IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant*.	Case No. 17-0600-CKK

PLAINTIFF'S CONSOLIDATED BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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Dated: March 13, 2018

Counsel for Plaintiff

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Introduction and Summary

Defendant is unlawfully withholding responsive records requested under FOIA by inaccurately claiming Plaintiff has not asked for those records. Defendant's argument rests upon a distorted interpretation that Plaintiff's FOIA request seeks only records related to an *intentional* agency decision to publish inaccurate information, as opposed to a decision to publish inaccurate information intentionally or otherwise. The Court should not allow Defendant the benefit of this evasion. Furthermore, the evidence in this case shows that additional responsive records are overwhelmingly likely to exist. Finally, this case presents an easy remedy under FOIA, as the Court may simply order Defendant to produce the remaining records Defendant has already retrieved but not released.

Factual Background

On or about January 15, 2015, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), a component of Defendant, released the 2014 Edition of its "Federal Firearms Regulations Reference Guide."[1] This ATF Guide edition omitted the usual exemption schedule specifying that certain AR-15 ammunition used for sporting purposes was available for sale to the public and not restricted by statute as "armor-piercing." On or about February 13, 2015, the ATF published a notice of proposed regulation entitled "Framework for Determining Whether Certain Projectiles are 'Primarily Intended for Sporting Purposes' Within the Meaning of 18 U.S.C. § 921(a)(17)(C)."[2] This Proposed Regulation similarly would have reclassified AR-15 ammunition commonly used for sporting purposes as "armor-piercing," which would make the ammunition unavailable to most members of the public.

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[1] This 2014 ATF firearms guide document is available at https://www.atf.gov/firearms/docs/guide/federal-firearms-regulations-reference-guide-2014-edition-atf-p-53004/download.

[2] This proposed regulation notice is available at https://www.atf.gov/resource-center/docs-0/download.

Reaction to these agency actions arrived in March of 2015. On March 4, 2015, two-hundred and thirty-six members of Congress sent a letter to ATF Director Todd Jones claiming the Proposed Rulemaking was illegal under statute and violated of the Second Amendment.[3] On March 8, the ATF issued a statement that the omission of the AR-15 ammunition exemption in the 2014 ATF Guide was a mistaken publishing error.[4] On March 9, 2015, fifty-three U.S. Senators sent a letter to ATF Director Todd Jones stating that the ATF's proposed reclassification of AR-15 ammunition was beyond its statutory authority and in conflict with the Second Amendment.[5] On March 10, 2015, the ATF announced it was withdrawing its Proposed Rulemaking restricting AR-15 ammunition.[6]

On March 9, 2015, Plaintiff submitted the FOIA request to Defendant about the changes to the ATF Guide that is the subject of this lawsuit. Plaintiff then filed this FOIA lawsuit on April 4, 2017 after nearly two years without agency compliance. After the litigation commenced, Defendant eventually produced 84 responsive pages of records to Plaintiff. However, all these records were dated in March of 2015, while Plaintiff's FOIA request sought all records created over a one-year period starting in March of 2014 and ending in March of 2015. Defendant also stated that it retrieved another 1,900 pages of records which it did not release to Plaintiff, claiming these records were not responsive. Given the fact that the

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[3] *See* Letter from Congressman Bob Goodlatte *et al*. to Todd Jones, March 4, 2015, available at https://culberson.house.gov/uploadedfiles/letter_to_atf_director_jones_apa_framework.pdf.

[4] *See* Plaintiff's Statement of Material Facts at ¶ 5 and Exh. C. This statement is also published on the ATF's website at https://www.atf.gov/resource-center/docs/noticeofpublishingerrorpdf/download.

[5] *See* Press Release, "Grassley, 52 Senators Condemn ATF Framework Limiting Sporting Ammo," March 9, 2015, available at https://www.grassley.senate.gov/news/news-releases/grassley-52-senators-condemn-atf-framework-limiting-sporting-ammo. A copy of this letter is also attached hereto at Exhibit D to Plaintiff's Statement of Material Facts.

[6] *See* Press Release, "Notice to Those Commenting on the Armor Piercing Ammunition Exemption Framework," March 10, 2015, available at https://www.atf.gov/news/pr/notice-those-commenting-armor-piercing-ammunition-exemption-framework. A copy of this Press Release is also attached hereto at Exhibit E to Plaintiff's Statement of Material Facts.

Reference Guide was published in January 2015 and the Proposed Regulation was published in February 2015, and yet no records pre-dating these events were produced, Plaintiff challenged the adequacy of Defendant's search for responsive records in this lawsuit.

Standard of Review

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). Also in FOIA litigation, but unlike most other litigation, a defendant agency moving for judgment bears the burden of proof – *not* the plaintiff challenging defendant's search sufficiency or withholdings. 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"); *Military Audit Project v. Casey*, 656 F.2d 724, 739 (D.C. Cir. 1981).

Argument

1. Defendant Failed to Conduct an Adequate Search, and Its Declaration Fails to Establish Otherwise

Defendant has failed to meet its burden of proof that it conducted a sufficient search, and its argument otherwise does little more than set out the legal standard and cite its own declaration. Def. Brief, ECF 14 at pp. 3-7. The adequacy of an agency's FOIA search declaration is "dependent on the circumstances of the case…" *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 293 (D.D.C. 2007) ("Because the adequacy of an agency's search is dependent upon the circumstances of the case… there is no uniform standard for sufficiently detailed and nonconclusory affidavits.") (internal punctuation omitted). To

satisfy its burden, an agency's search declaration must be "relatively detailed," *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983), and must "explain" that the components and systems searched were "reasonably calculated to uncover all relevant documents" and that "no other record system was likely to produce responsive documents." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

The Defendant has failed to meet this standard with its search declaration, which is incomplete in places, conclusory in other places, and is in no way adequate given the circumstance of this case. *See Boyd v. U.S. Marshals Serv.*, 2002 U.S. Dist. Lexis 27734, at *2-3, No. 99-2712 (D.D.C. Mar. 15, 2002) (search declarations were insufficient because "neither agency provides an *explanation* for where it searched for records and *why* those locations are the only locations to contain responsive records.") (italics added). Accordingly, the search is not sufficient, and Defendant should be ordered to take further steps to comply with FOIA. *See* Def. Decl. at ¶ 14-1.

Defendant's brief and declaration shows the ATF improperly limited the search based on ATF's own narrow misreading of Plaintiffs FOIA request. Def. Brief, ECF 14 at 3-4; Def. Decl., ECF 14-1 at ¶ 6. A FOIA requestor is only required to "reasonably describe" the documents it seeks. 5 U.S.C. § 552(a)(3)(A). When complying with FOIA, an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files..." *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985); *LaCedra v. Executive Office for the United States Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003) (agencies must "interpret the request liberally" and must "construe a FOIA request liberally"). The "linchpin" of whether an agency is misreading a request to avoid the production of records is

whether the "agency is able to determine precisely what records are being requested." *See Yeager v. Drug Enforcement Admin*., 678 F.2d 315, 326 (DC Cir. 1982).

First, ATF's explanation that no one "decided" to omit the exemption list and therefore the FOIA request was inaccurate takes a curious view of the meaning of decisions and accountability. Def. Brief, ECF 14 at 3-4; Def. Decl., ECF 14-1 at ¶ 6. Specifically, ATF seems to believe that since the omission of the exemption list was not supposed to happen, the mistake was therefore unrelated to employee decisions. This is not how Plaintiff views matters. Rather, Plaintiff's FOIA request allows for the possibility that someone or multiple people at ATF made a series of decisions that ultimately led to the publishing error. Even innocent mistakes do not happen in a vacuum; and in this case, government employees made decisions that eventually resulted in an inaccurate ATF Guide being published. ATF's claim that no one "decided" anything and therefore Plaintiff's FOIA request is inaccurate seems to be a responsibility dodge.

Second, Defendant's brief and declaration is also insufficiently detailed and does not fully describing the publishing error, and therefore the Court cannot ultimately determine if the search were sufficient even if Defendant's reading of Plaintiff's request were permissible. Def. Brief, ECF 14 at 3-4; Def. Decl., ECF 14-1 at ¶ 6. The revising and publishing of the Reference Guide involved action from ATF employees and officials. A "publishing error" could mean anything from a computer or machine malfunction, to an official hitting the wrong key on a keyboard, to an official sending the wrong version of a document to another official, to a miscommunication between officials about which version should be published. Depending on which of these circumstances was present, additional records would likely be responsive to Plaintiff's request.

Third, Defendant's brief and search declaration also fail to account for whether its unusual reading of the word "decided" in Plaintiff's FOIA request means that it excluded records from production after review. By reading the FOIA request narrowly, Defendant likely avoided producing records which discussed the armor-piercing exemption list by reasoning that such discussions were not about an ultimate "decision" to *intentionally* omit such a list. Def. Brief, ECF 14 at 3-4; Def. Decl., ECF 14-1 at ¶ 6. Considering that 1,900 pages were located and approximately 1,800 of those pages have not been produced, Defendant's misreading likely led to responsive records being improperly deemed unresponsive and withheld. Def. Decl., ECF 14-1 at ¶ 14; *see also* Plf. SOF at ¶ 1.

Finally, overwhelming evidence exists that Defendant has failed to produce responsive records. Plaintiff's FOIA request asked for documents spanning a full one-year period from March 2014 through March 2015. Def. SOF, ECF 14-2 at ¶ 1. The timeline of a January 2015 ATF Guide Publication and a February 2015 Proposed Regulation combined with a production exclusively limited to documents dated in the single subsequent month of March 2015 indicates that more responsive documents exist that have not been produced to Plaintiff. Plf. SOF at ¶¶ 3, 4, 5, 7, 8, 9 and Exhs. B, C, E, F, G. Defendant has failed to show that it conducted an adequate search under FOIA because its declaration does not show that its search was sufficient considering these circumstances. *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 293 (D.D.C. 2007).

Here, the Court must consider the unusual circumstance of both the events underlying Plaintiff's FOIA request *and* the discordant contents of the FOIA production to resolve Plaintiff's claim. In 2015, the ATF twice accidentally or deliberately indicated a change to its classification of AR-15 ammunition: once when it published its Reference Guide in January

2015, and again when it issued the Proposed Regulation in February of 2015. Plf. Statement of Material Fact ("SOF") at ¶¶ 5 to 9 and Exhs. C to G.[7] According to the ATF, the reclassification in the January Reference Guide was in error, while the publication of the Proposed Regulation was deliberate. Plf. SOF at ¶¶ 5, 7 and Exhs. C, E. Accordingly, it stands to reason that there was some internal ATF discussions of the traditional AR-15 ammunition exemption in the ATF 2014 Reference Guide that pre-date March of 2015. And yet, Defendant has not produced or identified any such records to Plaintiff. Plf. SOF at ¶¶ 2 to 4 and Exhs. A, B.

For all the foregoing reasons, Defendant's search declaration is insufficient and inadequate. Accordingly, Defendant has failed to meet its burden of proof and its motion for summary judgment should be denied. *Weisberg*, 705 F.2d at 1351.

2. The Court Should Order Defendant to Produce the Remainder of the Allegedly Non-Responsive 1,900 Records to Plaintiff

The Court should order Defendant to produce all responsive records to Plaintiff from Defendant's search without withholding based on a willful misreading of the FOIA request. Specifically, the Court may order Defendant to produce as "responsive" all internal documents that discuss the armor-piercing ammunition exemption in the context of preparation of the 2014 ATF Guide. This will eliminate the possibility of the agency hiding records behind its excuse that Plaintiff only asked for records about a non-accidental omission from the ATF Guide.

In this case, there is an easily enforced and workable solution to remedying Defendant's insufficient search. The Court can simply order Defendant to produce the remainder of the 1,900 documents already processed in this case. Def. Decl., ECF 14-1 at ¶ 14; *see also* Plf. SOF at ¶ 1.

[7] *See also* footnotes 1 to 6, *supra*. Courts may judicially notice facts on a government website as self-authenticating. *See Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009) (judicial notice of facts on Justice Department website); *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013) (noticing Maine's website); *Scurmont LLC v. Firehouse Restaurant Grp*., 2011 U.S. Dist. Lexis 75715 at *48-49, fn. 11 (D.S.C. July 8, 2011) ("government websites are generally considered admissible and self-authenticating.").

Defendant's declarant has affirmed that these documents were gathered from a full date-range search of the relevant ATF offices using terms that included the ammunition at issue and "regulations guide." Def. Decl., ECF 14-1 at ¶ 13. Accordingly, it is overwhelmingly likely that many of these records are responsive to Plaintiff's actual FOIA request as written – if not the request as Defendant has reimagined it.

Conclusion

Plaintiff's Motion for Summary Judgment should be granted, and Defendant's Motion for Summary Judgment should be denied. The Court should order Defendant to produce the remainder of the 1,900 pages of records as described herein.

Dated: March 13, 2018

Respectfully submitted,

s/ Chris Fedeli

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 17-0600-CKK
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS, AND STATEMENT OF MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this Response to Defendant's Statement of Material Facts Not in Dispute (ECF 14-2), and Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

I. Plaintiff's Response to Defendants' Statement of Undisputed Material Facts

1. Not disputed.

2. Disputed. Plaintiff's FOIA request was premised on the ATF's decision to revise the Regulation Guide. Records discussing portions of the Regulation Guide that were omitted unintentionally from the version ATF decided to publish are responsive to Plaintiff's FOIA request.

3. Defendant's use of the phrase "immediately corrected" is a characterization of facts not in evidence and is therefore improperly asserted in a Statement of Facts, as Defendant's declarant has not specified the amount of time that passed between publication of the inaccurate ATF guide and correction. *See* Def. Decl., ECF 14-1 at ¶ 6. Plaintiff lacks sufficient knowledge to confirm or deny the remainder of this paragraph, including precisely what the phrase

"publishing error" means, as Defendant has provided no description of specific events which would explain that phrase in any meaningful way. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (because of the asymmetrical distribution of knowledge between a requester and an agency in FOIA litigation, Courts must place the burden on the agency to sufficiently prove the factual elements necessary for its defense).

4. Not disputed.

5. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph.

6. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph.

7. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph.

8. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph.

9. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph.

10. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph.

II. Plaintiff's Statement of Undisputed Material Facts

1. In the June 12, 2017 joint filing with the Court, Defendant stated it had located an estimated 2,000 pages of potentially responsive records for processing. ECF 9 at ¶ 1.

2. On July 14, 2017, Defendant informed Plaintiff by letter that it was releasing 84 pages of responsive records in this lawsuit. ECF 14-1 at 11-12.

3. On September 15, 2017, Defendant sent Plaintiff a letter informing Plaintiff that no further records would be released in this lawsuit beyond those 84 pages. That letter is attached hereto as Exhibit A.

4. All of the 84 pages of records released were dated in March of 2015. *See* Declaration of Chris Fedeli, attached hereto as Exhibit B.

5. Defendant produced a March 8, 2015 email record in this lawsuit entitled "FINAL:

Media Stmt on the ATF Regulations Publishing Error," attached hereto as Exhibit C.

6. On March 9, 2015, fifty-three Senators sent a letter to the Director of the Bureau of Alcohol, Firearms, and Tobacco concerning the "ATF Framework for Determining Whether Certain Projectiles are Primarily Intended for Sporting Purposes," attached hereto as Exhibit D.

7. On March 10, 2015, Defendant issued a press release entitled "Notice to Those Commenting on the Armor Piercing Ammunition Exemption Framework," attached hereto at Exhibit E.

8. A NEWSWEEK article by Taylor Wofford entitled *Obama's Proposed Ban on 'Green Tip' Bullets Misfires* was published on March 12, 2015 and is attached hereto as Exhibit F.

9. A FOX NEWS article by Maxim Lott entitled *ATF misfire? Guide indicates bullets at center of firestorm already banned; agency blames 'error,'* was published on March 10, 2015 and is attached hereto as Exhibit G.

Dated: March 13, 2018

Respectfully submitted,

s/ Chris Fedeli

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202-646-5172

Counsel for Plaintiff

Exhibit A

September 15, 2017 REFER TO: 2015-0705

Mr. William F. Marshall
Judicial Watch, Inc.
425 3rd Street SW, Suite 800
Washington, DC 20224-3232

Dear Mr. Marshall:

This is in response to your March 9, 2015 Freedom of Information Act (FOIA) request to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which is now part of ongoing litigation with this agency.

Please be advised that ATF has completed a search of email accounts where potentially responsive records would be located. No additional responsive records were located pursuant to these searches. As a result, the July 14, 2017 document production contains all the responsive records related to your request.

Sincerely,

Peter J. Chisholm
Acting Chief, Disclosure Division

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	Case No. 17-0600-CKK
v.	)	
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

DECLARATION OF CHRIS FEDELI

Pursuant to 28 U.S.C. § 1746, I, Chris Fedeli, declare as follows:

1. I am an attorney with Judicial Watch, Inc. and counsel for Plaintiff in the above-captioned matter. I am over the age of eighteen and have personal knowledge of the matters set forth below.

2. I examined the 84 pages of records Defendant released as responsive in this litigation and determined that all records were dated in March of 2015, and that none of the 84 pages of records pre-date March of 2015.

The original signed version of this document is in the possession of the undersigned.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Washington, DC on this 13th day of March, 2018.

s / Chris Fedeli

Chris Fedeli

Exhibit C

From: (b) (6), (b) (7)(C)
Sent: Sunday, March 8, 2015 10:41 AM
To: PGA - Legislative Affairs
Subject: FINAL: Media Stmt on the ATF Regulations Publishing Error

If you have not seen it, the below is the ONLY approved statement on the recent ATF Regulations Publishing Error with respect to AP ammunition:

On Feb. 13, 2015, ATF released for public comment a proposed framework to guide its determination on what ammunition is "primarily intended for sporting purposes" for purposes of granting exemptions to the Gun Control Act's prohibition on armor piecing ammunition. The posted framework is only a proposal, posted for the purpose of receiving public comment, and no final determinations have been made.

Media reports have noted that the 2014 ATF Regulation Guide published online does not contain a listing of the exemptions for armor piercing ammunition, and conclude that the absence of this listing indicates these exemptions have been rescinded. This is not the case.

Please be advised that ATF has not rescinded any armor piercing ammunition exemption, and the fact they are not listed in the 2014 online edition of the regulations was an error which has no legal impact on the validity of the exemptions. The existing exemptions for armor piercing ammunition, which apply to 5.56 mm (.223) SS 109 and M855 projectiles (identified by a green coating on the projectile tip), and the U.S .30-06 M2AP projectile (identified by a black coating on the projectile tip), remain in effect.

The listing of Armor Piercing Ammunition exemptions can be found in the 2005 ATF Regulation Guide on page 166, which is posted here.

The 2014 Regulation Guide will be corrected in PDF format to include the listing of armor piercing ammunition exemptions and posted shortly. The e-book/iBook version of the Regulation Guide will be corrected in the near future. ATF apologizes for any confusion caused by this publishing error.

(b) (6), (b) (7)(C)
Chief - ATF Legislative Affairs
(b) (6), (b) (7)(C)
(b) (6), (b) (7)(C) **- cellular**
(b) (6), (b) (7)(C)

Exhibit D

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

March 9, 2015

The Honorable B. Todd Jones
Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue, N.E.
Washington, DC 20226

Dear Director Jones:

We take issue with the "ATF Framework for Determining Whether Certain Projectiles are 'Primarily Intended for Sporting Purposes' Within the Meaning of 18 U.S.C. 921(a)(17)(C)," to which ATF sought comment on February 13, 2015.

Congress in 1986 passed the Law Enforcement Officers Protection Act (LEOPA). It did so to protect law enforcement officers from a particular category of bullets – those that could be fired from handguns and pierce police officers' body armor. Because rifle ammunition could also pass through police body armor, and some rifle ammunition could be fired from handguns, LEOPA protected common rifle ammunition by exempting from its scope projectiles "which the Attorney General finds [are] primarily intended to be used for sporting purposes."

The "Framework" does not follow LEOPA. Without any support, it purports to create an "objective" test never before applied for delineating which projectiles are "primarily intended to be used for sporting purposes." ATF will exempt a ".22 caliber projectile … if the projectile weighs 40 grains or less AND is loaded into a rimfire cartridge," and will exempt other forms of ammunition if they are "loaded into a cartridge for which the only handgun that is readily available in the ordinary channels of commercial trade is a single shot handgun." But even if a particular projectile satisfies these novel tests, ATF proposes to "retain[] the discretion to deny any application for a 'sporting purposes' exemption if substantial evidence exists that the ammunition is not primarily intended for such purposes."

ATF would determine what amounts to "substantial evidence" and whether the "ammunition is not primarily intended for [sporting] purposes." The statute was not enacted to give authority to ATF to do either. In 1986, the sponsors of the legislation were emphatic in stating that ammunition commonly used in rifles for target practice or hunting was not of the type of ammunition that the bill would ban. ATF seems to have decided to ban ammunition types that the law did not ban, then developed from whole cloth an "objective" test to supposedly provide it with the ability to ban the ammunition types it already had selected for prohibition.

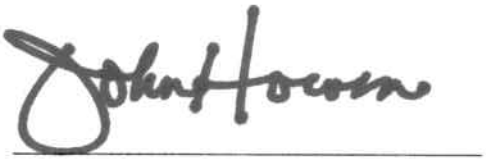
Earlier, ATF recognized the proper scope of LEOPA. ATF has always granted an exemption to the M855 5.56 x 45mm cartridge from the LEOPA ban because it recognized that this

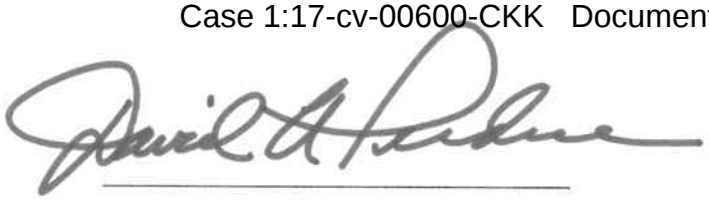
ammunition fell squarely within the "sporting purposes" test. It did so because factually, as well as legally under the legislative language, such cartridges were and are widely used by millions of law-abiding gun owners for "sporting purposes." These cartridges are prevalent for one of the most commonly possessed rifles, the AR-15. Congress did not, and did not intend to, ban this form of ammunition.

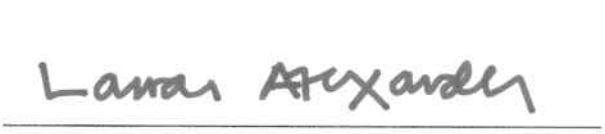
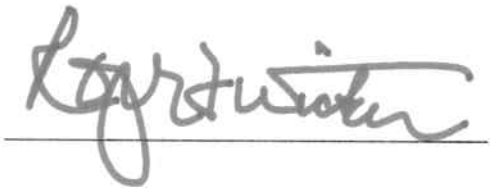
ATF's proposed restriction of the M855 cartridge is particularly serious in light of efforts to ban other forms of ammunition. The standards in the "Framework" would make use of ammunition containing materials other than lead more difficult. At the same time, various efforts to ban lead ammunition are proceeding apace. Second Amendment rights require not only access to firearms but to bullets. If law-abiding gun owners cannot obtain rifle ammunition, or face substantial difficulty in finding ammunition available and at reasonable prices because government entities are banning such ammunition, then the Second Amendment is at risk. An outright ban is an even more serious threat to the Second Amendment than the threat to the First Amendment's protection of free press created by a tax imposed only on voluminous purchases of paper and ink. *See Minneapolis Star Tribune Co. v. Commissioner,* 460 U.S. 575 (1983).

It is not clear where ATF believes it has obtained the authority to issue general standards interpreting the meaning of "sporting purposes" under LEOPA as opposed to exempting or not exempting particular cartridges. Nevertheless, no federal statute, including LEOPA, interferes with the ability of law-abiding citizens to obtain ammunition commonly used for such legitimate purposes as target shooting, hunting, and shooting competitions. Nor could any such statute do so consistent with the Second Amendment. The "Framework" should not be adopted, and ATF should not propose in the future to ban any widely used form of ammunition used by law-abiding citizens for lawful purposes.

Sincerely,





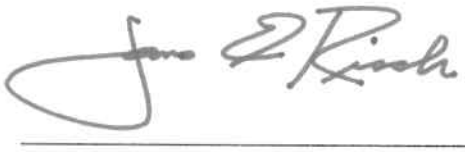







Exhibit E

Bureau of Alcohol, Tobacco, Firearms and Explosives

ATF

Special Advisory

Headquarters

Contact: Public Affairs Division
202-648-8500
www.atf.gov/

For Immediate Release
Tuesday, March 10, 2015

Notice to those Commenting on the Armor Piercing Ammunition Exemption Framework

Thank you for your interest in ATF's proposed framework for determining whether certain projectiles are "primarily intended for sporting purposes" within the meaning of 18 U.S.C. 921(a)(17)(C). The informal comment period will close on Monday, March 16, 2015. ATF has already received more than 80,000 comments, which will be made publicly available as soon as practicable.

Although ATF endeavored to create a proposal that reflected a good faith interpretation of the law and balanced the interests of law enforcement, industry, and sportsmen, the vast majority of the comments received to date are critical of the framework, and include issues that deserve further study. Accordingly, ATF will not at this time seek to issue a final framework. After the close of the comment period, ATF will process the comments received, further evaluate the issues raised therein, and provide additional open and transparent process (for example, through additional proposals and opportunities for comment) before proceeding with any framework.

###

Field Division: Headquarters

Exhibit F

OBAMA'S PROPOSED BAN ON 'GREEN TIP' BULLETS MISFIRES

BY **TAYLOR WOFFORD** ON 3/12/15 AT 6:21 PM

The Obama administration had proposed banning Green tipped armor-piercing 5.56 millimeter ammunition, which is popular among hunters and target shooters, but dropped the idea on March 12, 2015.

PHOTO ILLUSTRATION BY SCOTT OLSON/GETTY

SHARE

U.S. GUN CONTROL

The Obama administration is reconsidering its proposal to ban a popular type of rifle bullet—named for their distinctive green tips—after gun owners, lobbyists and members of Congress opposed the ban, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) said on Tuesday.

At issue is whether green tips qualify as armor-piercing ammunition, and if so, whether the ATF should revoke a 30-year-old regulatory exemption for the rounds based on their popularity in shooting sports.

The ban would have come under a new framework for interpreting the so-called sporting exemption for armor-piercing ammunition contained in the Law Enforcement Officer Protection Act (LEOPA) of 1986. The law makes the import, distribution and manufacture of armor-piercing ammunition illegal unless "primarily intended for sporting purposes." But the ATF and gun rights advocates disagreed over whether green tips qualify as armor-piercing.

Both groups say green tips are capable of piercing the light body armor typically worn by police. But that alone doesn't qualify them as armor-piercing under 1986 measure. Rather, the statute defines armor-piercing projectiles as those "which may be used in a handgun" and which are constructed from "one or a combination of" tungsten alloys, steel, iron, brass, bronze, beryllium copper or depleted uranium. Green tips, made primarily of lead and fitted with a steel "penetrator" head, do not qualify as armor-piercing under the statute, gun rights advocates said. But the question has never been resolved legally because the ATF granted green tips an exemption in 1986 based on their widespread use in shooting sports.

Now, the Obama administration wants that exemption revoked. Under the ATF's new framework, green tips would be banned because the proliferation of so-called "AR-type handguns"—fully automatic pistol-sized weapons capable of firing rifle rounds—means green tips are now effectively handgun bullets and should be subject to regulation. "These AR-type

handguns were not commercially available when the armor piercing ammunition exemption was granted in 1986," the ATF said.

But gun rights advocates argue that just because these handguns exist does not mean that green tips aren't primarily used for sporting purposes. "Anybody can take any particular cartridge or caliber and build a handgun around it," says Mike Bazinet, public affairs director of the National Shooting Sports Foundation. He claims no member of law enforcement has ever been injured by a handgun firing green tips.

At least 238 members of the House of Representatives agreed. They signed a letter to the ATF that expressed "serious concerns" that the new ban would interfere with Second Amendment rights. "The idea that Congress intended LEOPA to ban one of the preeminent rifle cartridges in use by Americans for legitimate purposes is preposterous," wrote Bob Goodlatte, the chairman of the House Judiciary Committee and the author of the letter. The ATF also received a separate letter, signed by 52 senators, which said, "ATF should not propose to ban….any widely used form of ammunition used by law-abiding citizens for lawful purposes."

The proposal also received more than 80,000 comments from the general public, most of them critical, the ATF said.

Many observers, including Robert Cotroll, a professor of law at George Washington University and expert on gun laws, believe the ban was "a backdoor way of trying to limit public access to the AR-15," a popular rifle based on the military's M-16 design. Since the 2012 Newtown massacre, President Barack Obama has pushed for stronger gun control, including a ban on assault weapons, without success. Now, his latest attempt appears to have foundered as well.

Exhibit G

SECOND AMENDMENT

ATF misfire? Guide indicates bullets at center of firestorm already banned; agency blames 'error'

By **Maxim Lott**
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It looked like the fix was in. But the ATF says it was just a misfire.

As the ATF faces a firestorm of controversy for seeking public comment on a proposal to ban a popular type of bullet, critics last week claimed the agency may have decided in advance how it would rule.

They pointed to the ATF's latest "Firearms Regulation Reference Guide," released in January 2015. The guide, curiously, did not contain an exemption for popular ".223 M855 'green tip' ammunition" that was included in earlier guides. Without that exemption, the ammunition is illegal to sell. (The change in language was first noticed by Fox News contributor Katie Pavlich at Townhall.com.)

So did the ATF already make up its mind?

No, the agency claims. The ATF has responded that the reference guide is not legally binding, so the bullets have not actually been banned yet, and has apologized for leaving the exemptions out of the guide. They say it was an innocent mistake. And the proposed ban is apparently still under consideration.

"[It] was an error which has no legal impact on the validity of the exemptions," ATF public affairs chief Ginger Colbrun told FoxNews.com in an emailed statement, adding that it will be corrected soon.

"The 2014 Regulation Guide will be corrected in PDF format to include the listing of armor piercing ammunition exemptions and posted shortly... ATF apologizes for any confusion caused by this publishing error."

As of Monday, the 2014 guide with the error was no longer available on the ATF website.

Case closed? Perhaps. Gun-rights supporters say that such errors are common for the ATF -- but that it could also have been a tip-of-the-hand that the administration already had reached a decision on banning the bullets.

"This is either real incompetence or ATF got caught with their pants down. With this administration it could be both," Alan Gottlieb of the Second Amendment Foundation told FoxNews.com.

The controversy comes on the heels of a letter from a hundreds of lawmakers urging the ATF not to ban the popular ammunition, which is the focus of regulatory efforts because it can pierce bulletproof vests used by law enforcement.

These lawmakers say the regulation would interfere with Americans' Second Amendment rights.

"This attack on the Second Amendment is wrong and should be overturned," Rep. Bob Goodlatte, R-Va., who started the petition, said in a statement to FoxNews.com. "Now 239 bipartisan Members of Congress -- a clear, sizeable majority of the House -- agree," he noted.

Although the ATF previously approved the bullets in 1986, the agency now says that because handguns have been designed that can also fire the bullets, police officers are more likely to encounter them.

White House Press Secretary Josh Earnest backed up the agency's proposal at a press conference last Monday.

"We are looking at additional ways to protect our brave men and women in law enforcement... This seems to be an area where everyone should agree that if there are armor-piercing bullets available that can fit into easily concealed weapons, that it puts our law enforcement at considerably more risk," Earnest said.

But gun-rights groups such as the National Rifle Association note that almost all rifle bullets can pierce armor, and say that this is just an excuse for limiting civilian gun use.

"The claim that this is done out of a concern for law enforcement safety is a lie. The director of the Fraternal Order of Police has said this is not an issue of concern. And according to the FBI, not one single law enforcement officer has been killed with M855 ammunition fired from a handgun," Chris Cox, executive director of the NRA Institute for Legislative Action, told FoxNews.com.

Some law enforcement groups reached by FoxNews.com also say that they see no need for the regulation.

"The notion that all of a sudden a new pistol requires banning what had long been perfectly legal ammunition doesn't seem to make a lot of sense to many officers," William Johnson, executive director of the National Association of Police Organizations, told FoxNews.com.

NAPO represents over 1,000 police units and associations and 241,000 law enforcement officers around the country.

But some law enforcement experts support the ban.

"I am definitely for the banning of these rounds... officers worry about them all the time," former NYPD detective Harry Houck told FoxNews.com, though he added that a ban might not actually keep criminals from getting the ammunition.

Gun control groups also support the ban.

"We understand why law enforcement has always been concerned about the threat of armor-piercing bullets," Dan Gross, president of the Brady Campaign to Prevent Gun Violence, told FoxNews.com.

Lawmakers warn that the regulation -- especially as it follows on the heels of attempts to restrict lead bullets -- will "result in drastically reduced options for lawful ammunition users." Already, the ammunition has been cleared from many store shelves by gun owners looking to stock up in anticipation of the ban. The proposed regulation would not prohibit owning the bullets, but it would stop anyone from manufacturing or importing them.

The ATF has announced that it is currently taking public comments on the regulation until March 16, when it will prepare to issue a final regulation. Comments can be sent to APAComments@atf.gov.

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