). This argument fails because despite the lack of express citation to FOIA, clear evidence demonstrates that Congress intended the 2012 Tiahrt Rider to preclude FOIA disclosures.

The Supreme Court has explained that when an earlier Congress purports to impose an express-reference requirement on a later Congress’s enactments, courts must evaluate the intent of the later Congress and give full effect to “the will of Congress as manifested either expressly or by *necessary implication* in a subsequent enactment.” *Dorsey*, 567 U.S. at 274 (citation omitted). The later Congress may have chosen to “exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified” and may have done so “by implication.” *Id.* The “plain import” or “fair implication” of a later statute “governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other magical password.” *Id.* (citations omitted).

For that reason, as the Second Circuit recognized in *Everytown*, “the specific-citation requirement of the OPEN FOIA Act does not dictate the outcome in this case.” 984 F.3d at 39. It is true that “[Firearm Tracing System] data do not appear to fall within one of the FOIA’s enumerated exemptions,” because “Exemption Three applies” to recently enacted statutes “only if the statute ‘specifically cites’ Exemption Three,” and the Tiahrt Rider does not contain such a specific citation. *Id.* at 38–39 (quoting 5 U.S.C. § 552(b)(3)). But “[w]hen Congress enacted the 2012 Tiahrt 1 Rider . . . it was not bound to follow the specific-citation requirement it had adopted in the OPEN FOIA Act” of 2009. *Id.* at 39. That requirement “provides a ‘background principle

of interpretation’ of which we assume Congress is ‘aware . . . when it enacts new . . . statutes.’” *Id.* (quoting *Dorsey*, 567 U.S. at 274). Where “ordinary interpretive considerations,” *id.*, “indicate that Congress intended to depart from the background principle when it adopted the later statute,” however, then “the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference,” *id.* (quoting *Dorsey*, 567 U.S. at 274–75).

Ordinary interpretive considerations clearly demonstrate that Congress intended the 2012 Tiahrt Rider to prohibit the release of the Firearm Tracing System data through FOIA, notwithstanding its lack of a specific citation to Exemption 3. “The text of the rider . . . provides that no appropriated funds may be used to disclose ‘the contents of the [Firearm Tracing System] database’ and other specified information collected by the ATF . . . and that ‘all such data shall be immune from legal process.’” *Everytown*, 984 F.3d at 40 (quoting 2012 Tiahrt Rider). “Because ATF operates only with appropriated funds, and because FOIA disclosure occurs subject to legal process, the rider exempts [Firearm Tracing System] data from FOIA disclosure.” *Everytown*, 984 F.3d at 40.

And even if that plain text was inconclusive, “there can be no doubt from the history and text of the rider that Congress intended to continue to exempt [Firearm Tracing System] data from FOIA disclosure.” *Id.* In 2003, “Congress passed the first Tiahrt Rider after the Seventh Circuit affirmed a district court decision requiring FOIA disclosure of [Firearm Tracing System] data.” *Id.* (citing *Chicago I*, 287 F.3d at 631). And “after the Seventh Circuit continued to maintain that [Firearm Tracing System] data was subject to FOIA disclosure,” *id.* at 41 (citing *Chicago II*, 384 F.3d at 432–23), Congress “strengthened the rider’s antidisclosure language,” adding “the phrase ‘all such data shall be immune from legal process,’” *id.* at 40–41 (internal quotation and citation omitted).

After the Seventh Circuit recognized that the congressional intent to bar FOIA access to the Firearm Tracing System data was now “unmistakable,” *Chicago III*, 423 F.3d at 782, “Congress continued to use this antidisclosure language throughout the 2000s and courts uniformly held that the Tiahrt Riders exempted the Firearm Tracing System data from FOIA disclosure,” *Everytown*, 984 F.3d at 41 (collecting cases). “There is no question, therefore, that when Congress passed the 2009 Tiahrt Rider,” which preceded the OPEN FOIA Act’s specific-citation requirement, “it did so intending to exempt [the Firearm Tracing System] data from FOIA disclosure.” *Id.*

“Because the 2009 Tiahrt Rider applied to ‘fiscal year 2009 and thereafter,’ that disclosure exemption would remain in effect today if Congress had not passed a subsequent Tiahrt Rider, and it unquestionably did not require a citation to Exemption Three,” as it became law before the OPEN FOIA Act. *Id.* (quoting 18 U.S.C. § 923 note, Consolidated Appropriations Act, 2010, Pub. L. No. 111–117, 123 Stat. 3034, 3128 (2009), other citations omitted). “When Congress employed the same antidisclosure language in the 2010 Tiahrt Rider and later the 2012 Tiahrt Rider, Congress is best understood to have intended that language to continue to exempt [the Firearm Tracing System] data from FOIA disclosure.” *Id.*

“The interceding enactment of the OPEN FOIA Act’s specific-citation requirement does not overcome the elementary principle that Congress uses the same language to accomplish the same objective.” *Id.* at 42. Congress would not “have reenacted the exact same language in 2010 and 2012 as it did in 2009 in order to accomplish the *opposite* result.” *Id.* (emphasis added). For that reason, the Second Circuit correctly concluded “that the plain import of the 2012 Tiahrt Rider exempts [the Firearm Tracing System] data from FOIA disclosure, and that statute must be given effect regardless of the specific-citation requirement of the OPEN FOIA Act, an earlier statute.”

Id. This court should adopt the Second Circuit’s reasoning and conclude that 2012 Tiahrt Rider qualifies as an Exemption 3 statute despite the fact that it does not expressly cross reference FOIA.

Moreover, *Center for Investigative Reporting* is not to the contrary. The majority expressly reserved the question of whether “the OPEN FOIA Act’s prospective definition of statutes of exemption as those that cite to 5 U.S.C. § 552(b)(3)” is “an impermissible legislative entrenchment on a later Congress’s ability to create statutes of exemption.” *Center for Investigative Reporting*, 14 F.4th at 932. The majority concluded that the issue was “clearly waived” because “[n]either party raised [it] before the district court, and no party or amici discussed the issue in briefing this appeal.” *Id.* In light of the parties’ waiver, the majority concluded that *Center for Investigative Reporting* was “not the case to address that question.” *Id.* Instead, the court assumed “for purposes of this particular case,” that the 2012 Tiahrt Rider did not exempt [the Firearm Tracing System] database records from disclosure through FOIA, because it did not expressly refer to Exemption 3. *Id.* at 927; *id.* at 932 (“Given that the government has advanced no argument suggesting that the 2010 or 2012 Riders satisfy the OPEN FOIA Act or that they do not need to satisfy the OPEN FOIA Act, . . . the data requested . . . is not exempted from disclosure”); *see also Lindsay-Poland v. U.S. Dep’t of Justice*, 2023 WL 8810796, at *8 (N.D. Cal. Dec. 19, 2023) (“The majority [in *Center for Investigative Reporting*] expressly declined to address the issue of whether the Rider applied in the first instance due to its failure to refer to Exemption (b)(3) of FOIA.”).

Importantly, courts in this district have consistently held that Exemption 3 protects ATF firearms trace data from disclosure under FOIA. *See, e.g., Cooper v. U.S. Dep’t of Justice*, 2022 WL 602532, at *26-27 (D.D.C. Mar. 1, 2022) (concluding that the data sought from the Firearm Tracing System was properly exempted under Exemption 3); *Reep v. U.S. Dep’t of Justice*, 302 F. Supp. 3d 174, 183 (D.D.C. 2018) (ATF properly withheld under Exemption 3 “a weapon’s trace

summary that was generated out of the ATF Firearms Tracing System database”); *Fowlkes v. ATF*, 139 F. Supp. 3d 287, 291–92 (D.D.C. 2015) (ATF’s decision to withhold trace information pursuant to Exemption 3 was “proper”); *Abdeljabbar v. ATF*, 74 F. Supp. 3d 158, 176 (D.D.C. 2014) (ATF properly withheld trace information related to plaintiff’s criminal investigation under Exemption 3); *Higgins v. U.S. Dep’t of Justice*, 919 F. Supp. 2d 131, 145 (D.D.C. 2013) (withholding of trace information pursuant to Exemption 3 was proper because “[t]he appropriations legislation on which [ATF] relies explicitly bars disclosure of information ‘maintained by the National Trace Center’” (citation omitted)).

There is no question that the FOIA Request at issue here asks ATF to “disclose part . . . of the contents of the [Firearm Tracing System] database.” 2012 Tiahrt Rider, 125 Stat. at 609; *see* Wood Decl. ¶ 18. The plain import of the 2012 Tiahrt Rider is that such disclosures are prohibited, unless they fall within an exception to the Tiahrt Rider, which they do not.

The publication exception does not apply.¹ The publication exception only permits “the publication of annual statistical reports on products regulated by [ATF] . . . or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations.” 2012 Tiahrt Rider, 125 Stat. at 610. As an initial matter, only Parts 1 and 2 of Plaintiff’s FOIA Request demand aggregate data. But more importantly, the publication exception does not cover FOIA disclosures.

The publication exception first appeared in the 2008 Tiahrt Rider, 121 Stat. at 1904, because earlier riders “ha[d] been interpreted to prevent publication of [ATF’s] long-running series

¹ The other two exceptions to the Tiahrt Rider are plainly irrelevant here. *See* 18 U.S.C. § 923 note, 125 Stat. at 610 (covering “disclosure of statistical information concerning total production, importation, and exportation by each licensed importer . . . and licensed manufacturer”; and disclosures for law enforcement, national security, or intelligence purposes).

of statistical reports.” H.R. Rep. No. 110-240, at 63 (2007). The newly added Exception C was meant to clarify that “those reports may continue to be published in their usual form.” *Id.* Thus, as the Second Circuit has properly recognized, Exception C does no more than that. *Everytown*, 984 F.3d at 44 (concluding that the “publication exception” merely “allows the ATF, at its own initiative, to release statistical aggregate data regarding firearms misuse, felons, and trafficking investigations to the public”). As such, Exception C does not permit disclosure of the Firearm Tracing System data under FOIA.

Any reliance on *Center for Investigative Reporting* to reach a contrary conclusion is misguided. As an initial matter, the Ninth Circuit’s conclusion that Exception C allows for certain types of disclosures under FOIA was incorrect. As the Second Circuit correctly recognized, reading Exception C broadly to include FOIA disclosures would undermine the entire purpose of the rider: “[i]f the publication exception means that the Firearm Tracing System data relating to firearms misuse is freely available to FOIA requesters, it would eviscerate the rider’s general prohibition on disclosure.” *Everytown*, 984 F.3d at 44. Moreover, as the *Everytown* court also noted, “[t]he rider uses the term ‘disclosure’ in a different exception, and “[w]hen ‘Congress uses certain language in one part of the statute and different language in another ... [the court] assume[s] different meanings were intended.’” *Id.* (quoting *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013)). As such, equating “publication” with “disclosure” would, in effect, “override Congress’s careful choice of language.” *Everytown*, 984 F.3d at 44.

Regardless, even if this Court accepts the Ninth Circuit’s broad reading of Exception C, which it should not, Plaintiff’s Request would still fall outside the scope of the exception. The Ninth Circuit went on to reason that although the “Tiahrt Rider does not define [‘publication’],” “[t]he plain meaning of ‘publication’ signifies ‘disclosure to the public, rather than the disclosure

of information to another individual or corporation within the context of a business or professional relationship.” *Center for Investigative Reporting*, 14 F.4th at 934 (quoting *Integrated Genomics, Inc. v. Gerngross*, 636 F.3d 853, 861 (7th Cir. 2011)). The court then held that “[t]urning over data regarding firearms in the United States to ‘a reporter’ or ‘a representative of the news-media’ like [Center for Investigative Reporting], which reports on the topic of guns in the United States, will make that data ‘generally known’ to the public.” *Center for Investigative Reporting*, 14 F.4th at 934; *see also Lindsay-Poland*, 2023 WL 8810796, at *10 (holding that pursuant to the *Center for Investigative Reporting*’s binding interpretation of “publication,” the plaintiff’s FOIA request, which claimed that he was a journalist who had “published extensively on issues related to firearms trafficking in the Americas” demonstrated “that disclosure of the records requested would result in that information becoming generally known to the public”) (internal quotation and citation omitted). By contrast, the Plaintiff here does not claim to be “a reporter” or “a representative of the news-media.” As such, even under the Ninth Circuit’s unduly broad reading of Exception C, the exception does not allow for disclosure of the Firearm Tracing System data pursuant to Plaintiff’s FOIA Request.

B. Responding to Plaintiff’s FOIA Request Would Require ATF to Create New Statistical Reports, Which Cannot be Compelled Under FOIA

FOIA does not permit courts to compel an agency to produce anything other than responsive, non-exempt records. *See* 5 U.S.C. § 552(a)(4)(B) (district court “has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld” from plaintiff). Once an agency establishes that information falls within a FOIA exemption, it cannot be compelled to produce that information, even in an altered or modified form. *See, e.g., Kissinger*, 445 U.S. at 152 (“The Act does not obligate agencies to create or retain documents.”); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975)

(explaining that 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”); *ACLU v. U.S. Dep’t of Justice*, 681 F.3d 61 (2d Cir. 2012) (“[I]f the Government altered or modified the [requested document] . . . the Government would effectively be ‘creating’ documents—something FOIA does not obligate agencies to do.”); *Carson v. U.S. Office of Special Counsel*, 534 F. Supp. 2d 99, 103 (D.D.C. 2008) (“[P]laintiffs’ request that this Court order the defendant to create records or to render opinions . . . is not cognizable under the FOIA.”). FOIA does not require agencies to “produce or create explanatory material,” *NLRB*, 421 U.S. at 161–62, or “answer questions,” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985).

Parts 1 and 2 of Plaintiff’s FOIA Request demand statistical summaries related to traces of firearms recovered in Baltimore from 2018 to 2022, *see* Wood Decl. ¶ 14 & Ex. A at 3–4. Responding to this request would require ATF to create new records in the form of customized statistical reports compiled from data in the Firearms Trace System database. *Id.* ¶¶ 24–26. Although ATF prepares a number of statistical reports every year, *see generally, Data & Statistics: Bureau of Alcohol, Tobacco, Firearms and Explosives*, available at <https://www.atf.gov/resource-center/data-statistics> (last visited on Apr. 15, 2024); *see also* Wood Decl. ¶ 8, to date, ATF has never prepared any reports summarizing the specific statistical summaries sought in Parts 1 and 2 Plaintiff’s FOIA Request. *Id.* ¶ 24. In other words, responding to Plaintiff’s FOIA Request would plainly require ATF to create specific statistical reports *other than* those “the agency has decided for its own reasons to create.” *NLRB*, 421 U.S. at 162; *see id.* (explaining that 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”);

Moreover, the work entailed in responding to the FOIA Request underscores that Plaintiff

is seeking the creation of new records. To respond to the FOIA Request, the requested data pulls for each year would need to be assigned to five full-time VCAB analysts who would be tasked with creating new summaries. Wood Decl. ¶ 25. The process would entail: a query of the Firearms Tracing System for the requested data; at least two dedicated working days per analyst to clean up the raw data pulled from the data queries; conducting comparative analyses of possessor and purchaser information, which is a time-consuming process depending on the comparative methodology used; and data product review and approval by one of the analysts and the Chief of VCAB. *Id.* ¶¶ 25–26.² In short, in responding to Parts 1 and 2 of Plaintiff’s FOIA Request, ATF will have to do more than simply compile pre-existing agency records, it must create new records by connecting, cleaning up, and analyzing the raw data it maintains to create new statistical reports. *See Nat’l Sec. Couns. v. CIA*, 969 F.3d 406, 409 (D.C. Cir. 2020) (concluding that “[t]o produce listings of FOIA requesters by fee category per [plaintiff’s] request ... ‘the CIA’s FOIA analysts would be required to individually review each FOIA request submitted from 2008 to 2010 and manually sort thousands of requests based on fee category[,]’ [which] would quintessentially entail the creation of new records”) (internal citation omitted); *Long v. Immigr. & Customs Enforcement*, 2021 WL 3931879, at *4 (D.D.C. Sept. 2, 2021) (reasoning that responding to plaintiff’s request would require the creation of new records in part because “to produce the disputed fields, ICE must do more than simply sort through information using preexisting connections—it must create many of those connections in the first instance”).

Thus, contrary to the Ninth Circuit’s conclusion in *Center for Investigative Reporting*—the only court of appeals decision to expressly address this issue—providing customized aggregate

² In total, ATF has estimated that generating customized statistical summaries for Parts 1 and 2 of Plaintiff’s FOIA Request will take at least 240 hours of dedicated analyst and supervisory review time. Wood Decl. at 11.

reports from the Firearm Tracing System database is not akin to “sorting, extracting, and compiling pre-existing information from a database.” 14 F.4th at 938. Parts 1 and 2 of Plaintiff’s Request do not simply request that ATF search the Firearms Trace System database to extract and release an existing agency record—which is already prohibited under Exemption 3—and produce it in unaltered form. Rather, Plaintiff is impermissibly using FOIA in an effort to compel ATF to create new statistical reports with annualized data of specific interest to Plaintiff. ATF is not required to “answer questions disguised as a FOIA request,” *Hudgins*, 620 F. Supp. at 21, nor to “conduct research on behalf of private citizens.” *Kissinger*, 445 U.S. at 159, n.2.

CONCLUSION

For the reasons set forth above and in ATF’s declaration, the Defendant is entitled to summary judgment affirming its denial of Plaintiff’s FOIA request.

Dated: April 15, 2024

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAYOR AND CITY COUNCIL OF
BALTIMORE,
100 N. Holliday Street
Baltimore, Maryland 21202,

Plaintiff,

v.

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,
99 New York Avenue, NE
Washington, DC 20226,

Defendant.

Case No. 23-cv-03762-RDM

**DECLARATION OF ELIZABETH A. WOOD,
ACTING CHIEF, INFORMATION AND PRIVACY GOVERNANCE DIVISION,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES**

1. I am the Acting Chief of the Information and Privacy Governance Division at the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), Department of Justice (“DOJ”). In this capacity, I am responsible for all records requests made of ATF under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Privacy Act of 1974 (“PA”), 5 U.S.C. § 552a. I am also responsible for all requests referred to ATF from other agencies that have located ATF-originated documents in their records while processing their FOIA and PA requests. As part of these official duties, I oversee the processing of all FOIA and PA records requests, which includes any searches relevant to such requests, and the determination of what records should be disclosed.

2. I am familiar with the procedures followed by the Information and Privacy Governance Division when responding to the FOIA request submitted to ATF on behalf Mayor and City Council of Baltimore (“Plaintiff”). I declare that the statements made herein are based on

my personal knowledge, as well as information acquired by review of the administrative file relating to Plaintiff's FOIA request, and knowledge otherwise obtained during the performance of my official duties.

ATF's Law Enforcement Mission

3. ATF is a criminal and regulatory enforcement agency and has been a component of the U.S. Department of Justice since 2003. ATF is the federal agency responsible for, among other things, enforcing Federal firearms laws, including the Gun Control Act of 1968 ("Gun Control Act"), 18 U.S.C. §§ 921–930 (2000) (originally enacted as Act of Oct. 22, 1968, Pub. L. No. 90–618, § 1, 82 Stat. 1213). The Gun Control Act established a licensing system for persons or entities referred to as Federal Firearm Licensees ("FFLs"), who are engaged in manufacturing, importing, dealing, and collecting firearms and are regulated by ATF. ATF enforces the licensing provisions of the Gun Control Act, which, among other things, regulates the interstate movement of firearms.

Firearms Tracing

4. Pursuant to the Gun Control Act, the U.S. Attorney General is authorized to administer firearms tracing. The Attorney General has designated ATF the sole federal agency authorized to trace firearms. To carry out its firearms tracing functions, ATF maintains the Firearms Tracing System ("FTS"), which is a law enforcement information database. The FTS is maintained at the National Tracing Center ("NTC"). In response to requests from law enforcement, the NTC provides ATF field agents and other law enforcement agencies with Firearms Trace Result Reports commonly referred to as "trace data" as well as investigative leads obtained from the traced firearm.

5. "Tracing" a firearm is the systematic tracking of a recovered firearm from its manufacturer or importer, through its subsequent introduction into the distribution chain

(wholesaler/retailer), to identify an unlicensed purchaser. A firearm trace begins when the NTC receives a request from a Federal, State, local, or foreign law enforcement agency that has recovered a firearm or suspects that a certain firearm has been used in crime. ATF also requests traces in connection with the investigations that it conducts. Firearms for which traces are requested typically have been recovered at the scene of a crime or from the possession of a suspect, felon, or other person who is prohibited from owning the firearm or may have been purchased by law enforcement in an undercover capacity.

6. The “trace data” is maintained in the FTS and includes the 8-digit identification number of the FFLs involved in the sale or transfer of the firearm, along with any information regarding the retail purchaser of the firearm. Law enforcement agencies, including ATF, may use the “trace data” to link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime. To conduct a trace, the requesting agency must provide the NTC with information about the firearm, including the type of gun (*e.g.*, pistol, revolver or shotgun), the manufacturer, the caliber, and the serial number of the gun. In a typical case, after receiving a trace request, NTC personnel will contact the manufacturer or importer to determine when and to whom the firearm in question was sold. When the NTC contacts an FFL manufacturer or importer requesting information about a particular gun or guns, ATF informs the licensee only about the firearm involved in the trace; the FFL is not informed of any circumstances relating to the alleged criminal conduct nor the identity of the law enforcement agency that recovered the firearm.

7. In most instances, the manufacturer or importer has sold the firearm to an FFL wholesaler. NTC personnel then contact the wholesaler to determine when and to whom the firearm in question was sold, usually to an FFL retailer. The tracing process continues as long as

records allow and is considered successful when ATF can identify the first retail purchaser (a non-FFL). ATF's tracing process generally stops at the first retail purchaser because any subsequent disposition of the firearm by a non-FFL is not subject to Gun Control Act record-keeping or reporting requirements. The NTC forwards the firearms tracing results directly to the requesting law enforcement agency.

8. ATF regularly prepares statistical reports utilizing trace data in the Firearms Tracing System database to provide the public and law enforcement agencies with insight into firearms recoveries. ATF's Office Intelligence Operations prepares reports for internal ATF use and in some instances for external law enforcement agencies. The statistical trace data provided by ATF, including these reports, help domestic and international law enforcement agencies solve firearms crimes, detect firearms trafficking, and identify trends with respect to intrastate, interstate and international movement of crime guns. Of all the statistical reports prepared by ATF, the agency publishes a limited number of aggregate statistical reports that ATF believes will provide helpful insights to the public without disclosing any law-enforcement or other sensitive material. Those public reports are available on the agency's website at <https://www.atf.gov/resource-center/data-statistics>.

9. The statistical reports are prepared and created by experienced specialists in ATF's Violent Crime Analysis Branch ("VCAB") who utilize their experience and skills to prepare these reports in an accurate and timely manner. VCAB provides ATF and other federal, state, local and international law enforcement agencies with crime gun, explosives, and arson intelligence information in statistical and visual formats. VCAB also collects, analyzes, and disseminates criminal intelligence information derived from various sources for the purpose of reducing violent crime and protecting the public.

FOIA Exemption 3 and the Tiahrt Rider

10. FOIA Exemption 3 permits the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met: the statute either (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3). In 2009, Congress provided that Exemption 3 would only apply to later-enacted statutes that specifically cited the exemption. *Id.* § 552(b)(3)(B).

11. Beginning in 2003, in a series of “Tiahrt Riders,” Congress placed restrictions on ATF’s disclosure of certain Gun Control Act-related information. The most recent iteration of these restrictions was included in the 2012 Appropriations Act. *See Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011) (codified at 18 U.S.C. § 923 note) (hereinafter “2012 Tiahrt Rider”).* In pertinent part, the 2012 Tiahrt Rider states:

[D]uring the 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 Firearms Trace System [(“FTS”)] database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives or any information required to be kept by [Federal Firearms] [L]icensees pursuant to Section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section . . . and all such data shall be immune from legal process . . . except that this proviso shall not be construed to prevent: . . . (C) the publication of annual statistical reports on products regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives . . . or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations.

Id. (emphasis added).

12. Although the 2012 Tiahrt Rider does not specifically cite FOIA Exemption 3, ATF understands it to bar the release of FTS data to FOIA requesters, for substantially the reasons set

forth in *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 984 F.3d 30 (2d Cir. 2020).

Plaintiff's FOIA Request

13. On September 12, 2023, Aaron Esty, Senior Counsel, Everytown Law (hereinafter, "Everytown") submitted to ATF, via ATF's online FOIA Portal, a FOIA request on behalf of Brandon M. Scott, Mayor of Baltimore, Maryland. A true and correct copy of the request is attached hereto as Exhibit A. Plaintiff's FOIA request seeks, generally, records of firearm traces with a link to Baltimore, Maryland.

14. Plaintiff's September 12, 2023, request consists of the following four parts:

Part 1: Records sufficient to identify the federally licensed firearms dealers ("FFL") that are the top ten sources of firearms recovered in Baltimore from 2018 through 2022. In addition, with respect to each of these ten FFLs, I request records sufficient to show the following:

- a. The number of firearms recovered in Baltimore annually from 2018 through 2022.
- b. The number of firearms recovered in Baltimore annually broken down by time-to-crime, i.e., the number of firearms recovered in each of the following categories: in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over; and average-time-to-crime.
- c. The number of firearms recovered in Baltimore in connection with each category of offense or other circumstance, e.g., Homicide, Homicide - Attempted, Carrying Concealed Weapon, Found Firearm.

I will accept the records requested by Part 1 on either an aggregate or individualized basis.

Part 2: I request records sufficient to show, with respect to firearms recovered in Baltimore on an annual basis from 2018 through 2022, in connection with the category of offense or other circumstance of Homicide, Homicide - Attempted, Aggravated Assault, Robbery, Suicide, and Suicide - Attempted, the following information:

- a. The total number of firearms recovered in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over.

- b. The total number of each firearm type by manufacturer, weapon type, and caliber.
- c. The total number of firearms from each source state.

I will accept records requested by Part 2 on either an aggregate or individualized basis.

Part 3: Underlying data related to ATF’s recent report on trace data in Baltimore showing the “Top Source Cities” for crime guns recovered in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 3 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-reportlarge-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the “Top Source Cities” table on page 3 of the report.

Part 4: Underlying data related to ATF’s recent report on trace data in Baltimore showing the “Top Recovery Cities” for recovered crime guns sourced in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 4 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-mdstate-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the “Top Recovery Cities” table on page 4 of the report.

Exhibit A, at 3-4.

ATF’s Response to Plaintiff’s FOIA Request

15. In a letter dated September 30, 2023, ATF acknowledged Plaintiff’s FOIA request and assigned the request ATF tracking number 2023-01644. In the same letter, ATF denied Plaintiff’s FOIA request under Exemption 3 of FOIA. A true and correct copy of that letter is attached hereto as Exhibit B.

Plaintiff’s Appeal to OIP

16. On November 15, 2023, Plaintiff administratively appealed ATF’s final response to the Department of Justice’s Office of Information Policy (“OIP”). A true and correct copy of that letter is attached hereto as Exhibit C.

17. By letter dated March 15, 2024, OIP notified Plaintiff that the appeal was being closed without decision because Plaintiff was pursuing its claims before this Court. A true and correct copy of the letter is attached hereto as Exhibit D.

Information Withheld Pursuant to the Tiahrt Rider

18. All the information requested by Plaintiff resides in or originates from the FTS database. For the reasons explained above, the 2012 Tiahrt Rider bars the release of all such information to FOIA requesters. ATF has therefore withheld all records responsive to Plaintiff's FOIA request, as required by the 2012 Tiahrt Rider.

19. ATF has not released information from the FTS in response to Plaintiff's FOIA request because: (1) ATF is prohibited by statute from releasing such data in response to FOIA requests; and (2) to respond to Plaintiff's FOIA request, ATF would need to process data and create customized statistical reports, which is not required under FOIA.

20. Section 552(b)(3) of FOIA provides that FOIA does not require the release of matters that are specifically exempt from disclosure by statute, provided that such statutes: (A) require that the matters be withheld from the public in such a manner as to leave no discretion on this issue; or (B) establish particular criteria for withholding or refer to particular types of matter to be withheld. 5 U.S.C. § 552(b)(3). I have determined that the data sought in Plaintiff's FOIA request is information that falls squarely within the scope of a relevant withholding statute.

21. The 2012 Tiahrt Rider prohibits ATF from using federal funds to disclose part or all of the contents of the Firearms Trace System database. Specifically, it provides that that:

[D]uring the 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 Firearms Trace System maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section, 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

18 U.S.C. § 923 note.

22. That statutory prohibition does not prevent ATF from disclosing certain “statistical information concerning total production, importation, and exportation by each licensed [firearms] importer,” nor does it prevent ATF itself from publishing “annual statistical reports” or certain “statistical aggregate data.” *Id.* ATF understands that this exception was based on Congressional intent to permit ATF to continue to publish statistical reports documenting “trends in firearms, commerce and use of federal services in the United States.” *See Statistics Available from the Department of Justice: Bureau of Alcohol, Tobacco, Firearms and Explosives*, available at <https://www.justice.gov/doj/statistics-available-department-justice/> (last visited on Apr. 15, 2024). Further, it is ATF’s understanding that this exception does not permit ATF to use federal funds to create and release new statistical reports or statistical aggregate data in response to FOIA requests or otherwise disclose the contents of the FTS database in response to such requests.

23. All of the underlying “raw data” associated with Plaintiff’s FOIA request is originated in the FTS. The FTS contains more than 75 tables with a combined total of 800 columns/fields, not including subsystems and integrated or associated systems, similar to eTrace. The data elements related to firearms trace results in the FTS database can be grouped into six general categories: (i) information about the law enforcement agency requesting the trace, such as the agency’s name, address, case number, and investigative notes provided by the agency; (ii) information provided by the requesting agency regarding its recovery of the firearm, such as the date and location where the traced firearm was taken into custody by the requesting agency; (iii)

information about purchasers of the traced firearm; (iv) information about possessors of the traced firearm and any associates (i.e., persons with the possessor of the firearm when the firearm comes into police custody), such as their names and addresses, driver's license information and social security numbers, and any related vehicle information; (v) information identifying each FFL that has sold the traced firearm; and (vi) information about the traced firearm, such as the manufacturer, importer, model, weapon type, caliber and serial number. In addition to these categories of information, the FTS database includes close-out codes for each trace, including those related to law enforcement and government agencies identified above.

24. To date, ATF has never prepared any reports summarizing the specific statistical summaries sought in Plaintiff's FOIA request. Compelling ATF to run searches on the FTS database to produce customized summaries responsive to Plaintiff's FOIA request would require the creation of new records. Running a search of the FTS for any of the data reports Plaintiff seeks would not be an automatic process but would require an ATF employee to exercise judgment in selecting the search criteria and would require further work to refine the results.

25. Creating these records would also impose a significant and undue burden on ATF. Because the FOIA request seeks statistical data for the years 2018 through 2022, the requested data pulls for each year would need to be assigned to an analyst, which means that five full-time analysts assigned to VCAB would be assigned to respond to the FOIA request. ATF further estimates that it will take each analyst one hour to query the FTS for the requested data, and at least two dedicated working days per analyst to clean up the raw data pulled from the data queries. This process includes analyzing many free-form fields of associated recovery locations and purchaser information, which can be a time-consuming process. In total, it would take each analyst approximately 32 hours to pull, compare, and analyze the requested data for his or her assigned

year, for a total of 160 working hours for five analysts. There are presently only six analysts assigned to VCAB, which means that close to one-third of VCAB's analysts would need to spend an entire week pulling, comparing, and analyzing the data needed to respond to the FOIA request. Moreover, this 160-hour time estimate assumes the highly unlikely scenario that the five analysts assigned to the FOIA request have no other time-sensitive and high-priority data requests from ATF's 25 Field Divisions nationwide and ATF's Office of Field Operations, among others, and are not covering for each other if unavailable due to scheduled leave or sick leave.

26. The five analysts' data pulls would also need to be reviewed and approved by one of these same analysts and the Chief of VCAB, which is a separate time-consuming process that could take up to a week for each final reviewer, for a total of 80 hours of final review.

In sum, ATF estimates that generating customized statistical summaries for Part 1 and Part 2 of Plaintiff's FOIA request will take at least 240 hours of dedicated analyst and supervisory review time. Because generating and presenting accurate statistical data from the FTS is a time-consuming process requiring the efforts of experienced specialists at ATF, compelling ATF to run searches on the FTS to produce customized statistical data sought by FOIA requestors would impose an additional and significant burden on the agency and would divert resources currently used to prepare and publish reports of statistical data.

* * * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of April 2024.


Elizabeth A. Wood
Acting Chief
Information and Privacy Governance Division

A

The following list contains the entire submission submitted 9/12/2023 and is formatted for ease of viewing and printing.

Contact information

First name: Aaron
Last name: Esty
Address: 450 Lexington Avenue
PO Box 4184
City: New York
State: New York
Postal Code: 10017-3904
Country: United States of America (USA)
Phone: 646-324-8369
Organization: Everytown Law
Email: aesty@everytown.org

Request information

Request ID: 2023-01644
Request description: I am submitting the attached request by Brandon M. Scott, Mayor of Baltimore, on behalf of the City of Baltimore. The request describes the information sought as follows:

I am requesting the following records:

Part 1: Records sufficient to identify the federally licensed firearms dealers (“FFL”) that are the top ten sources of firearms recovered in Baltimore from 2018 through 2022. In addition, with respect to each of these ten FFLs, I request records sufficient to show the following:

- a. The number of firearms recovered in Baltimore annually from 2018 through 2022.
- b. The number of firearms recovered in Baltimore annually broken down by time-to-crime, i.e., the number of firearms recovered in each of the following categories: in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over; and average-time-to-crime.
- c. The number of firearms recovered in Baltimore in connection with each category of offense or other circumstance, e.g., Homicide, Homicide - Attempted, Carrying Concealed Weapon, Found Firearm.

I will accept the records requested by Part 1 on either an aggregate or individualized basis.

Part 2: I request records sufficient to show, with respect to firearms recovered in Baltimore on an annual basis from 2018 through 2022, in connection with the category of offense or other circumstance of Homicide, Homicide - Attempted, Aggravated Assault, Robbery, Suicide, and Suicide - Attempted, the following information:

- a. The total number of firearms recovered in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in

3 years and over.

- b. The total number of each firearm type by manufacturer, weapon type, and caliber.
- c. The total number of firearms from each source state.

I will accept records requested by Part 2 on either an aggregate or individualized basis.

Part 3: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Source Cities" for crime guns recovered in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 3 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Source Cities" table on page 3 of the report.

Part 4: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Recovery Cities" for recovered crime guns sourced in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 4 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Recovery Cities" table on page 4 of the report.

Supporting documentation

- Request Letter
 - Baltimore Trace Data FOIA Request (1).docx

Fees related information

Request category ID: All Other
Fee Waiver: Yes
Explanation: This request qualifies for a fee waiver. This request can be categorized as "All Other Requestors." This request is not made to further a commercial interest. Baltimore seeks the requested records for the purpose of promoting public safety.
Willing to pay: \$0.00

Expedited processing

Expedited Processing: No
Explanation:



BRANDON M. SCOTT
MAYOR

100 Holliday Street, Room 250
Baltimore, Maryland 21202

Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”)
Information Privacy and Governance Division, Room 4E.301
99 New York Avenue NE
Washington, DC 20226
Phone: (202) 648-8740

RE: Request for firearm trace data records

I am requesting records under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, on behalf of the City of Baltimore (“Baltimore”). As Mayor of Baltimore, one of my top priorities has been to address the scourge of gun violence in this city. The records that I request are critical tools for the City of Baltimore to address gun violence.

I am requesting the following records:

Part 1: Records sufficient to identify the federally licensed firearms dealers (“FFL”) that are the top ten sources of firearms recovered in Baltimore from 2018 through 2022. In addition, with respect to each of these ten FFLs, I request records sufficient to show the following:

- a. The number of firearms recovered in Baltimore annually from 2018 through 2022.
- b. The number of firearms recovered in Baltimore annually broken down by time-to-crime, i.e., the number of firearms recovered in each of the following categories: in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over; and average-time-to-crime.
- c. The number of firearms recovered in Baltimore in connection with each category of offense or other circumstance, e.g., Homicide, Homicide - Attempted, Carrying Concealed Weapon, Found Firearm.

I will accept the records requested by Part 1 on either an aggregate or individualized basis.

Part 2: I request records sufficient to show, with respect to firearms recovered in Baltimore on an annual basis from 2018 through 2022, in connection with the category of offense or other circumstance of Homicide, Homicide - Attempted, Aggravated Assault, Robbery, Suicide, and

phone: 410.396.3835 | fax: 410.576.9425 | email: mayor@baltimorecity.gov

Suicide - Attempted,¹ the following information:

- a. The total number of firearms recovered in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over.
- b. The total number of each firearm type by manufacturer, weapon type, and caliber.
- c. The total number of firearms from each source state.

I will accept records requested by Part 2 on either an aggregate or individualized basis.

Part 3: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Source Cities" for crime guns recovered in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 3 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Source Cities" table on page 3 of the report.

Part 4: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Recovery Cities" for recovered crime guns sourced in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 4 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Recovery Cities" table on page 4 of the report.

This request includes records containing information from the ATF's National Tracing Center's Firearms Tracing System. Baltimore is aware that ATF often withholds this type of information. However, Baltimore asserts that the records sought by this request must be produced because no withholding statute exempts the records from disclosure and because the data can be produced without creating a new agency record.

First, the records requested are not exempted from disclosure by statute because the appropriations rider that ATF relies on to withhold trace data, the Tiahrt Rider, see Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011), repealed earlier versions of the Tiahrt Rider and does not qualify as a withholding statute under the OPEN FOIA Act of 2009. See *Ctr. for Investigative Reporting v. U.S. Dept. of Justice*, 14 F.4th 916, 932–33 (9th Cir. 2021); but see *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 984 F.3d 30 (2d Cir. 2020).

Second, the data requested can be extracted by querying the Firearms Tracing System to extract a subset of data from that database, which does not require creating a new agency record under FOIA. *Ctr. for Investigative Reporting*, 14 F.4th at 922.

¹ ATF annually publishes spreadsheets showing, on a state-by-state basis, the category of offense or other circumstance that firearms were recovered in connection with. In 2021, ATF made a spreadsheet available for download titled "Categories Associated with Firearms Recovered and Traced in the United States and Territories." See ATF, Firearms Trace Data - 2021, <https://www.atf.gov/resource-center/firearms-trace-data-2021>.

This request qualifies for a fee waiver. This request can be categorized as "All Other Requestors." This request is not made to further a commercial interest. Baltimore seeks the requested records for the purpose of promoting public safety.

Please contact Aaron Esty of Everytown Law at (646) 324-8369 or aesty@everytown.org if you have any questions. Everytown Law is counsel for Baltimore in this matter. I appreciate your time and attention to this request.

Sincerely,

A handwritten signature in cursive script that reads "Brandon M. Scott".

Brandon M. Scott, Mayor
Baltimore City

B

From: [REDACTED]@atf.gov
To: [REDACTED]@everytown.org
Subject: [EXTERNAL] Final response to your ATF FOIA request 2023-01644
Date: Saturday, September 30, 2023 10:08:49 AM

September 30, 2023

REFER TO: 2023-01644

Aaron Esty
450 Lexington Avenue
P.O. Box 4184
New York, New York 10017-3904

Dear Mr. Esty:

This responds to your FOIA request dated September 12, 2023, and received by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on the same date, in which you requested records concerning firearm recoveries in Baltimore. Your request was assigned ATF tracking number 2023-01644. Please refer to this number in any future correspondence.

You requested information ATF is required to maintain pursuant to the Gun Control Act (GCA) and/or is information contained in ATF Firearms Tracing System database. This information is exempt from disclosure pursuant to Exemption 3 of the FOIA and Public Law 112-55, 125 Stat. 552.

Exemption 3 of the FOIA permits the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met: the statute either (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. Thus, a statute falls within the exemption's coverage if it satisfies any one of its disjunctive requirements.

Beginning in 2003, Congress placed restrictions on ATF's disclosure of certain GCA related information. In short, ATF can only provide certain GCA data to a law enforcement agency or a prosecutor solely in connection with a criminal investigation or prosecution. Beginning in Fiscal Year 2006, Congress included a provision within each iteration of the restriction, which effectively made the law permanent.

The most recent iteration of these various restrictions was included in ATF's 2012 Appropriation Bill, Public Law 112-55, 125 Stat. 552. Some of the information in the requested records falls within this restriction. Since the Fiscal Year 2006 through 2008 restrictions satisfy all the requirements of FOIA Exemption 3, and the 2012 language is perpetuated from those restrictions, I am withholding the trace data pursuant to 5 U.S.C. section 552 (b)(3) and Public Law 112-55, 125 Stat. 552.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to

those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaisons, Lynette Carter and Zina Kornegay, at 202-648-7390, or Attorney Advisor [REDACTED] at [REDACTED]@atf.gov, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://doj-foia.entellitrak.com/etk-doj-foia-prod/login.request.do>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Ginae E. Barnett
Acting Chief
Information and Privacy Governance Division

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v.E.1

C

November 15, 2023

Submitted Via FOIA STAR Portal

Director, Office of Information Policy (“OIP”)
United States Department of Justice
441 G Street, NW, 6th Floor
Washington, D.C. 20530

RE: Freedom of Information Act Appeal of ATF’s Final Response to Request No. 2023-01644

Dear Director of the Office of Information Policy,

This letter is an administrative appeal of the final response of the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) to a request for records submitted on behalf of the City of Baltimore (“Baltimore”) by Everytown Law under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*

I. Background to this administrative appeal.

On September 12, 2023, Brandon Scott, Mayor of Baltimore, submitted a FOIA request to ATF for records that “are critical tools for the City of Baltimore to address gun violence.” Exhibit A.¹ To that end, the request sought information about the sources of firearms recovered in Baltimore and the circumstances of those recoveries.

The request had four parts. Part 1 of the request sought records “sufficient to identify” the licensed gun dealers that comprised the top ten sources of firearms recovered in Baltimore from 2018 through 2022, as well as specific information about those crime guns, including the time-to-crime of those guns and the offenses that each crime gun was recovered in connection with.

Part 2 of the request asked for additional information about firearms recovered in connection with six specific circumstances—Homicide, Homicide - Attempted, Aggravated Assault, Robbery, Suicide, and Suicide – Attempted—from 2018 through 2022. For firearms recovered in connection with each of these six circumstances, the request sought time-to-crime data, basic firearm information—manufacturer, weapon, type, and caliber—and the source state. The request noted that ATF already

¹ The request was submitted through the SecureRelease account of counsel for Baltimore.

produces annual state-by-state data on the category of offense or other circumstance that firearms were recovered in connection with. With regard to both Parts 1 and 2, Baltimore specified that it would accept records that provide either aggregate data or individualized information.

Parts 3 and 4 of the request sought data tables or spreadsheets that were used to compile two charts published in the report produced by ATF earlier this year on Baltimore crime guns. See ATF, *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report (2023)*, <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download/> (last visited Nov. 15, 2023). Specifically, the request asked for any tables or spreadsheets used to compile the charts that list the “Top Source Cities” of firearms recovered in Baltimore and the “Top Recovery Cities” of firearms sourced from Baltimore.

ATF responded by refusing to produce any records. By email on September 30, 2023, ATF represented that it was withholding any responsive records because the information sought by the request constitutes “information ATF is required to maintain pursuant to the Gun Control Act (GCA) and/or is information contained in ATF Firearms Tracing System database.” Exhibit B. The response letter explained: “This information is exempt from disclosure pursuant to Exemption 3 of the FOIA and Public Law 112-55, 125 Stat. 552.”

Baltimore submits this administrative appeal to ask that the request be remanded to ATF to produce responsive records. As discussed below, the information sought by Baltimore is not exempt from disclosure because the claimed statutory exemption from disclosure, Public Law 112-55, 125 Stat. 552, known as the “Tiahrt Rider,” is not a basis for withholding information under FOIA. Furthermore, even if the Tiahrt Rider were a basis for withholding information under FOIA, the Tiahrt Rider does not bar the production of the requested information in the form of “statistical aggregate data.”

II. The Tiahrt Rider does not justify ATF’s withholding of information responsive to Baltimore’s request.

First, nothing in the text of the Tiahrt Rider purports to prevent the disclosure of the requested information to Baltimore. The Tiahrt Rider provides, in relevant part, that appropriated funds may not be used to disclose the contents of the Firearms Trace System database except under three exceptions related to law enforcement—exceptions which contain further restrictions pertaining to the subsequent use of such data disclosed under an exception. Therefore, to the extent that ATF’s denial of Baltimore’s request is based on the Tiahrt Rider’s restriction on expending funds, Baltimore has requested a fee waiver, and in the alternative is willing to pay the cost

of a production. Accordingly, no appropriated funds are needed to fulfill Baltimore's request.

Second, even if the text of the Tiahrt Rider, read in isolation, could be construed to prevent the disclosure of the requested information, production of the information is nevertheless required under FOIA. FOIA exempts from disclosure information that is "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3), a basis for withholding known as "Exemption 3." However, Congress acted to limit the proliferation of Exemption 3 withholding statutes by adding a provision stating that a law "enacted after the enactment date of the OPEN FOIA Act of 2009" will exempt information from disclosure only if that law "specifically cites to [5 U.S.C. § 552(b)(3)]." 5 U.S.C. § 552(b)(3)(B); *see also* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009). In other words, since the enactment of the OPEN FOIA Act in 2009, any later-enacted statutory exemption from disclosure must specifically cite to that provision of FOIA.

The most recent Tiahrt Riders were enacted after the OPEN FOIA ACT, but do not cite to 5 U.S.C. § 552(b)(3). *See* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3128–29 (2009) (the "2010 Tiahrt Rider") and Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011) ("2012 Tiahrt Rider"). And the 2012 Tiahrt Rider is the only rider that is currently in effect. *Ctr. for Investigative Reporting v. U.S. Dep't of Just.*, 14 F.4th 916, 927, 931–32 (9th Cir. 2021).

As the Ninth Circuit held, because each successive Tiahrt Rider entirely repealed the previous version, and because 2012 Tiahrt Rider does not meet the OPEN FOIA Act's specific citation requirement, there is no Tiahrt Rider currently in effect that provides a valid basis under FOIA for withholding information from disclosure. *Ctr. for Investigative Reporting*, 14 F.4th at 932. The Second Circuit's holding to the contrary, *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 984 F.3d 30, 41–42 (2d Cir. 2020), is incorrect. Among other things, its reasoning squarely conflicts with *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). There, the Supreme Court held that courts must give effect to a statutory proclamation that any *later-enacted* statute remains subject to the *earlier-enacted* statute's requirements, unless the later statute "*explicitly excludes* such application by reference to" the earlier statute. *Id.* at 719 n.30 (emphasis in original) (quoting 42 U.S.C. § 2000bb-3(b)).²

² In addition, while a later-enacted statute is capable of impliedly repealing an earlier-enacted statute, the 2012 Tiahrt Rider does not meet the high standard for implied repeals, which are "disfavored," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *United States v. Fausto*, 484 U.S. 439, 452 (1988)), particularly where the later-enacted statute is an appropriations rider. *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020).

Third, even if OIP were to follow the Second Circuit’s incorrect holding in *Everytown*—that the specific-citation requirement of the OPEN FOIA Act of 2009 does not mean what it says—the Tiahrt Rider cannot fairly be read to reflect a clear congressional intent to withhold the ATF materials sought by Baltimore here. Not only is the language of the Rider inapplicable to the present FOIA request (*see supra* p. 2), longstanding principles of statutory interpretation foreclose ATF’s position. Among other things, Congress is presumed to have been “aware” of the requirements of the OPEN FOIA Act “when it enact[ed]” the 2012 Tiahrt Rider, and yet it chose *not* to include the required citation to FOIA Exemption 3. *Everytown*, 984 F.3d at 39 (quoting *Dorsey v. United States*, 567 U.S. 260, 274 (2012)). OIP therefore should not conclude that, in enacting the 2012 Tiahrt Rider, Congress intended to exempt the requested documents from production under FOIA.

Baltimore urges OIP to follow the OPEN FOIA Act and remand the request to ATF for production of responsive records.³

III. The Tiahrt Rider allows production of the requested records as statistical aggregate data.

Even if OIP determines that the Tiahrt Rider is a FOIA withholding statute, OIP should remand the request to ATF to produce the requested records as statistical aggregate data. The 2012 Tiahrt Rider’s subpart (C) contains an express exception for the release of trace data in this form. It provides that the rider “shall not be construed to prevent . . . (C) the publication of . . . statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations[.]”

As the Ninth Circuit recognized, this exception allows ATF to use appropriated funds to release statistical aggregate data “if doing so would make these reports or data generally known to the public.” *Ctr. for Investigative Reporting*, 14 F.4th at 935. As above, Baltimore urges that the Ninth Circuit’s conclusion about the effect of subpart (C) was correct and that the Second Circuit’s contrary conclusion should not prevail. *See Everytown*, 984 F.3d at 43–44.

Here, each of the four parts of Baltimore’s request could be produced as “statistical aggregate data regarding firearms . . . trafficking channels.” Its release will shed light on the sources and characteristics of crime guns, information that has been withheld from view for two decades. If the requested information is produced, Baltimore intends to publish the information in a manner that ensures that the public will be made aware of it.

³ Furthermore, ATF is able to produce the requested information about Baltimore crime guns and no part of the request would require ATF to create a new record.

IV. Conclusion.

For the reasons above, Baltimore asks OIP to remand request 2023-01644 to ATF with instructions to produce the records requested.

Sincerely,

Aaron Esty

Aaron Esty
Senior Counsel, Everytown Law
Everytown for Gun Safety Support Fund
450 Lexington Avenue
P.O. Box 4184
New York, NY 10017
aesty@everytown.org
(646) 324-8369

Counsel for Baltimore

Exhibit A



BRANDON M. SCOTT
MAYOR

*100 Holliday Street, Room 250
Baltimore, Maryland 21202*

Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”)
Information Privacy and Governance Division, Room 4E.301
99 New York Avenue NE
Washington, DC 20226
Phone: (202) 648-8740

RE: Request for firearm trace data records

I am requesting records under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, on behalf of the City of Baltimore (“Baltimore”). As Mayor of Baltimore, one of my top priorities has been to address the scourge of gun violence in this city. The records that I request are critical tools for the City of Baltimore to address gun violence.

I am requesting the following records:

Part 1: Records sufficient to identify the federally licensed firearms dealers (“FFL”) that are the top ten sources of firearms recovered in Baltimore from 2018 through 2022. In addition, with respect to each of these ten FFLs, I request records sufficient to show the following:

- a. The number of firearms recovered in Baltimore annually from 2018 through 2022.
- b. The number of firearms recovered in Baltimore annually broken down by time-to-crime, i.e., the number of firearms recovered in each of the following categories: in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over; and average-time-to-crime.
- c. The number of firearms recovered in Baltimore in connection with each category of offense or other circumstance, e.g., Homicide, Homicide - Attempted, Carrying Concealed Weapon, Found Firearm.

I will accept the records requested by Part 1 on either an aggregate or

phone: 410.396.3835 | fax: 410.576.9425 | email: mayor@baltimorecity.gov

individualized basis.

Part 2: I request records sufficient to show, with respect to firearms recovered in Baltimore on an annual basis from 2018 through 2022, in connection with the category of offense or other circumstance of Homicide, Homicide - Attempted, Aggravated Assault, Robbery, Suicide, and Suicide - Attempted,¹ the following information:

- a. The total number of firearms recovered in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over.
- b. The total number of each firearm type by manufacturer, weapon type, and caliber.
- c. The total number of firearms from each source state.

I will accept records requested by Part 2 on either an aggregate or individualized basis.

Part 3: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Source Cities" for crime guns recovered in Baltimore. *See* ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 3 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Source Cities" table on page 3 of the report.

Part 4: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Recovery Cities" for recovered crime guns sourced in Baltimore. *See* ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 4 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Recovery Cities" table on page 4 of the report.

This request includes records containing information from the ATF's National Tracing Center's Firearms Tracing System. Baltimore is aware that ATF often

¹ ATF annually publishes spreadsheets showing, on a state-by-state basis, the category of offense or other circumstance that firearms were recovered in connection with. In 2021, ATF made a spreadsheet available for download titled "Categories Associated with Firearms Recovered and Traced in the United States and Territories." *See* ATF, Firearms Trace Data - 2021, <https://www.atf.gov/resource-center/firearms-trace-data-2021>.

withholds this type of information. However, Baltimore asserts that the records sought by this request must be produced because no withholding statute exempts the records from disclosure and because the data can be produced without creating a new agency record.

First, the records requested are not exempted from disclosure by statute because the appropriations rider that ATF relies on to withhold trace data, the Tiahrt Rider, *see* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011), repealed earlier versions of the Tiahrt Rider and does not qualify as a withholding statute under the OPEN FOIA Act of 2009. *See Ctr. for Investigative Reporting v. U.S. Dept. of Justice*, 14 F.4th 916, 932–33 (9th Cir. 2021); *but see Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 984 F.3d 30 (2d Cir. 2020).

Second, the data requested can be extracted by querying the Firearms Tracing System to extract a subset of data from that database, which does not require creating a new agency record under FOIA. *Ctr. for Investigative Reporting*, 14 F.4th at 922.

This request qualifies for a fee waiver. This request can be categorized as “All Other Requestors.” This request is not made to further a commercial interest. Baltimore seeks the requested records for the purpose of promoting public safety.

Please contact Aaron Esty of Everytown Law at (646) 324-8369 or aesty@everytown.org if you have any questions. Everytown Law is counsel for Baltimore in this matter. I appreciate your time and attention to this request.

Sincerely,

A handwritten signature in cursive script that reads "Brandon M. Scott".

Brandon M. Scott, Mayor
Baltimore City

Exhibit B



Aaron Esty <aesty@everytown.org>

Final response to your ATF FOIA request 2023-01644

1 message

mary.carney@atf.gov <noreply@securerelease.us>
Reply-To: mary.carney@atf.gov
To: aesty@everytown.org

Sat, Sep 30, 2023 at 10:08 AM

September 30, 2023

REFER TO: 2023-01644

Aaron Esty
[450 Lexington Avenue](#)
P.O. Box 4184
New York, New York 10017-3904

Dear Mr. Esty:

This responds to your FOIA request dated September 12, 2023, and received by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on the same date, in which you requested records concerning firearm recoveries in Baltimore. Your request was assigned ATF tracking number 2023-01644. Please refer to this number in any future correspondence.

You requested information ATF is required to maintain pursuant to the Gun Control Act (GCA) and/or is information contained in ATF Firearms Tracing System database. This information is exempt from disclosure pursuant to Exemption 3 of the FOIA and Public Law 112-55, 125 Stat. 552.

Exemption 3 of the FOIA permits the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met: the statute either (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. Thus, a statute falls within the exemption's coverage if it satisfies any one of its disjunctive requirements.

Beginning in 2003, Congress placed restrictions on ATF's disclosure of certain GCA related information. In short, ATF can only provide certain GCA data to a law enforcement agency or a prosecutor solely in connection with a criminal investigation or prosecution. Beginning in Fiscal Year 2006, Congress included a provision within each iteration of the restriction, which effectively made the law permanent.

The most recent iteration of these various restrictions was included in ATF's 2012 Appropriation Bill, Public Law 112-55, 125 Stat. 552. Some of the information in the requested records falls within this restriction. Since the Fiscal Year 2006 through 2008 restrictions satisfy all the requirements of FOIA Exemption 3, and the 2012 language is perpetuated from those restrictions, I am withholding the trace data pursuant to 5 U.S.C. section 552 (b)(3) and Public Law 112-55, 125 Stat. 552.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaisons, Lynette Carter and Zina Kornegay, at 202-648-7390, or Attorney Advisor Mary Carney at mary.carney@atf.gov, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, [Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001](#), e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://doj-foia.entellitrak.com/etk-doj-foia-prod/login.request.do>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Ginae E. Barnett
Acting Chief
Information and Privacy Governance Division

This message (including any attachments) contains confidential information intended for a specific individual and purpose, and is protected by law. If you are not the intended recipient, you should delete this message and any disclosure, copying, or distribution of this message, or the taking of any action based on it, by you is strictly prohibited.

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v.E.1

D



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

Aaron Esty, Esq.

Re: Appeal No. A-2024-00355
Request No. 2023-01644

aesty@everytown.org

VIA: Online Portal - 03/15/2024

Dear Aaron Esty:

You appealed on behalf of your client, Brandon M. Scott, from the action of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) on your client's Freedom of Information Act (FOIA) request for access to records concerning firearms recovered in Baltimore between 2018 and 2022.

I have been informed that your client filed a lawsuit concerning ATF's action in the United States District Court for the District of Columbia. As indicated in the Department of Justice's regulations located at 28 C.F.R. § 16.8(b)(2) (2023), an appeal ordinarily will not be acted upon by this Office if the FOIA request becomes the subject of litigation. For this reason, I am closing your appeal file in this Office.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office and speak with the undersigned agency official by calling 202-514-3642.

Sincerely,

A handwritten signature in blue ink, appearing to read "Christina Troiani".

X

Christina Troiani

Chief, Administrative Appeals Staff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAYOR AND CITY COUNCIL OF
BALTIMORE,
100 N. Holliday Street
Baltimore, Maryland 21202,

Plaintiff,

v.

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,
99 New York Avenue, NE
Washington, DC 20226,

Defendant.

Case No. 23-cv-03762-RDM

DEFENDANT’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Civil Rule 7(h)(1), Defendant Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) hereby respectfully submits the following statement of material facts as to which there is no genuine issue.

Firearms Tracing by ATF:

1. ATF is a criminal and regulatory enforcement agency and has been a component of the U.S. Department of Justice since 2003. Decl. of Elizabeth A. Wood (“Wood Decl.”) ¶ 3.
2. ATF is the federal agency responsible for, among other things, enforcing Federal firearms laws, including the Gun Control Act of 1968 (“Gun Control Act”), 18 U.S.C. §§ 921–930 (2000) (originally enacted as Act of Oct. 22, 1968, Pub. L. No. 90–618, § 1, 82 Stat. 1213). *Id.*

3. To carry out its firearms tracing functions, ATF maintains the Firearms Tracing System (“FTS”), which is a law enforcement information database. *Id.* ¶ 4.
4. FTS is maintained at the National Tracing Center (“NTC”). *Id.*
5. In response to requests from law enforcement, the NTC provides ATF agents and other law enforcement agencies with Firearms Trace Result Reports commonly referred to as “trace data” as well as investigative leads obtained from the traced firearm. *Id.*
6. “Tracing” a firearm is the systematic tracking of a recovered firearm from its manufacturer or importer, through its subsequent introduction into the distribution chain (wholesaler/retailer), to identify an unlicensed purchaser. *Id.* ¶ 5.
7. A firearm trace begins when the NTC receives a request from a Federal, State, local, or foreign law enforcement agency that has recovered a firearm or suspects that a certain firearm has been used in crime. *Id.*
8. ATF also requests traces in connection with the investigations that it conducts. *Id.*
9. Firearms for which traces are requested typically have been recovered at the scene of a crime or from the possession of a suspect, felon, or other person who is prohibited from owning the firearm or may have been purchased by law enforcement in an undercover capacity. *Id.*
10. The “trace data” is maintained in the FTS and includes the 8-digit identification number of the FFLs involved in the sale or transfer of the firearm, along with any information regarding the retail purchaser of the firearm. *Id.* ¶ 6.
11. Law enforcement agencies, including ATF, may use the “trace data” to link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime. *Id.*

12. To conduct a trace, the requesting agency must provide the NTC with information about the firearm, including the type of gun (*e.g.*, pistol, revolver or shotgun), the manufacturer, the caliber, and the serial number of the gun. *Id.*
13. In a typical case, after receiving a trace request, NTC personnel will contact the manufacturer or importer to determine when and to whom the firearm in question was sold. *Id.*
14. When the NTC contacts an FFL manufacturer or importer requesting information about a particular gun or guns, ATF informs the licensee only about the firearm involved in the trace. *Id.*
15. The FFL is not informed of any circumstances relating to the alleged criminal conduct nor the identity of the law enforcement agency that recovered the firearm. *Id.*

Plaintiff's FOIA Request and Instant Suit:

16. On September 12, 2023, Aaron Esty, Senior Counsel, Everytown Law (hereinafter, "Everytown") submitted to ATF, via ATF's online FOIA Portal, a FOIA request on behalf of Brandon M. Scott, Mayor of Baltimore, Maryland. Wood Decl. ¶ 13 & Ex. A.
17. Plaintiff's FOIA Request consists of the following four parts:

Part 1: Records sufficient to identify the federally licensed firearms dealers ("FFL") that are the top ten sources of firearms recovered in Baltimore from 2018 through 2022. In addition, with respect to each of these ten FFLs, I request records sufficient to show the following:

- a. The number of firearms recovered in Baltimore annually from 2018 through 2022.
- b. The number of firearms recovered in Baltimore annually broken down by time-to-crime, *i.e.*, the number of firearms recovered in each of the following categories: in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over; and average-time-to-crime.

- c. The number of firearms recovered in Baltimore in connection with each category of offense or other circumstance, e.g., Homicide, Homicide - Attempted, Carrying Concealed Weapon, Found Firearm.

I will accept the records requested by Part 1 on either an aggregate or individualized basis.

Part 2: I request records sufficient to show, with respect to firearms recovered in Baltimore on an annual basis from 2018 through 2022, in connection with the category of offense or other circumstance of Homicide, Homicide - Attempted, Aggravated Assault, Robbery, Suicide, and Suicide - Attempted, the following information:

- a. The total number of firearms recovered in under 3 months; in 3 months to under 7 months; in 7 months to under 1 year; in 1 year to under 2 years; in 2 years to under 3 years; in 3 years and over.
- b. The total number of each firearm type by manufacturer, weapon type, and caliber.
- c. The total number of firearms from each source state.

I will accept records requested by Part 2 on either an aggregate or individualized basis.

Part 3: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Source Cities" for crime guns recovered in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 3 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-md-state-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Source Cities" table on page 3 of the report.

Part 4: Underlying data related to ATF's recent report on trace data in Baltimore showing the "Top Recovery Cities" for recovered crime guns sourced in Baltimore. See ATF, National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns - Volume Two, Baltimore, MD Report, at 4 (2023), <https://www.atf.gov/firearms/docs/report/baltimore-mdstate-report-large-cities/download>. Specifically, I am seeking any tables or spreadsheets used to compile the "Top Recovery Cities" table on page 5 of the report.

Id.

18. In a letter dated September 30, 2023, ATF acknowledged Plaintiff's FOIA Request and assigned the Request ATF tracking number 2023-01644. Wood Decl. ¶ 15 & Ex. B.

19. In the September 30, 2023 letter, ATF provided its final response to Plaintiff's Request by denying Plaintiff's FOIA Request under Exemption 3 of FOIA. *Id.*
20. On November 15, 2023, Plaintiff administratively appealed ATF's final response to the Department of Justice's Office of Information Policy ("OIP"). Wood Decl. ¶ 16 & Ex. C.
21. On December 18, 2023, Plaintiff filed the instant suit, asserting a claim for relief under FOIA. *See generally* ECF 1, Compl.
22. By letter dated March 15, 2024, OIP notified Plaintiff that the appeal was being closed without decision because Plaintiff was pursuing its claims before this Court. Wood Decl. ¶ 17 & Ex. D.

Dated: April 15, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Pardis Gheibi
PARDIS GHEIBI (D.C. Bar No. 90004767)
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Counsel for Defendant

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAYOR AND CITY COUNCIL OF
BALTIMORE,
100 N. Holliday Street
Baltimore, Maryland 21202,

Plaintiff,

v.

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,
99 New York Avenue, NE
Washington, DC 20226,

Defendant.

Case No. 23-cv-03762-RDM

[PROPOSED] ORDER

Upon consideration of Defendant's motion for summary judgment and the parties' briefs,
it is hereby ORDERED that Defendant's motion for summary judgment is GRANTED.

Dated:

HON. RANDOLPH D. MOSS
United States District Judge