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Description of document: Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Records on whether the Tiahrt Rider qualifies as an Exemption 3 statute under the Freedom of Information Act (FOIA) 2012

Requested date: 04-November-2019

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Posted date: 11-March-2024

Source of document: FOIA Request
Bureau of Alcohol, Tobacco, Firearms and Explosives
Information Privacy and Governance (IPG) Division,
Room 4E.301
99 New York Avenue, NE
Washington, DC 20226
[ATF FOIA Portal](#)

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U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

www.atf.gov

August 5, 2022

REFER TO: 2020-0158

VIA Email

This responds to your Freedom of Information Act (FOIA) request dated November 4, 2019 and received by ATF on November 19, 2019 in which you requested records regarding whether the Tiahrt Rider qualifies as an Exemption 3 Statute to the Freedom of Information Act.

We apologize for the delay in our response as we are currently working through a backlog of requests.

In response to your request, we have processed a total of 12 pages of responsive material.

We are withholding deliberative materials in the records you requested under FOIA Exemption (b)(5). FOIA Exemption 5 permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." FOIA Exemption 5 protects advice, opinions, recommendations, predecisional discussion, and evaluative remarks that are part of the government decision-making process. Release of such predecisional advisory communications would harm the quality of agency decision-making and the policy of encouraging frank, open discussion among agency personnel before making a decision (5 U.S.C. §552 (b)(5)).

The most commonly invoked privilege within Exemption 5 is the deliberative process privilege. The general purposes of this privilege are to prevent injury to the quality of agency decisions and to protect government agencies' decision-making processes. The deliberative process privilege allows agencies to freely explore alternative avenues of action and to engage in internal debates without fear of public scrutiny (Missouri ex rel. Shorr v. United States Army Corps of Engineers, 147 F.3d 708, 710 (8th Cir. 1998)). Exemption 5 protects not merely documents, but also the integrity of the deliberative process itself, where the exposure of that process could result in harm.

We are withholding third party information, including the names of ATF employees, under FOIA Exemption (b)(6). To disclose personal information about a living individual to a member

of the public, we need the written consent from the persons whose information you requested. Without written consent, proof of death, or an overriding public interest, personal information is exempt from disclosure under the FOIA. The FOIA does not require agencies to disclose information that would be a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(6)).

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 Liaison, Zina Kornegay, at (202) 648-7390, 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://www.justice.gov/oip/submit-and-track-request-or-appeal>. 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."

Sincerely,



Adam C. Siple
Chief
Information and Privacy Governance Division

Enclosure

National Tracing Center Division

Office of Enforcement Programs and Services

March 29, 2012

Subject: Clarification on the Fiscal Year 2012 Tiahrt Policy related to the release of trace data.

This is clarification of ATF's FY-12 Tiahrt Policy in order to assist personnel in determining appropriate releases of firearms trace data.

1. ATF cannot release firearms trace data nor the records or the product of records required to be kept under the Gun Control Act by Federal Firearms Licensees to anyone, neither the public nor other law enforcement agencies where that release would compromise a criminal investigation or undercover operation.
2. Law Enforcement Agencies in possession of firearms trace information and/or the records or the product of records required to be kept under the Gun Control Act by Federal Firearms Licensees are prohibited from disclosing this information to the public.
3. Statistical reports can be released so long as they are broad enough to eliminate a realistic possibility of compromising an individual criminal investigation or undercover operation.
4. ATF takes the position that only the law enforcement agency that is the originator of a trace request can determine if release of this information to another law enforcement agency would or would not compromise a criminal investigation or undercover operation. Therefore, ATF will not release trace information to a law enforcement agency without permission from the originating agency.
5. Law enforcement agencies may share their trace information with other law enforcement agencies as long as it will not compromise a criminal investigation or undercover operation.
6. Trace data is immune to FOIA requests or civil subpoena.

Everytown for Gun Safety v. Bureau of Alcohol, Tobacco, Firearms and Explosives
Southern District of New York 18-cv-2296

On December 14, 2016, Everytown submitted a FOIA request seeking records related to traces of firearms used in suicide across several variables, including the length of time between purchase and use; the type of gun used; the state of use relative to state of purchase; and whether the user was the individual buyer. The Disclosure Division rejected the Everytown request on the basis that the above-requested documents were exempt from disclosure pursuant to Exemption (b)(3) under the Tiahrt restriction, FOIA's statutory exemption. The Department of Justice's Office of Information Policy upheld our determination.

We argued two primary bases for rejecting the Everytown FOIA request. First, that the information sought was exempt from disclosure under Exemption 3 (Tiahrt). Second, that the request falls outside the scope of our FOIA disclosure obligation because responding to the request would require ATF to create an agency record.

Exemption 3 Argument

Under FOIA Exemption 3, as amended in 2009 by the OPEN FOIA Act, agencies may withhold information "specifically exempted from disclosure by statute," so long as the statute:

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph. 5 U.S.C. § 552(b)(3).

Since 2012 numerous courts have concluded that the various appropriation restrictions in effect prior to 2009 and the OPEN FOIA Act were still applicable and qualified as Exemption 3 statutes. This includes a recent ND CA case with a similar fact pattern, which is currently being appealed by the *Center of Investigative Reporting* in the 9th Circuit (18-17356).

In this case, the Court held that "to conclude that any pre-2009 Tiahrt Rider remains in effect would require the Court to effectively ignore Congress's unambiguous textual language and intent in passing the 2009 OPEN FOIA Act. This language prescribes clear rules for designating congressional enactments as exemption statutes: acts "enacted after the date of the enactment of the OPEN FOIA Act of 2009" must include a citation to section 552(b)(3), while earlier enactments require no such citation. If Congress intended to ensure that no citation to section 552(b)(3) was required for reenactment of new versions of earlier statutes, it could have clarified that Congress was not required to include a clear statement rule in such circumstances. It did not do so." The court continues that because the Exemption 3 statute does not reference section 552(b)(3) and that "because each Tiahrt Rider replaces its predecessor by complete substitution-the Tiahrt Riders enacted prior to 2009 are no longer operative law."

Creation of a Record

Plaintiff generally sought “statistical” trace data related to suicides which they claimed was an exception to the Tiahrt restriction. ATF argued 1) plaintiff was misinterpreting the statistical exception of the statute and 2) that to comply with the request ATF would have to create a new record. Case law clearly provides the FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." *NLRB v. Sears, Roebuck & Co.*, 421 U.S.132, 162 (1975).

After extensive consultation with VCAB and the Tracing Center it was determined that to fulfill the request ATF would need to: (1) identify the relevant trace data, (2) clean up the raw data by performing six levels of data filtering and filling in gaps with educated guesses; (3) insert the resulting statistics into applicable software; and (4) subject the resulting product to multi-level reviews to ensure the accuracy of the data and the format in which it is presented. The Court however equated the request to just providing a raw number with no analysis. Contrary to the recent decision in *Center of Investigative Reporting* case (17-6557) which held that this process would require the creation of a new record this Court court concluded that “ATF has not carried its burden of demonstrating that, given the structure of the Firearms Tracing System database, conducting a search to produce the raw data entry counts Everytown requests would require it to create records.”

Impact

The FTS is designed to assist ATF and other law enforcement in firearms-related investigations, both specific crimes committed with particular firearms as well as interstate firearms trafficking of a large number of weapons. The continued effectiveness of ATF's tracing program as a significant tool in investigating both of these types of crimes would be greatly diminished if the district court opinion is not overturned. The district court's decision turns back the clock to pre-Congressional intervention when multiple courts held that the public is entitled to virtually contemporaneous access with law enforcement agencies to information obtained by ATF under the GCA for a bona fide criminal investigation. Immediate disclosure of the results of a firearm trace would greatly diminish its value to Federal, State, local and foreign law enforcement agencies that utilize this investigative tool for specific crimes and for combating illegal firearms trafficking.

The FY2004 budget contained a restriction relating to the disclosure of Gun Control Act (GCA) information. The restriction covers disclosure to the public of ANY information required to be kept as a record by Federal firearms licensees (FFLs) or reported to ATF under the Gun Control Act (trace requests and multiple sales reports), 18 U.S.C. § 923(g). The restriction does not apply to information maintained solely under the National Firearms Act.

The nondisclosure language is not intended to interfere with disclosures by ATF routinely made during the course of fulfilling ATF's statutory mission to provide assistance to Federal, State, local, and international law enforcement.

However, the restriction clearly covers disclosures to the public through Freedom of Information Act (FOIA) requests, press releases, or otherwise. Disclosures of this nature are no longer authorized.

ATF may continue to conduct and publicly disclose studies based on trace information. However, the FY2004 budget requires all studies to include a [REDACTED] If you are conducting a study please contact (b) (6) to obtain the proper disclaimer.

The attached list includes our understanding of the restriction the Disclosure Division, Public information Officers, and ATF personnel are required to abide by.

Additional questions regarding the restriction may be directed to (b) (6) Office of Chief Counsel.

ATTACHMENT

- I. Information that may continue to be disclosed to the public:
 1. FFL list or portions thereof.
 2. FFL applications and licenses.
 3. Inspection reports to the extent that information was not extracted from prohibited records.
Copies of prohibited records that are part of

the inspection report would be withheld--release would consist of violations cited and other ATF observations not from dealer records.

4. Information, other than data contained in dealer records, provided to ATF by law enforcement agencies in requests to trace a firearm.

II. Prohibited disclosures to the public:

1. Information from Out-of-Business Records (OOB) (the Disclosure Division processes 20-30 requests a month from individuals who have lost their firearm serial number and need it so that the theft or loss of the weapon can be entered into NCIC. Since ATF may no longer provide this information, ATF may want to consider an alternative way to handle this problem, (i.e. the requester can ask police department to obtain the information through a routine use request so the information could be entered into NCIC rather than have the individual request it, which is the current procedure).
2. ATF Form 4473, Firearms Transaction Record.
3. Firearm licensee Acquisition and Disposition Books/records.
4. Firearms trace data reported by dealers and any 923(g) information retrieved from dealer records.
5. Multiple Sales Reports and any 923(g) information retrieved from dealer records.
6. AFMR--Manufacturing Statistics.
7. Form 3310.11, FFL Theft & Stolen Firearms Records.
8. Form 5300.35, Brady Forms.
9. Records of transactions of semiautomatic assault weapons.
10. Law enforcement certification letters.

11. Record of approved variances.
12. Forms 6 and 6a (importation) and supporting documentation.
13. Reports containing GCA information that do not contain the legal disclaimer.

From: [Boucher, Stephanie M.](#)
To: (b) (6)
Cc:
Subject: Fwd: ATF FOIA Data questions
Date: Wednesday, November 19, 2014 2:13:28 PM

Begin forwarded message:

From: (b) (6)
Date: November 19, 2014 at 2:12:44 PM EST
To: "Boucher, Stephanie M." (b) (6)
Subject: FW: ATF FOIA Data questions

This is the email string between OIP and me on the reason we changed Tiahrt exemptions. As you can see from yesterday's email, we apparently are only allowed to take the 2008 Appropriations Act for b3. Admittedly, I did a lousy job describing why we changed to a different exemption, but I didn't think we had to explain it and/or request permission to change. I emailed her back and told her one of us would get back to her by Friday.

From: Roberts, Lindsay (OIP) [<mailto:Lindsay.Roberts@usdoj.gov>]
Sent: Tuesday, November 18, 2014 1:24 PM
To: (b) (6)
Subject: RE: ATF FOIA Data questions
Hi (b) (6)

Thanks for your response. I'd like to clarify the Declaration you mentioned your Division Chief is writing, but OIP's current position is that ATF should cite only to the Consolidated Appropriations Act of 2008 (Pub. L. No. 110-161, 121 Stat. 184) as an exemption 3 statute to withhold firearms database information.

On appeal, OIP cites to the Consolidated Appropriations Act of 2008 because more recent appropriations acts, e.g. 2012, do not meet post-OPEN FOIA Act of 2009 requirement that statutes must specifically refer to 5 USC § 552(b)(3) for the exemption apply. However, the 2008 act pre-dates this requirement and OIP considers it to be permanent law prohibiting ATF from using appropriated funds to disclose firearms database information. The District Court for DC recently held in [Fowlkes v. ATF et al.](#), 2014 WL 4536909,, that ATF did not demonstrate that the Consolidated Appropriations Act of 2012 specifically refers to FOIA Exemption 3, and therefore could not be used as a FOIA Exemption 3 statute.

(b)(5) Per OIP

(b)(5) Per OIP If it's currently an issue in litigation, that may affect how we report it.
Best,

Lindsay

From (b) (6)

Sent: Friday, November 14, 2014 8:17 AM

To: Roberts, Lindsay (OIP)

Subject: RE: ATF FOIA Data questions

Hi Lindsey,

My Division Chief got back to me on the exemption 3 issue. We are now citing that Public Law because the language is stronger. My Chief is writing a Declaration today answering why we are citing that law. I can provide a more detailed explanation once she has completed her declaration.

From: Roberts, Lindsay (OIP) [<mailto:Lindsay.Roberts@usdoj.gov>]

Sent: Thursday, November 13, 2014 4:04 PM

To (b) (6)

Subject: ATF FOIA Data questions

Hi Pete,

I am reviewing ATF's FY14 FOIA data. For the most part it looks good, but I have a couple of questions. (b)(5) Per OIP

(b)(5) Per OIP

(b)(5) Per OIP

The statutes contain the same language about not disclosing Firearms Trace System and licensee information.

Also, as you mentioned may be the case, there is a discrepancy in the number of pending requests at the end of FY13 and the beginning of FY14. There were 754 requests pending at the end of FY13 and 772 pending at the beginning of FY14. I anticipate this resulted from a delay in data entry, which we can note in a footnote, but if there is some other reason, please let me know.

Thanks!

Lindsay M. Roberts

Attorney-Advisor

Office of Information Policy

U.S. Department of Justice

202.305.0677

From: (b) (6)
To: (b) (6)
Cc:
Subject: Fwd: FOIA Request 275474
Date: Friday, January 31, 2020 10:54:08 AM
Attachments: [FOIA Fee Waiver.pdf](#)
[ATT00001.htm](#)
[FOIA Tiarhrt Rider.pdf](#)
[ATT00002.htm](#)
[PA Request Search Form.pdf](#)
[ATT00003.htm](#)

Please handle.

Begin forwarded message:

From: (b) (6)
Date: January 31, 2020 at 9:52:08 AM EST
To: (b) (6)
Cc: (b) (6)
Subject: FOIA Request 275474

Good Morning,
I have attached the FOIA request and the pertinent information that came in with in.
When it is completed please return it to me so that I can upload it to IQ.

Thanks,

(b) (6)

Staff Assistant
Office of Chief Counsel
ATF

P (b) (6)

From: (b) (6)
To: Boucher, Stephanie M.
Cc: (b) (6)
Subject: RE: ATF FOIA Data questions
Date: Wednesday, November 19, 2014 3:31:05 PM

Isn't 2008 fine?

(b) (6)

Associate Chief Counsel (Field Operations and Information)
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From: Boucher, Stephanie M.
Sent: Wednesday, November 19, 2014 2:13 PM
To: (b) (6)
Cc: (b) (6)
Subject: Fwd: ATF FOIA Data questions

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