

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
JUDICIAL WATCH, INC.,)	
)	
<i>Plaintiff,</i>)	
)	Case No. 17-600-CKK
v.)	
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
<i>Defendant.</i>)	
_____)	

PLAINTIFF’S CONSOLIDATED REPLY BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION TO STAY

Defendant U.S. Department of Justice has failed to refute Plaintiff’s arguments for summary judgment. Plaintiff should be awarded judgment and Defendant should be ordered to produce the 1,900 pages of disputed records at issue.

The key issue in this case is that Defendant’s component, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”), knew or should have known which documents Plaintiff was seeking. Rather than release those records, ATF instead chose to insist on its own narrow reading of Plaintiff’s request. Defendant’s initial narrow reading of Plaintiff’s request might have been an innocent misunderstanding even if impermissible under FOIA. However, once Judicial Watch corrected ATF and explained its request in its opposition brief and response to Defendant’s statement of facts (ECF 16 at pp. 4-6, ECF 16-1 at 1, ¶ 2), ATF should have changed its position. Defendant ATF has not done so. ATF is in violation of FOIA for failing to release the records after being informed of its mistaken reading of Plaintiff’s FOIA request. *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (DC Cir. 1982).

Furthermore, Defendant mistakenly suggests that the Court should not order the release of the 1,900 pages because such an order is not a proper remedy. ECF 18 at 4. To the contrary, courts regularly order remedial measures when agencies have not performed adequate searches and releases of records under FOIA, and the remedy Plaintiff proposes is well within the Court's power.

Finally, to conserve the Court's time and avoid unnecessary imposition on its limited resources, Plaintiff asks the Court to hold both cross-motions for summary judgment (ECF 14 and 15) in abeyance and stay this case for 60 days. Plaintiff has now filed a new FOIA request with Defendant for the 1,900 pages of disputed records. *See* Exhibit 1. If Defendant complies with this request, such compliance could potentially render this lawsuit and both parties' summary judgment motions moot.

Argument

1. Defendant Has Failed to Show That it is Reading Plaintiff's FOIA Request Liberally and Reasonably as Required

ATF is wrong about what FOIA requires the agency to release in this case. Under FOIA, Defendant agencies must release records reasonably described by a FOIA request to the extent an agency can discern what is being requested. *See Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (DC Cir. 1982) (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."). It is impossible for ATF to still claim it does not know what Judicial Watch is seeking after reading Judicial Watch's opposition brief and response to Defendant's statement of facts. ECF 16 at pp. 4-6, ECF 16-1 at ¶ 2. Instead, ATF is wrongly claiming that it may

continue to willfully read the request narrowly to avoid releasing records if it wishes to do so. ECF 18 at 4.

ATF is correct that the relevant FOIA standard is whether the agency's reading of the request is liberal and reasonable. ECF 18 at 4; *see also Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1489 (D.C. Cir. 1984). ATF is incorrect, however, to argue that its reading of the Judicial Watch FOIA request was reasonable – in fact it was not. FOIA requires federal agencies to produce records when a requestor “reasonably describes” them. 5 U.S.C. § 552(a)(3)(A). Judicial Watch's request was a fair and sensible description of the records it sought. However, ATF's narrow and restrictive reading of the request was not reasonable. Accordingly, ATF has violated the plain meaning of the statute. ATF's focus on the single word “decision” in the request violates FOIA. ECF 18 at 1, 3. The arguments ATF advances would take the words “reasonably describe” out of the FOIA statute. Instead, ATF wants to replace the words “reasonably describe” with “perfectly describe,” or “describes with exact precision” in Section 552. This is not what Congress intended when it passed FOIA, the purpose of which is to ensure the conduct of government business is transparent to citizens.

Even if ATF's initial reading were liberal and reasonable, once the ATF's mistaken assumption about the premise of Plaintiff's request was corrected (*see* ECF 16-1 at 1, ¶ 2) there remained no question whether ATF could “determine precisely” what records Plaintiff sought. *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (DC Cir. 1982) (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.”). In this case, Defendant has even acknowledged that its misreading was based on ATF's own assumption about the “premise” of Plaintiff's request. Defendant's Statement of Facts, ECF 14-2 at 2, ¶ 2.

The first time Plaintiff learned that Defendant was fundamentally misreading the FOIA request was when Defendant filed its motion for summary judgment in this case. Plaintiff then explained that this reading was incorrect in its responsive brief. Considering Defendant's confusion and Plaintiff's explanation, the appropriate response would have been for Defendant to make further releases. Instead, Defendant has chosen to double-down on its right to read the request narrowly.

Finally, *even if* Defendant's continued insistence on misreading Plaintiff's request was permissible, some of the 1,900 pages described should be released. Defendant's declarant Peter Chisholm describes the 1,900 pages of withheld records as falling "into such categories as, drafts and final versions of ATF talking points related to the Armor Piercing Ammunition Notice of Proposed Rulemaking (NPRM); emails and attachments discussing the classification of 5.56mm SS109 and M855 ammunition for the NPRM; and drafts and final versions of Questions for the Record subsequent to ATF Director B. Todd Jones' testimony before Congress, portions of which mention armor piercing ammunition." Supplemental Declaration of Peter Chisholm, ECF 18-1 at 4, ¶ 9. This statement stops short of affirming that *none* of these 1,900 records discuss both the AR-15 ammunition and the revised 2014 Reference Guide subject to Plaintiff's request. *See* ECF 16 at p. 2. Plaintiff submits that any records that discuss both subjects are responsive to its request, even if certain other portions of the withheld records are not. Since Defendant's declarant has failed to unequivocally state that none of the 1,900 pages discuss both the AR-15 ammunition and the Reference Guide, the Court should order the production of all records. At a minimum, the Court should order the release of *any* pages in the 1,900 withheld records that mention the 2014 Reference Guide.

For all the foregoing reasons, Defendant's supplemental search declaration (ECF 18-1) fails to satisfy its burden in FOIA litigation. *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995).

2. Courts Routinely Order Remedial Relief When Agencies Have Performed Inadequate FOIA Searches and Releases, and Defendant's Argument to the Contrary Is Unpersuasive

The ATF is wrong to suggest that this Court may not order it to produce the 1,900 pages as remedy for its violation of FOIA. ECF 18 at 4. Indeed, ATF appears to be expressing doubt about a matter of blackletter law in FOIA jurisprudence. Section 552(a)(4)(B) states that a district court has the power to "enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). District courts routinely order agencies to conduct additional reviews and releases of documents when their FOIA compliance is inadequate. *See, e.g., Morley v. CIA*, 508 F.3d 1108, 1119-20 (D.C. Cir. 2007); *Int'l Counsel Bureau v. United States DOD*, 657 F. Supp. 2d 33, 40 (D.C. Cir. 2009) (ordering an agency to re-conduct its search because its original search was inappropriately limited in scope).

ATF argues that "Plaintiff offers no support" for the claim that the Court may order Defendant to produce the 1,900 pages. ECF 18 at 4. While it is true that Plaintiff did not cite the statute, it should go without saying that the Court's power to order agencies to the release documents is fundamental to FOIA. In *Renegotiation Board v. Bannerkraft Clothing Company*, 415 U.S. 1 (1974), the Supreme Court explained that since FOIA expressly authorizes district courts to "compel the production of agency records improperly withheld," (*Id.* at 18) the district courts' injunctive power to ensure FOIA compliance was necessarily broad: "With the express vesting of equitable jurisdiction in the district court by 552(a), there is little to suggest... that

Congress sought to limit the inherent powers of an equity court.” *Id.* at 18-20 (internal citations omitted). This Court may order the relief Plaintiff requests.

3. The Cross-Motions Should be Held in Abeyance for 60 Days Pending Defendant’s Response to Plaintiff’s New FOIA Request

Plaintiff is entitled to judgment in its favor. However, to avoid a potentially unnecessary imposition on the Court’s time – especially considering Defendant’s continued opposition to Plaintiff’s arguments – Plaintiff moves for a brief stay of this litigation. Plaintiff has conferred with opposing counsel, and opposing counsel stated Defendant opposes this motion.

In its opposition brief, ATF states that Plaintiff may simply file a new FOIA request for the 1,900 pages if it wants them. ECF 18 at 4. As Plaintiff has explained, ATF is required to release these records or substantial portions of them regardless of whether Plaintiff files a new FOIA request. *See supra* at pp. 1 to 5. Nevertheless, to avoid an unnecessary burden on this Court’s resources, Plaintiff has now filed a new FOIA request with ATF. That new FOIA request (hereinafter “New FOIA Request”) is attached hereto as Exhibit 1.

Plaintiff’s New FOIA Request to ATF asks for release of the 1,900 pages of records described at paragraph 9 of the Supplemental Declaration of Peter J. Chisholm. *See* ECF 18-1, ¶ 9. Plaintiff is entitled under FOIA to the records described in the Chisholm declaration, and Defendant is required to release them to Plaintiff. Accordingly, stay of this lawsuit and abeyance of the pending cross-motions is appropriate. If Defendant complies with the New FOIA Request, this case will be moot. However, this case is not moot unless and until Defendant complies with the New FOIA Request.

In addition, granting Plaintiff’s motion for stay would also best protect Plaintiff’s right to relief before the Court. If Defendant complies with Plaintiff’s New FOIA Request this case may be moot. However, Plaintiff reminds the Court that Defendant took over two years to produce a

single record in response to Plaintiff's original FOIA request in 2015, prompting this lawsuit. *See* ECF 16 at p. 2. Stay of this case pending Defendant's response to the New FOIA Request therefore serves the interests of FOIA, which is ensuring government transparency. Defendant should not be allowed to unjustly delay the release of records to requesters or the public. Moreover, by affording Defendant the opportunity to resolve this lawsuit by complying promptly with the New FOIA Request, the Court is promoting the efficient resolution of legal disputes. In any event, it is well within this Court's discretion to stay a lawsuit upon request of a party.

Accordingly, the Court should stay this case and order the parties to file a Joint Status Report in 60 days from the date of the order specifying whether Defendant's response to the New FOIA Request has made this case moot, or whether the stay should be lifted so the Court may rule on the cross-motions for summary judgment.

Conclusion

For all the foregoing reasons, the Cross-Motions for Summary Judgment (ECF 14 and 15) should be STAYED for 60 days pending Defendant's response to Plaintiff's New FOIA Request. After that time, if this case is not made moot by Defendant's forthcoming response to the New FOIA Request, Plaintiff's motion for summary judgment should be GRANTED and Defendant's motion for summary judgment should be DENIED.

Dated: May 15, 2018

Respectfully submitted,

/s/ Chris Fedeli

Chris Fedeli

DC Bar No. 472919

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff

Exhibit 1



**Judicial
Watch**[®]
*Because no one
is above the law!*

May 14, 2018

Via Email

Bureau of Alcohol, Tobacco, Firearms and Explosives
Attn: Disclosure Division, Room 4E.301
99 New York Avenue, NE
Washington, DC 20226
foiamail@atf.gov

Re: Freedom of Information Act Request

Dear Freedom of Information Officers:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) produce the following records within twenty (20) business days:

The 1,900 pages of records referenced at paragraph 9 of the Supplemental Declaration of Peter J. Chisolm, Acting Chief, ATF Disclosure Division, filed on May 1, 2018 in the U.S. District Court for the District of Columbia, civil action case number 17-600-CKK.¹ In relevant part, paragraph 9 of the Chisolm Declaration describes the 1,900 pages we request as follows:

“The approximately 1,900 pages ultimately determined to be non-responsive, were carefully reviewed line-by-line for responsiveness by the Disclosure Division. After that extensive review was completed, these pages were set aside without additional processing because they were non-responsive. The non-responsive documents fell into such categories as, drafts and final versions of ATF talking points related to the Armor Piercing Ammunition Notice of Proposed Rulemaking (NPRM); emails and attachments discussing the classification of 5.56mm SS109 and M855 ammunition for the NPRM; and drafts and final versions of Questions for the Record subsequent to ATF Director B. Todd Jones’ testimony before Congress, portions of which mention armor piercing ammunition.”²

¹ For reference, this pending lawsuit concerns a March 9, 2015 FOIA request from Judicial Watch to ATF, control number 2015-0705.

² For further reference, excerpts of the Chisolm Declaration are attached hereto as Attachment 1.

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Concerning this request, please note the following important points:

Waiver of Search and Duplication Fees

Judicial Watch requests a waiver of all search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii), as well as any fee waiver it is entitled to under 5 U.S.C. § 552(a)(4)(A)(viii).

First, with respect to 5 U.S.C. § 552(a)(4)(A)(ii)(II), Judicial Watch is entitled to a waiver of all search fees because it is a member of the news media. *Cause of Action v. Federal Trade Comm.*, 799 F.3d 1108 (D.C. Cir. 2015); *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989). Judicial Watch has been recognized as a member of the news media in other FOIA litigation. *Judicial Watch, Inc. v. Department of Defense*, 2006 U.S. Dist. Lexis 44003 (D.D.C. June 28, 2006); *Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp. 2d 52 (D.D.C. 2000). Judicial Watch regularly obtains information about the operations and activities of government through FOIA and uses this information to produce written journalism which is disseminated to the public via our monthly newsletter (circulation of over 300,000), weekly email updates (over 600,000 subscribers), in the published books THE CORRUPTION CHRONICLES (Threshold Editions, 2012) and CLEAN HOUSE (Threshold Editions, 2016), and in various other formats via our website, social media, and published reports. As a tax exempt, 501(c)(3) non-profit corporation, we have no commercial interests and do not seek the requested records for any commercial use. Rather, we intend to use the requested records as part of our ongoing investigative journalism and public education efforts to promote integrity, transparency, and accountability in government and fidelity to the rule of law.

Second, under 5 U.S.C. § 552(a)(4)(A)(iii), this request is exempt from both search and duplication fees. This is because: 1) Judicial Watch is a 501(c)(3) public interest, not-for-profit organization with no commercial purpose; and 2) the requested information will contribute to the public's understanding of the activities and operations of government. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. We are seeking the records referenced in this letter as part of our ongoing efforts to document the operations and activities of the federal government and to educate the public about them. Disclosure of the requested records undoubtedly will shed light on "the operations or activities of the government." *Cause of Action*, 799 F.3d at 1115. Disclosure also is "likely to contribute significantly to the public understanding" of those operations or activities because Judicial Watch intends to disseminate insightful information gleaned from the records to "a reasonably broad audience of persons interested in the subject" via its newsletter, email updates, and various other distribution channels. *Cause of Action*, 799 F.3d at 1116, quoting *Carney v. US. Dep't of Justice*, 19 F.3d 807, 815 (2nd Cir. 1994).

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Finally, if the records are not produced within twenty (20) business days, Judicial Watch requests the complete waiver of search and duplication fees it is entitled to under Section 6(b) of the OPEN Government Act of 2007, codified in relevant part at 5 U.S.C. § 552(a)(4)(A)(viii).

Given these various circumstances, Judicial Watch should not be charged any search or duplication costs. Nonetheless, in the unlikely event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. If you intend to assess these costs, please contact the undersigned before incurring the costs so we may decide if we wish to move forward.

Production of Records

For our mutual convenience, please produce all records electronically as one or more .pdf documents. You may send electronic productions for this FOIA request via email to the address cfedeli@judicialwatch.org. When necessary, Judicial Watch will also accept the rolling production of documents.

If you do not understand this request or any portion thereof, or if you need clarification of this request, please contact me immediately at 202-646-5185 or cfedeli@judicialwatch.org. I look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,

s/ Chris Fedeli
Chris Fedeli
JUDICIAL WATCH, INC.

cfedeli@judicialwatch.org
202-646-5185

Attachment 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 17-600 (CKK)
)	
U.S. DEPARTMENT OF JUSTICE)	
)	
Defendant.)	
)	

**SUPPLEMENTAL DECLARATION OF PETER J. CHISHOLM,
ACTING CHIEF, DISCLOSURE DIVISION
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES**

I, Peter J. Chisholm, do hereby declare and say:

1. I am the Acting Chief, Disclosure Division, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ). In this capacity, I receive all 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. In this capacity, I also review all requests referred to ATF from other agencies that have located ATF-originated documents in their records while processing their FOIA and PA requests. I am responsible for processing all FOIA and PA requests, initiating searches relevant to such requests, supervising the determination of what records should be disclosed, processing all documents referred to ATF and to other agencies, and recording all administrative appeals filed with ATF.

2. I declare that the statements made herein are based on knowledge acquired by me through the performance of my official duties. I am familiar with the procedures followed by this office in responding to the FOIA request made by Mr. William F. Marshall, on behalf of

Accordingly, during the course of the review process that material was determined to be non-responsive to Plaintiff's FOIA request and, therefore, was not released to Plaintiff. When performing its searches, ATF cast a wide net to ensure that Plaintiff received everything responsive to their request. Specifically, "any and all records of communications, including but not limited to, emails, to or from employees or officials of ATF regarding, concerning, or related to the decision to revise the ATF 2014 Regulations Guide to no longer exempt 5.56mm, SS109 and M855 (i.e., "green tip" AR-15) ammunition from the definition of "armor-piercing" ammunition."

9. The approximately 1,900 pages ultimately determined to be non-responsive, were carefully reviewed line-by-line for responsiveness by the Disclosure Division. After that extensive review was completed, these pages were set aside without additional processing because they were non-responsive. The non-responsive documents fell into such categories as, drafts and final versions of ATF talking points related to the Armor Piercing Ammunition Notice of Proposed Rulemaking (NPRM); emails and attachments discussing the classification of 5.56mm SS109 and M855 ammunition for the NPRM; and drafts and final versions of Questions for the Record subsequent to ATF Director B. Todd Jones' testimony before Congress, portions of which mention armor piercing ammunition. These documents were ultimately deemed non-responsive since, although they contained some of the broad search terms used, they were not related to any "decision to revise the ATF 2014 Regulations Guide to longer exempt 5.56mm, SS109 and M855 (i.e., 'green tip' AR-15) ammunition from the definition of 'armor-piercing' ammunition" since, as previously noted, no such decision was ever made.

10. The searches described above were conducted in all of the locations in which it is reasonably likely that responsive records would reside and using the search terms and methods

Chris Fedeli

From: postmaster@atf.gov
To: foiamail@atf.gov
Sent: Monday, May 14, 2018 3:41 PM
Subject: Delivered: Judicial Watch FOIA Request re AR-15 Ammunition Records

Your message has been delivered to the following recipients:

[foiamail@atf.gov \(foiamail@atf.gov\)](mailto:foiamail@atf.gov)

Subject: Judicial Watch FOIA Request re AR-15 Ammunition Records