

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

GUN OWNERS FOUNDATION,)
)
 Plaintiff,)
)
 v.)
)
 BUREAU OF ALCOHOL, TOBACCO,)
 FIREARMS AND EXPLOSIVES,)
)
 Defendant.)

Civil Action No. 12-919 (BAH)
Judge Beryl A. Howell

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO
PLAINTIFF’S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

INTRODUCTION

The Court should deny plaintiff Gun Owners Foundation’s (“GOF”) motion for “partial summary judgment,” by which it seeks to impose on defendant Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) an impossible production schedule for records responsive to GOF’s Freedom of Information Act (“FOIA”) request relating to a law enforcement operation known as “Operation Fast and Furious.” Pursuant to its proposed “judgment,” GOF asks the Court to order ATF to complete its search for records responsive to its request and to produce all non-exempt documents, together with a *Vaughn* index of any records withheld under a claim of exemption, all within 30 days. The Court, however, should deny this motion for being unreasonable and contrary to the law.

As explained below, Operation Fast and Furious (“Fast and Furious” or the “Operation”) has been the subject of significant public interest. ATF, as a result, has received thus far 20 FOIA requests for records relating to the Operation, including GOF’s request. In order to

respond in the most efficient and effective manner possible, ATF determined to search collectively for records responsive to all Fast and Furious FOIA requests, many of which overlap each other, rather than proceed on a request by request basis, which would inevitably result in unnecessary, repetitive searches, often times for the same documents. This universal search has now concluded. Going forward, ATF will process the large volume of potentially responsive records found pursuant to this search and will produce all non-exempt records on an ongoing basis. ATF has reasonably determined that this is the most efficient and fair manner by which to respond to these FOIA requests in order to produce records of potential interest to the general public, which will thereby most effectively serve the underlying purpose of FOIA. GOF offers no grounds on which to upset this determination.

BACKGROUND

A. Operation Fast and Furious

Fast and Furious, launched out of ATF's Phoenix field office in 2009, was a law enforcement operation intended to stem the flow of illegal weapons from the United States into Mexico. *See* H.R. Rep. 112-546, at 4-5 (2012). The Operation became the subject of an investigation by the House Oversight and Government Reform Committee (the "Committee"), which accused the Justice Department of allegedly allowing weapons unlawfully purchased in Arizona to "walk" (be transferred) to drug cartels in Mexico. The Committee conducted numerous hearings into Fast and Furious and has obtained voluminous records from the Justice Department relating to the Operation pursuant to subpoenas *duces tecum* issued by the Committee in March and October 2011. *See* Decl. of Peter J. Chisholm ("Chisholm Decl.") (attached hereto as Ex. A) ¶ 6. The Committee's investigation into Fast and Furious has been

politically charged, resulting in a vote on June 28, 2012, by a majority in the House of Representatives to hold the Attorney General in contempt for refusing to produce certain documents over which the President has invoked executive privilege. *See* 158 Cong. Rec. at H4417 (daily ed. June 28, 2012) (agreeing to H. Res. 711).

B. ATF's Response to Fast and Furious FOIA Requests

Owing to these events, Fast and Furious became a subject of interest for members of the public, some of whom have filed FOIA requests seeking documents pertaining to the Operation. To date, ATF has received 20 such requests, *see* Chisholm Decl. ¶ 3, including the FOIA request from GOF that is the subject of this lawsuit, *see id.* ¶ 4. GOF's request, received by ATF in April 2011, was preceded by nine other Fast and Furious FOIA requests. *See id.* After receipt of GOF's request, ATF went on to receive 10 additional requests. *See id.* ¶¶ 3-4. Of key consideration to ATF was the fact that there is substantial overlap between many of these FOIA requests. *See id.* ¶¶ 3-5. While the requests vary in scope, taken together they seek all records within ATF's possession relating to Fast and Furious. *See id.* ¶ 3. Many of the same documents would be responsive to the majority of the FOIA requests. *See id.* ¶ 5.

Due to these considerations, ATF determined that it would be more efficient to conduct a comprehensive search for documents responsive to all Fast and Furious requests, rather than process the requests sequentially, on a request-by-request basis. *See id.* ¶ 7. ATF concluded that this would allow the agency, with its limited resources, to respond to the many FOIA requests it had received, including GOF's request, more efficiently than would otherwise be possible. *See id.*

The comprehensive search for all records responsive to the Fast and Furious FOIA

requests has now been completed. *See id.* ¶ 8. This search resulted in the identification of approximately 30,000 pages of emails. *See id.* ¶ 9. ATF has decided to initially focus its review for statutory exemptions on the approximately 30,000 pages of emails, because those are the documents most likely to be responsive to the bulk of the Fast and Furious FOIA requests, including GOF's. *See id.* As of today's date, ATF has completed initial processing on approximately 8000 pages of the emails. *See id.* ¶ 11.

Once ATF completes its initial review, it forwards the documents to other Department of Justice entities having equities in the documents for further review. *See id.* ¶ 12. Documents are cleared for public release only when those entities complete their review. *Id.* Thus far, approximately 1460 pages of records have been cleared for public release, *see id.* ¶ 13. ATF, moreover, is presently working on establishing a website that will provide all FOIA requesters, and the public, online access to Fast and Furious documents that have been cleared for public release. *See id.* ¶ 14.

ATF is also making active efforts to improve its ability to respond to these various FOIA requests. Previously, ATF had assigned two employees to work nearly full time on the FOIA requests. *See id.* ¶ 10. Recently, ATF detailed three additional employees to work nearly full time on the processing of the Fast and Furious FOIA requests. *See id.* Nevertheless, even with this dedication of additional resources, given the scope of the FOIA requests received to date, ATF will not be able to process and produce non-exempt records responsive to GOF's FOIA request within 30 days, the time GOF has requested. *See id.* ¶ 15.

C. Procedural History of The Case

GOF filed this FOIA suit on June 6, 2012. *See* Compl. (ECF No. 1). ATF answered on

July 12, 2012, *see* Answer (ECF No. 6), and GOF filed the instant motion on July 24, 2012, *see* Pl.'s Mot. for Partial J. on the Pleadings (ECF No. 8).

ARGUMENT

I. THE COURT SHOULD NOT GRANT THE RELIEF GOF SEEKS

A. The Pleadings Do Not Entitle GOF to Judgment as a Matter of Law.

GOF argues that it is entitled to a “judgment” on the pleadings because ATF has not to date produced to it all non-exempt records responsive to its FOIA request. *See* Mem. of P. & A. in Supp. of Pl.'s Mot. for Partial J. on the Pleadings (“Pl.'s Mem.”) (ECF No. 8-1) at 4. GOF, however, is not the first plaintiff proceeding under FOIA to challenge a “defendant’s failure to respond to the various requests within the explicitly stated FOIA time limits.” *Hornbostel v. U.S. Dep’t of Interior*, 305 F. Supp. 2d 21, 28 (D.D.C. 2003), *aff’d*, No. 03-5257, 2004 WL 1900562, at *1 (D.C. Cir. Aug. 25, 2004) (“The merits of the parties’ positions are so clear as to warrant summary action.”). This Court has long recognized that it is not possible for agencies often times to respond to FOIA requests within the time contemplated by FOIA, causing the Court to explain on numerous occasions that “a lack of timeliness or compliance with FOIA deadlines does not . . . mandate summary judgment for the requester.” *Landmark Legal Foundation v. EPA*, 272 F. Supp. 2d 59, 68 (D.D.C. 2003). The Court has accordingly taken a practical approach to FOIA and has, for example, acknowledged that “[s]earches that last a year or more are not uncommon in FOIA cases.” *Int’l Counsel Bureau v. U.S. Dep’t of Defense*, 723 F. Supp. 2d 54, 59-60 (D.D.C. 2010) (alteration in original). An agency’s failure to provide a timely response gives a FOIA requester the right to sue in federal court. *See Spannaus v. U.S. Dep’t of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987). But the lack of timely response does not

entitle a FOIA requester to substantive relief, and there is nothing in the pleadings filed in this case that would entitle GOF to the specific relief it requests.

B. The ATF is Acting Reasonably To Respond To The Fast And Furious FOIA Requests.

Reasonableness standards permeate FOIA. Requesters, for example, must “reasonably describe[]” the records they seek, 5 U.S.C. § 552(a)(3)(A), and agencies must make “reasonable efforts” to search for such records, *id.* § 552(a)(3)(C). And if responsive records are found but are exempt from disclosure, agencies must release the non-exempt portions of those records if they are “reasonably segregable” from the exempt portions. *Id.* § 552(b) (hanging paragraph). Consistent with these standards of reasonableness, courts have long taken a “‘practical approach’ . . . in interpreting” FOIA, *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989)), and have allowed agencies flexibility as they craft a reasonable and effective response to FOIA requests that could otherwise become crippling, *see Int’l Counsel Bureau*, 723 F. Supp. 2d at 59 (“[E]nlisting a full-time staff of twelve for a year to review hundreds of thousands of unsorted images would impose such an undue burden.”). Ultimately, what FOIA requires of an agency is “‘good faith and due diligence’ and a ‘procedure which is fair overall in the particular agency.’” *Al-Fayed v. CIA*, No. 00-2092, at 9 n.5 (D.D.C. Jan. 16, 2001) (attached hereto as Ex. B) (quoting *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 615 (D.C. Cir. 1976)).

In accordance with these standards, ATF has taken reasonable and practical steps to respond to GOF’s record request and the many other FOIA requests for documents made by others relating to Fast and Furious. Due to the public interest in the Operation, ATF was

confronted with the very real and difficult question about how to respond to these requests as effectively and efficiently as possible. It could, for example, have searched for and responded to these requests one request at a time, possibly in the order in which they were received, which would have placed GOF tenth in line. This approach, however, is not practical and would result inevitably in repetitive, overlapping searches for and processing of documents commonly responsive to multiple, overlapping FOIA requests. *See* Chisholm Decl. ¶ 7. ATF has chosen, instead, to concentrate its efforts on processing records that are most likely to be commonly responsive to the bulk of the FOIA requests received, including GOF's request; this process focuses on the approximately 30,000 pages of emails it considers most relevant to these requests. *See id.* ¶ 9. This is the best calculated means by which ATF can satisfy the *public's* interest in Fast and Furious. Proceeding differently might better serve a particular FOIA requester seeking specific records of particular interest to it, but it would not better serve the public's interest under FOIA to obtain as efficiently as possible the broader spectrum of records relating to the Operation that are commonly responsive to the bulk of requests.

ATF is furthermore taking steps to ensure wide dissemination of non-exempt documents responsive to these many FOIA requests by posting them on its website, which will enable all interested members of the public to view these materials. *See id.* ¶ 14. Such efforts accord with the President's direction that "[a]ll agencies should use modern technology to inform citizens about what is known and done by their Government." Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009). Once ATF is in a position to put all the cleared documents in a digestible format on the Internet, it will do so. *See* Chisholm Decl. ¶ 14.

This Court should decline to disrupt the reasonable and permissible steps that ATF has taken. Given the number of documents pertaining to Fast and Furious, and the multiple layers of review involved, ATF simply is not capable of completing its comprehensive response within the time contemplated by GOF. *See id.* ¶ 15. This Court in other cases has rejected a proposal by a FOIA plaintiff that would require significant expansion of an agency's FOIA response, *e.g. Int'l Counsel Bureau*, 723 F. Supp. 2d at 59 (“[E]nlisting a full-time staff of twelve for a year to review hundreds of thousands of unsorted images would impose such an undue burden.”), and it should do so again here, particularly where ATF recently enhanced its processing capabilities by adding additional full-time personnel, *see Chisholm Decl.* ¶ 10. The Court should instead allow ATF to proceed in the manner it has chosen, which is inherently reasonable as it would allow the agency to process and produce on an ongoing basis non-exempt records that are responsive to GOF's request and the many other requests made by others for many of the same records.

C. GOF Has No Right to a *Vaughn* Index.

The Court should also decline GOF's request for the Court to order ATF to give it “a *Vaughn* Index with respect to any responsive records withheld under a claim of exemption.” Pl.'s Mem. at 6. This request too lacks merit, as ATF has no obligation under FOIA to provide a *Vaughn* Index prior to moving for summary judgment in support of whatever claims of exemptions that might be made.

It is blackletter law that an agency must bring forth evidence justifying its withholdings only “in connection with a motion for summary judgment filed by a defendant in a civil action pending in court.” *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) (citing *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). Thus,

notwithstanding decisions of other courts to order the production of a *Vaughn* Index prematurely, *see, e.g., Am. Civil Liberties Union v. Dep't of Defense*, 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004), courts of this jurisdiction have made clear that an agency that has not yet moved for summary judgment on a FOIA claim need not provide a *Vaughn* Index, *see Bangoura v. U.S. Dep't of Army*, 607 F. Supp. 2d 134, 143 n.8 (D.D.C. 2009); *see also Gallant v. NLRB*, 26 F.3d 168, 172 (D.C. Cir. 1994) (“Appellant . . . requests this court to order the production of a *Vaughn* Index This we decline to do.”); *Voinche v. FBI*, 412 F. Supp. 2d 60, 65 (D.D.C. 2006) (“[A]n agency does not have to provide an index per se.”).

CONCLUSION

ATF is working on making records available, in good faith, with due diligence, and in a way that is fair to all FOIA requesters who seek Fast and Furious documents from ATF. *See Al-Fayed v. CIA*, No. 00-2092, at 9 n.5 (quoting *Open Am.*, 547 F.2d at 615). For this and the additional reasons stated above, ATF respectfully requests that GOF’s motion for partial judgment on the pleadings be denied.

Dated: August 9, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2012, a true and correct copy of the foregoing Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Judgment on the Pleadings was served upon plaintiff's counsel of record at the address listed below:

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