

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUN OWNERS FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 12-919 (BAH)
)	
BUREAU OF ALCOHOL, TOBACCO,)	
FIREARMS AND EXPLOSIVES,)	
)	
Defendant.)	

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

INTRODUCTION

Plaintiff, Gun Owners Foundation (“GOF”), filed this action to compel defendant, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), to comply with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and furnish records responsive to GOF’s FOIA request dated April 21, 2011. GOF’s Complaint (“Comp.”), necessitated by ATF’s failure to comply with FOIA in connection with GOF’s FOIA request, was filed herein on June 6, 2012. ATF’s Answer was filed on July 12, 2012. GOF has filed a Motion for Partial Judgment on the Pleadings, requesting this Court to enter an order compelling ATF to respond to furnish non-exempt records responsive to GOF’s FOIA request as well as a *Vaughn* Index with respect to any records that are withheld. This Memorandum of Points and Authorities is submitted in support of GOF’s motion, together with a proposed form of order.

STATEMENT OF UNDISPUTED FACTS

GOF is a nonprofit educational organization, exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code, and dedicated to the correct construction,

interpretation and application of the law, with particular emphasis on firearms statutes and constitutional guarantees related to firearm ownership and use. Comp. ¶4.¹ ATF is a “component” of the U.S. Department of Justice, a department of the Executive Branch of the United States Government. Comp. ¶5; Answer ¶5. ATF has possession, custody, and control of the records to which GOF seeks access. Comp. ¶5.² On April 21, 2011, GOF submitted a FOIA request to ATF via e-mail and facsimile, Comp. Exhibit 1, which ATF admits was received on April 25, 2011. Comp. ¶7; Answer ¶7.³

ATF has not released a single document to GOF pursuant to its FOIA request, nor has it communicated to GOF the assertion of a single exemption over any responsive material. Comp. ¶22; Answer ¶22.⁴ Nevertheless, ATF has told GOF that it “will grant [GOF’s]

¹ Although ATF has not admitted a number of facts asserted in the Complaint, including GOF’s address (*see* Answer ¶4), there are no undisputed material facts upon which GOF relies for its motion for judgment on the pleadings.

² ATF asserts that this is a legal conclusion. *See* Answer ¶5. However, it is apparent from the pleadings that GOF’s FOIA request seeks only records that are in ATF’s possession, custody, and/or control.

³ The subject matter of GOF’s FOIA request are records relating to a March 2011 request to ATF from Congressman Darrell Issa, Chairman of the House Committee on Oversight and Government Reform for records related to ATF’s involvement in smuggling firearms from the United States to Mexico, such involvement having taken place during ATF operations “Project Gunrunner” and “Operation Fast and Furious.” *See* Comp. ¶6; Answer ¶6.

⁴ Neither has ATF claimed that there are any “exceptional circumstances” or that the agency has exercised “due diligence in responding to the request,” pursuant to 5 U.S.C. § 552(a)(6)(C). Since the burden is on ATF to demonstrate the existence of such circumstances (*see* Morrow v. FBI, 2 F.3d 642, 644 (5th Cir. 1993)), ATF should be deemed to have waived any such defense.

request in part,” indicating that ATF possesses at least one non-exempt document that is responsive to GOF’s request. Comp. ¶11; Exhibit 2.

ARGUMENT

I. AS A MATTER OF LAW, ATF MUST COMPLY WITH FOIA’S REQUIREMENTS FORTHWITH AND PRODUCE ALL RESPONSIVE RECORDS THAT ARE NOT EXEMPT FROM DISCLOSURE UNDER FOIA

Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), ATF’s response to GOF’s April 2011 FOIA request was due by no later than May 2011. Thus, at the time this suit was filed, in June 2012, ATF was more than one year in default. Assuming that ATF has responsive, non-exempt documents in its possession, custody and/or control, they must be produced as a matter of law.

Under FOIA, every “agency” shall make “available to any person” for “public inspection and copying” all requested records that are not privileged from disclosure under one of FOIA’s nine statutory exemptions. *See* 5 U.S.C. § 552(a)(3), (a)(4). FOIA was enacted “to establish a general philosophy of full agency disclosure.” Environmental Protection Agency v. Mink, 410 U.S. 73, 80 n.6 (1973); Dep’t of the Air Force v. Rose, 425 U.S. 352, 361-62 (1976). Full disclosure is the official policy of the Executive Branch, as confirmed by President Obama’s January 21, 2009 Memorandum for the Heads of Executive Departments and Agencies. *See* footnote 4, *supra*. Although FOIA exemptions exist, they are narrowly construed, *see Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). An agency has the burden of proving that its decision to withhold a record responsive to a FOIA request is justified. *See* 5 U.S.C. § 552(a)(4)(B). Even if a requested record contains exempt information, it must still release “any reasonably segregable portion”

of that record. *See* 5 U.S.C. § 552(b). *See also* Oglesby v. U.S. Dept. of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Finally, the agency’s search for the requested records — although subject to no uniform, precise external standard — must be systematic and reasonable, and the agency’s showing in this regard must be sufficient enough to allow the requester to challenge the procedures utilized. *See* Weisberg v. Dept. of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980).

There are no disputed issues of fact at issue herein. GOF filed an FOIA request which ATF admits it received. By law, ATF may only (i) release requested records, or (ii) claim statutory exemptions. Incomprehensibly, ATF admits it has done neither,⁵ but denies it has violated the law. *See* Answer ¶22. ATF’s Answer admits the essential elements of plaintiff’s claim, and effectively concedes plaintiff’s *prima facie* case. Plaintiff thus is entitled to judgment on the pleadings with respect to the basic FOIA compliance issues, and requests this Court, pursuant to Federal Rule of Civil Procedure 12(c), to grant plaintiff’s motion, and to order defendant to comply with the law.

While GOF may be entitled to further relief if ATF should claim that certain records must be withheld under a claim of exemption, GOF’s only request, at this stage of the litigation, is that this Court order ATF to respond to plaintiff’s FOIA request as FOIA commands it to do, and to produce the required records forthwith. This is not a case where a government agency has lodged a reasonable request for additional time, because of a long pre-

⁵ Even in its answer, ATF fails to claim any exemption, only that GOF’s request “**may** implicate ... statutory exemptions.” *See* Answer, Second Affirmative Defense (emphasis added).

existing queue of other FOIA requests or has proffered an excuse for temporary non-compliance because of forces beyond its control. This is a case where defendant appears to have flatly refused to honor GOF's FOIA request without offering a single reason for doing so, has never sought an extension of time to produce the required records, has already had more than 15 months to produce the records, and has forced GOF to file a lawsuit to obtain the most fundamental FOIA relief.⁶

II. DEFENDANT SHOULD BE REQUIRED TO RESPOND IN FULL TO PLAINTIFF'S FOIA REQUEST AND TO PRODUCE A VAUGHN INDEX WITH RESPECT TO ANY WITHHELD RECORDS BY A TIME CERTAIN

GOF's FOIA request is limited to a four-month period, seeking only the records created between January 1, 2011 and the date of GOF's FOIA request of April 21, 2011. *See Comp.*, Exh. 1, p. 2. ATF has not produced a single record, nor claimed a single exemption, nor sought additional time from GOF. Rather, based on conversations between counsel for plaintiff and counsel for defendant, it appears that ATF has not even begun to process GOF's FOIA request, but rather has lumped GOF's request together with all other FOIA requests related to ATF's "Fast and Furious" program. Now ATF claims that 30,000 pages of

⁶ As set forth in its motion, GOF requests that the Court order ATF to furnish all responsive records to GOF within 30 days from the date of this Court's Order granting the motion. It is important to remember that GOF's FOIA request was submitted in April 2011, and that AFT has had more than 15 months to complete its search. On July 19, 2012, counsel for plaintiff contacted counsel for defendant to try to determine whether the parties could agree to a reasonable production schedule. As of the date plaintiff's Motion for Partial Judgment on the Pleadings was filed, plaintiff has not been given even an estimate as to when ATF's search might be completed. *See also* page 6, *infra*.

documents need to be reviewed, of which a mere 1,200 pages have been reviewed thus far.⁷ At this rate, it could take ATF many months, if not years, to respond. The existence of other broad requests — no doubt spanning many years of documents — should not negate ATF's duty to respond to GOF's very limited request, spanning only four months, and to do so within a reasonable time. GOF submits that a time frame of 30 days from the date of this Court's order granting plaintiff's motion would be sufficient time for ATF to respond. To make GOF wait indefinitely for the results of its limited request until ATF has completed a review of many thousands of pages of records, most of which almost certainly are not responsive to GOF's FOIA request, would be unreasonable.

CONCLUSION

Based upon the foregoing, GOF's motion should be granted, and this Court should order ATF to comply with FOIA forthwith by (i) enjoining ATF from continuing to withhold non-exempt records responsive to plaintiff's April 21, 2011 FOIA request, and (ii) requiring ATF to promptly conduct and complete its search for all records responsive to plaintiff's FOIA request by a date certain, producing and delivering to plaintiff all non-exempt records responsive to plaintiff's FOIA request within 30 days of this Court's Order demanding defendant's compliance, together with a *Vaughn* Index with respect to any responsive records withheld under a claim of exemption.

⁷ GOF does not seek review of 30,000 pages of documents, nor does GOF's simple request disclosure of 30,000 pages. Nor should GOF be required to wait until ATF completes its review of numerous other FOIA requests.

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Respectfully submitted,

/s/ William J. Olson

WILLIAM J. OLSON
(D.C. Bar No. 233833)

/s/ John S. Miles

JOHN S. MILES
(D.C. Bar No. 166751)

Jeremiah L. Morgan
Robert J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Avenue, West, Suite 4
Vienna, VA 22185-5615
703-356-5070 (telephone)
703-356-5085 (fax)
wjo@mindspring.com (e-mail)

Counsel for Plaintiff
Gun Owners Foundation