

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.)	

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO DEFENDANT’S MOTION FOR OPEN AMERICA STAY**

Plaintiff, Gun Owners Foundation (“GOF”), hereby opposes Defendant’s Motion for *Open America* Stay filed herein by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”).

Contrary to what ATF would have this Court believe, this is not simply a case about an overworked federal agency that is facing an onslaught of FOIA cases and needs additional time to process the plaintiff’s request. Instead, this case involves an agency that authorized firearms to be illegally purchased in the United States, and transferred into the hands of Mexican drug cartels in an ill-fated program known as “Fast and Furious.” Fast and Furious allegedly was instituted by ATF as part of an effort to trace the flow of illegal firearms, but this could not be the true reason, because the firearms were not traced after ATF agents assisted in their illegal purchase and smuggling.¹ Rather, Fast and Furious is widely viewed as part of ATF’s effort

¹ See, e.g., R. Serrano, “Informant helped smuggle guns to Mexico, investigators say,” Los Angeles Times, September 27, 2011, <http://articles.latimes.com/2011/sep/27/nation/la-na-atf-guns-20110928>. See also A. Silverleib, “House holds Holder in contempt,” CNN, June 29, 2012, <http://www.cnn.com/2012/06/28/politics/holder-contempt>.

to generate support for increased federal gun controls. Fast and Furious finally unraveled when a U.S. Border Patrol agent was killed by a bullet fired from one of the Fast and Furious firearms. ATF Memorandum in support of its Motion for Open America Stay, p. 1. ATF has steadfastly resisted every effort by Congress, the media, and private parties to uncover information about this ill-conceived operation. Viewed through this lens, ATF's motion for a stay is but a continuation of an agency coverup of its own actions that have had tragic consequences — the kind of resistance to transparency and accountability that the Freedom of Information Act was enacted to prevent.

For many months after GOF made its FOIA request, ATF advised GOF that it was processing the request. During that period, there was no mention of ATF being overburdened by FOIA requests, or any problem preventing a response to GOF's request. Only well after suit was filed did ATF claim to have too many Fast and Furious FOIA requests to handle, stating that it had administratively determined to stay processing all requests until it completed its review of a "universe" of documents potentially relevant to these requests. This position appears to be unprecedented, and without legal support. For the reasons discussed herein, it certainly does not support granting a stay under Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). Furthermore, there is no guarantee that ATF will respond even after another year. Indeed, left to its own devices, plaintiff believes defendant will continue to stall indefinitely, until this Court orders defendant to submit a prompt response. GOF submits that ATF should be ordered to respond fully to GOF's FOIA request within a much shorter time span than that requested by ATF.

BACKGROUND

1. **Administrative Proceeding.** On April 21, 2011, GOF submitted its FOIA request to ATF, seeking a limited set of records, from a narrow time period, regarding ATF's preparation of and response to the congressional investigation into the much-publicized Fast and Furious operation.²

ATF's response to GOF's FOIA request was due no later than May 19, 2011.³ In response to follow-up inquiries by GOF, ATF promised to grant GOF's request in part, and established deadlines for itself, first by July 13, 2011,⁴ and then by August 31, 2011.⁵ ATF did not respond by either date. At no point during that time did ATF ever mention any other pending FOIA request related to Fast and Furious, or any anticipated problem in a prompt response. Ultimately, after several additional months, ATF having failed to produce a single document, stopped communicating with GOF entirely. With no other choice, GOF filed this action, asking this Court to direct ATF to comply with FOIA. Suit was filed in June of 2012 — 14 months after GOF submitted its FOIA request.

2. **District Court Proceeding.** ATF's Answer filed in this case did not allude to any back-log of pending FOIA requests, or anything out of the ordinary about the processing of GOF's request. Even at that point, there was no mention of any planned "group processing"

² GOF filed a narrow request for records pertaining to the March 16, 2011 letter from Congressman Darrell Issa requesting documents from ATF, ATF's response, and a copy of Congressman Issa's subpoena, as well as other related documents.

³ See 5 U.S.C. § 552(a)(6)(A)(i).

⁴ Compl., ¶11.

⁵ Compl., ¶¶12-18.

of FOIA requests. ATF, through counsel, simply refused to set any deadline for a response. As ATF's Answer failed to join issue on the legitimacy of GOF's claim, GOF filed its Motion for Partial Judgment on the Pleadings on July 24, 2012. That motion was opposed by ATF, and briefing concluded on August 14, 2012.

On February 11, 2013, this Court denied GOF's motion, without prejudice, and invited ATF to file a motion to stay these proceedings pursuant to 5 U.S.C. § 552(a)(6)(C) and the decision in Open America. In response, ATF filed such a motion on March 11, 2013. In its motion, ATF belatedly comes to the Court with a vague, patchwork tale that asks for much — and promises virtually nothing — with ATF still flatly refusing to abide by any fixed deadline whatsoever in the production of documents. Instead, it requests a **one-year stay**, on top of the nearly **two-year delay** thus far.

ARGUMENT

I. **ATF'S POSITION IS UNREASONABLE, AND IS NOT SUPPORTED BY THE STATUTE OR OPEN AMERICA.**

A. **ATF Has Failed to Make the Required § 552(a)(6)(C)(ii) Showing of "Exceptional Circumstances."**

An agency must respond to a FOIA request within 20 days. 5 U.S.C. § 552(a)(6)(A). However, it may obtain additional time if it affirmatively demonstrates "exceptional circumstances" as provided in 5 U.S.C. § 552(a)(6)(C)(ii). "[E]xceptional circumstances" does not include a delay that results from a **predictable agency workload of requests.**" *Id.* (Emphasis added.) But ATF's workload is described as follows: "**This fiscal year looks to be no different....**" Declaration of ATF Disclosure Chief Stephanie Boucher ("Boucher Decl."), p. 6 (emphasis added). ATF argues that it "has faced a deluge of FOIA requests ...

concerning **Fast and Furious**” and that “neither the agency nor Congress could have predicted the **breadth of information that would be asked for....**” ATF Mem. in Support of Motion for *Open America* Stay, p. 9 (emphasis added). Those broad assertions do not apply to GOF’s simple, straightforward request. Unable to show that it has been “deluged with a volume of requests,”⁶ ATF instead argues that a relatively **small number of requests** have left it with a **large volume of records** to review. But ATF’s representations do not establish the predicate for the statute in order to obtain a significant stay of FOIA’s statutory requirements.

The statute also allows a finding of exceptional circumstances when, even with a predictable workload, “the agency demonstrates reasonable progress in **reducing** its backlog of pending requests.” 5 U.S.C. § 552(a)(6)(C)(ii) (emphasis added). However, ATF cannot meet this standard either. ATF asserts that “[a]t the time ATF received GOF’s FOIA request, ATF had **160** FOIA and PA requests outstanding. As of today’s date, it has [**increased to**] **300** requests outstanding.” Boucher Decl., p. 6 (emphasis added). ATF’s backlog has not decreased, as would be required for consideration of a stay under prong (C)(ii) of the statute.

B. Open America Does Not Support a Stay In This Case.

Although ATF has accepted the Court’s invitation to seek a stay based on Open America, that case does not support ATF’s motion. In Open America, the FBI responded to the FOIA requester within one month of receiving the FOIA request, indicating that there were more than 5,000 FOIA cases in its queue. *Id.*, 547 F.2d at 608. The FBI showed that an

⁶ ATF claims that Nat’l Sec. Archive v. United States SEC, 770 F. Supp. 2d 6, 9 (D.D.C. 2011) supports its position. But in that case, from 2001 to 2008, FOIA requests [to the SEC] increased by more than 300%....” *Id.* at 9 (emphasis added).

appropriate number of staff had been allocated to the FOIA case in question, and that more than 38,000 documents would be reviewed in a matter of months. *Id.*, at 612-613. The FBI's prompt and reasonable actions in processing FOIA matters at that time stand in stark contrast to ATF's belated, ineffectual, and unreasonable handling of Fast and Furious FOIA requests — and GOF's FOIA request in particular.

Open America interpreted the “exceptional circumstances” provision of FOIA, 5 U.S.C. § 552(a)(6)(C), to mean that, when an agency demonstrates that it is deluged with a volume of requests for information vastly in excess of that anticipated by Congress — and does not have resources adequate to deal with the volume of such requests within the time limits of 5 U.S.C. section 552(a)(6)(A) — the court may allow the agency additional time to complete its review of the records, if the agency has exercised due diligence. *See id.*, 547 F.2d at 616. That situation does not obtain here.

First, there is no reason to believe that ATF's FOIA staff is overwhelmed by the **number** of FOIA requests. ATF advises that the number of FOIA requests has not increased substantially above those of other years. Apparently, only 22 FOIA requests related to Fast and Furious have been made in the past two years, and ATF has not demonstrated the exercise of due diligence in processing any of the FOIA cases before it — in fact, it has admitted that it **has failed to respond to any of them.**

Second, ATF has changed stories during the litigation of this case. In opposing GOF's Motion for Partial Judgment on the Pleadings in August 2012, ATF argued — without even addressing any facts regarding its processing of GOF's FOIA request — that it had determined to first conclude its “universal search” for all documents related to Fast and Furious. ATF

stated: “[t]his 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.” Def. Mem. in Opposition, p. 2 (emphasis added). Currently, of course, ATF’s position is quite different. It now holds out the prospect of searching many multiples of the 30,000 records alluded to in August 2012, without any production until all documents are reviewed.

Just last week, on March 28, 2013, this Court denied a motion for a 14-month Open America stay requested by the FBI in a matter very similar to this case. Electronic Privacy Information Center v. FBI (“EPIC”), 2013 U.S. Dist. LEXIS 43998, No. 12-667 (D.D.C.) (CCK). The Court in EPIC noted that the FBI’s workload of FOIA requests had not increased. Memorandum Opinion, No. 12-667, March 28, 2013, p. 7. The same is true here. The Court in EPIC determined that, even though the “complexity” of some of the FOIA requests received by the FBI had increased, that was due to the manner in which the FBI ran its searches, not the nature of the request. *Id.*, at 8. Here too, it is only ATF’s delayed and evolving choices to run additional searches that has led to the alleged “hundreds of thousands” of documents needing to be reviewed. Finally, in EPIC the Court determined that the FBI’s backlog had increased far faster than any increased workload, militating against a stay. *Id.*, pp. 10-11. The same is true in this case.

GOF submits that, although Open America provides a framework for consideration of a reasonable agency proposal to expand the FOIA response time limits, it provides no basis for the position espoused by ATF in this case. Moreover, the most relevant decisions in this Circuit support GOF’s position. *See EPIC, supra*. *See also Buc v. Federal Drug*

Administration, 762 F. Supp. 2d 62 (D.D.C. 2011) (motion for *Open America* stay denied, defendant ordered to promptly produce any responsive documents on a rolling basis, and complete its production within one month); Gov't Accountability Project v. U.S. Dep't of Health & Human Servs., 568 F. Supp. 2d 55 (D.D.C. 2008) (motion for *Open America* stay denied, and plaintiff's motion for judgment on the pleadings granted insofar as defendants ordered to process plaintiff's request and release the documents on a rolling basis).

II. ATF'S BEHAVIOR IN THIS CASE NECESSITATES THIS COURT'S OVERSIGHT OF ITS REVIEW PROCESS AND COMPLIANCE DETERMINATIONS.

A. ATF Failed to Properly Process GOF's FOIA Request.

GOF's Complaint was necessitated by ATF's failure to comply with FOIA, as well as its own self-imposed deadlines, over a period of 14 months. ATF claimed it had received, was processing, and would grant GOF's request in part (Compl., ¶ 11), but then never provided GOF any update of its progress. Compl., ¶ 24. What dates ATF set for production were not met. Indeed, ATF stopped communicating with GOF entirely. Compl., ¶¶ 11-21.

Only after GOF filed suit — and then only after GOF moved for partial judgment on the pleadings — did ATF first claim it had **30,000 pages** of emails to review. *See, e.g.*, Defendant's Mem. in Opp. to Plaintiff's Motion for Partial Judgment on the Pleadings (Doc. #9 herein), p. 7. Now, in its latest motion, ATF claims it has "**hundreds of thousands**" of **pages** to review. *See, e.g.*, Defendant's Memorandum of Points and Authorities in Support of its Motion for *Open America* Stay (Doc. #14 herein), p. 6. It is hard to reconcile ATF's constantly changing claims.

Even assuming the credibility of ATF's estimates, its dilatory tactics and inefficient search methods do not justify its current request for an amorphous, year-long stay. Had ATF made GOF aware of these alleged "hundreds of thousands" of documents, GOF may have been able to work with ATF in an attempt to narrow ATF's search.⁷ Such efforts certainly could have shortened ATF's processing time, and could have avoided the significant costs of ATF's review of those documents, as well as this litigation itself.

ATF admitted to having responsive, non-exempt documents, stating nearly 15 months ago that it "will grant [GOF's] request in part...." *See, e.g.*, Compl., ¶ 11. To date, GOF has not received a single document from ATF, nor has ATF proffered a single claim of exemption, nor has ATF given GOF any idea of when this may occur. Courts consider partial production as a sign of good faith in evaluating FOIA compliance matters. *See, e.g., Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976) ("We note that some 400 documents have already been delivered to plaintiff's attorney by the FBI."). There has been no partial production here.

Moreover, in a declaration accompanying its Motion for *Open America Stay*, ATF admits it has uncovered "eleven documents" that are responsive to GOF's request. Memorandum of Points and Authorities in Support of Defendant's Motion for *Open America Stay*, p. 5. ATF never previously told GOF of these documents, nor notified GOF of any claim of exemption. Surely, ATF does not need an additional year to analyze these 11

⁷ *See* 5 U.S.C. § 552(a)(6)(C)(iii) ("Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request ... after being given an opportunity to do so by the agency ... shall be considered as a factor in determining whether exceptional circumstances exist....").

documents.⁸ One district court facing government agency intransigence stated, “we simply see no reason why plaintiff should have to wait until defendant has completed review of all ... before he may obtain the first requested and reviewed document.” Hinton v. FBI, 527 F. Supp. 223, 225 (E.D. Pa. 1981).

B. ATF Has Negligently or Deliberately Obfuscated the “Universe” of Documents that is Allegedly at Issue in this Case.

The most recent ATF filings in this case dramatically increased the number of potentially responsive documents in this matter. GOF submits that it is extremely difficult to track ATF’s “Fast and Furious” FOIA progress, or even to evaluate the reasonableness of that progress. In this case, ATF has reported at various times how many document pages it has reviewed as of various dates:

- August 9, 2012 8,000 pages of emails (Chisholm Decl., ¶ 11)
- August, 2012 15,000 pages of emails (Boucher Decl., ¶ 10)
- January, 2013 28,000 pages of emails (Boucher Decl., ¶ 12)
- March 11, 2013 35,300 “printed pages” (Boucher Decl., ¶ 17)

ATF’s representations have been inconsistent as to how many total documents there are awaiting review. ATF reports that its searches have uncovered, at various times:

⁸ ATF now claims that it “has established a website” to make Fast and Furious documents available and, indeed, that 2,116 pages of documents have been made available. Def. Mem. in Support of Motion, p. 6. Presumably, the website to which ATF refers is located at <http://www.atf.gov/about/foia/operation-fast-and-furious-and-related-matters.html>. ATF did not give anyone the address to this website, and counsel for GOF had to find this site on their own. Moreover, it is extremely challenging, if not impossible, to determine whether any of the documents on the website are responsive to GOF’s FOIA request. Regardless, that is ATF’s — not GOF’s — job.

- 30,000 total pages needing review (ATF Memorandum in Opposition to GOF's Motion for Partial Judgment, pp. 4, 7.)
- 315,000 pages of documents in the initial search (**including** 30,000 pages of email potentially responsive to GOF's request) (Boucher Decl., ¶ 9.)
- 315,000 pages of documents (**in addition to** the 30,000 potentially responsive to GOF's request) (Joint Status Report, p. 1.)
- 13,000 additional pages of emails in search #2 (Boucher Decl., ¶ 10.)
- 80,000 additional pages of emails and 138,000 additional pages of documents in search #3 (Boucher Decl., ¶ 12.)

ATF claims to have found 261,000 pages of documents potentially responsive to GOF's request, but claims to have processed only 35,300 pages in the two years since GOF filed its request. Joint Status Report, Document #13 herein (3/11/13), p. 1. Subtracting that amount from the 261,000 pages, it would seem ATF still needs to review over 225,000 pages of documents before it can respond to GOF's request.⁹ ATF claims it needs nine months to do this. ATF Motion, p. 7. But at ATF's rate of progress, **it could take ATF over a decade to finish its review.** While ATF's estimate of nine months may appear to be in the realm of "good news," one is left with a feeling of *deja vu* about ATF's prior "estimates," and an

⁹ ATF claims to now have identified the entire "universe" of "hundreds of thousands" of documents that are potentially responsive to all Fast and Furious FOIA requests. Of course, that number could change should ATF receive additional requests or unilaterally decide to run additional "searches."

uncertainty about what ATF will advise this Court when another year¹⁰ has elapsed, as ATF still has promised nothing specific in terms of compliance.¹¹

GOF submits that ATF's failure to make any clear and consistent statements of fact concerning the review process undermines ATF's credibility with respect to the reasonableness and sufficiency of its position. Without any specific commitments being made by ATF, any stay will only serve to defeat the purpose for which FOIA was enacted.

C. ATF's "Collective" Approach is Unreasonable.

ATF's decision to process requests collectively and cumulatively should be rejected. ATF has not cited a single case where an agency has been permitted to lump together many requests, and delay its response to all of them until it can respond to them collectively. Such an approach differs from Open America, where the Court held that "there is no allegation ... that the FBI procedure, treating each request on a first-in, first-out basis ... is anything but fair, orderly, and the most efficient procedure...." *Id.* at 614. Indeed, the Court, in dicta, seemed to imply that **any** order by a court to force an agency to respond to a request before its due turn could be viewed as granting "preferential, expedited treatment to the request" of the

¹⁰ ATF's notion that, at the conclusion of its determination process, it must then seek the views of other agencies is an added insult. If any such review is necessary, it should be undertaken as soon as ATF discovers a document responsive to GOF's request — not only after all documents have been reviewed.

¹¹ Should this Court decide to grant ATF a stay for any period of time, GOF requests that, at a minimum, the Court should require frequent, regular progress reports by ATF.

person who may have requested last — but sued first.¹² *Id.* at 614. Although many FOIA cases discuss this traditional “first in, first out” approach,¹³ none have been found which discuss (much less permit) the sort of collective strategy taken by ATF here. ATF’s cumulative response is a form of group punishment — “last out for all.” ATF’s approach here is precisely what was rejected in Open America — as it treats all requests the same, regardless of when they were received.

¹² Other courts have rejected this extreme approach. *See Hamlin v. Kelley*, 433 F. Supp. 180, 182-183 (N.D. Ill. 1977) (“Defendants further argue that court-ordered compliance [means] that plaintiff would be given an unfair preference over others seeking documents from defendants.... This is an extraordinary argument. Defendants have not only delayed plaintiff’s request for more than a year in clear violation of the statutory time limits, but now suggest that this Court become a party to their denial of documents and violation of the statute by holding plaintiff in his place in the line of those awaiting the agencies’ convenience ... The fact of pervasive non-compliance as an argument to justify and sustain further non-compliance is bad law and worse logic. Congress established strict time limits to prevent the present practices of defendants....”).

¹³ *See Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir. Cal. 1976) (“We hold the ‘first in - first out’ consideration of demands, based on date of filing with the FBI, ordinarily seems reasonable.”); *Jerome Stevens Pharms. Inc. v. United States FDA*, 2008 U.S. Dist. LEXIS 81163 (E.D.N.Y. Jan. 11, 2008) (“DIDP processes both simple and complex requests on a first-in, first-out basis.”); *Appleton v. FDA*, 254 F. Supp. 2d 6, 9 (D.D.C. 2003) (“Courts in this circuit have interpreted this ‘exceptional circumstances’ provision as excusing any delays ... as long as the agencies are making good-faith efforts and exercising due diligence ... on a first-in, first-out basis.”).

CONCLUSION

For the foregoing reasons, GOF respectfully submits that ATF's request for a stay be denied, and that ATF be ordered to respond to GOF's FOIA request in a timely fashion, as suggested in the proposed Order submitted with this Memorandum.

Respectfully submitted,

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[Proposed] **ORDER**

Upon consideration of defendant's Motion for Open America Stay, along with its Memorandum of Points and Authorities in support thereof, and plaintiff's Memorandum in opposition thereto, it is by the Court, this ___ day of _____, 2013,

ORDERED, that defendant's Motion be, and is hereby, denied; and it is further

ORDERED that defendant, within 30 days of this Order, produce all documents responsive to plaintiff's FOIA request that defendant has thus far identified for which no claim of exemption is made, together with a Vaughn index of all such documents being withheld under claim of exemption; and it is further

ORDERED that defendant, within 90 days of this Order, complete its search for and review of documents responsive to GOF's FOIA request, and produce all documents

responsive to plaintiff's FOIA request for which no claim of exemption is made, together with a Vaughn index of all such documents being withheld under claim of exemption.

BERYL A. HOWELL
United States District Judge

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