

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 REPLY TO DEFENDANT’S OPPOSITION TO PLAINTIFF’S
MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

STATEMENT

Plaintiff, Gun Owners Foundation (“GOF”), has filed a motion for partial judgment on the pleadings, requesting that the Court order defendant, the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), to comply with GOF’s request for records, dated April 21, 2011, under the Freedom of Information Act (“FOIA”), which ATF has not yet done — well over 15 months after the submission of GOF’s request. GOF has asked that the Court order ATF (i) to comply with the law by responding substantively to GOF’s FOIA request, producing all responsive records and, with respect to those records which ATF claims are exempt from disclosure, explaining the basis for the exemption, and (ii) to comply within 30 days of the Court’s order.

ATF has opposed GOF’s motion, not on any theory that it need not comply with FOIA, but rather because it claims requiring compliance within 30 days is unreasonable — although ATF has “sat on” GOF’s request for well over one year and has given no indication about what time frame for compliance it believes would be reasonable. This Reply responds to the

arguments set forth in ATF's Memorandum in Opposition ("Mem. Opp.") to GOF's Motion for Partial Judgment on the Pleadings.

ARGUMENT

I. DEFENDANT HAS FAILED TO ADVANCE ANY AUTHORITY OR REASONABLE ARGUMENT AGAINST ENTRY OF JUDGMENT ON THE PLEADINGS.

ATF's Memorandum in Opposition asserts no credible legal defenses to GOF's Motion for Partial Judgment on the Pleadings. Neither ATF's handling of this request during the administrative processing of GOF's request, nor the conversations between counsel for the parties that occurred herein prior to the filing of GOF's motion, reveal that ATF has any plans to comply with the requirements of FOIA regarding GOF's request. It is clear that it will take an order from this Court to persuade ATF to comply. Thus, GOF's motion should be granted.

II. DEFENDANT'S ARGUMENTS REGARDING THE TIME FRAME FOR COURT-ORDERED COMPLIANCE LACK SUBSTANCE AND REASON.

A. Although Initially Promising Compliance, ATF Halted All FOIA Compliance Efforts with respect to GOF's Request, Forcing the Filing of This Lawsuit.

At the administrative level, ATF acknowledged GOF's FOIA request, and even promised the production of responsive documents. Complaint, ¶ 11. Without explanation, however, ATF then stopped all communication with GOF. Many months passed, and GOF's entreaties to ATF were ignored. ATF's actions, in clear violation of FOIA's requirements, forced GOF to file this lawsuit to obtain what it is entitled to under FOIA.

This is not a case where a government agency, deluged with hundreds of FOIA requests, asks for forbearance and additional time to comply with FOIA's requirements. ATF not only stopped all communication with GOF; it now argues that it unilaterally grouped GOF's FOIA request together with a number of other FOIA requests, and decided to process them as though they were one. Mem. Opp., p. 3. There is no indication in the defendant's submissions thus far as to when that decision was made. Nor is there any indication regarding the similarities or differences between GOF's FOIA request and any of the requests with which GOF's request was grouped. Yet that grouping is the entire basis for ATF's current position regarding its utter failure to respond to GOF's FOIA request. ATF does not state whether this technique was developed administratively, or only after suit was filed, but it cannot be employed to avoid FOIA's clear requirements. Such a technique is unreasonable, without factual or legal support, and should be rejected.

B. ATF Has Never Indicated How Many Records Fall Within the Narrow Date Range in GOF's Request.

ATF claims it has received a total of 20 Fast and Furious FOIA requests. Mem. Opp., p. 3. ATF claims these requests have resulted in a combined 30,000 total pages of potentially responsive records, of which 8,000 pages have passed initial processing, and of which 1,460 pages have been cleared for release. Mem. Opp., p. 4. ATF claims that it would be

“impossible”¹ and “unreasonable” to force it to complete this enormous task in 30 days.² But that argument is a red herring. GOF certainly does not seek 30,000 generic “Fast and Furious” documents. Indeed, its FOIA request was crafted narrowly, in an effort to avoid the search for and production of unnecessary documents. GOF asked ATF to respond to **GOF’s** FOIA request, not 19 other requests. GOF’s request contains a very narrow date restriction of four months. GOF’s request of April 2011 seeks “records related to (i) ATF’s preparation of a response to the Issa letter, and (ii) any new records that had been created since the date of the Issa letter.” Complaint, ¶ 8.

Not once has ATF ever stated or even estimated how many pages of records are potentially responsive to GOF’s request **in particular**. Rather, all of ATF’s arguments involve **generally** the 20 FOIA requests that ATF says it has received.³

If ATF by now has a list which identifies 30,000 pages of records, that list certainly should be sortable to identify records by their date of creation. Since GOF’s request seeks records only from a short, four-month period, many — if not most — of the 30,000 pages of

¹ ATF never explains why it would be “impossible.” ATF never estimates how many staff it would have to devote, or how many man hours would be required. It simply asserts impossibility.

² Early on (in June and August of 2011), when GOF inquired as to the status of its request, ATF twice stated that it “anticipated responding” to GOF’s request **within 14 days**. Complaint, ¶¶ 11, 18. If ATF knew it had 30,000 pages of documents to review, why would it promise a response in so short a time period? Or had ATF not even begun to process GOF’s request by that date? Or has ATF simply made a policy decision to delay its response to all Fast and Furious FOIA requests as long as possible?

³ ATF states numerous times that “many” of these requests overlap with others, but it has never specifically claimed that there is any overlap of any other request with GOF’s request. Mem. Opp., pp. 2, 3, 7, 8.

records claimed by ATF presumably would be outside the time period requested by GOF. It is entirely possible that there are only a limited number of records within the date range GOF seeks. While ATF could have made this determination with little effort, it apparently has never bothered to do so. If ATF has done so, it has not reported the results.

If it were necessary for ATF to comb through 30,000 pages in order to respond to GOF's request in particular, ATF could simply have said so — but ATF has not made this claim. Rather, it continues to treat GOF's request as a component part of some larger amalgam of requests. ATF artificially creates for itself an insurmountable task — which no one has asked it to perform — and then claims it cannot meet that “impossible,” fictitious burden it created. This is an unreasonable position.

C. ATF Has Never Offered Any Estimated Time Frame In Which It Will Respond to GOF's Request.

Although ATF early on promised to produce some documents (Complaint, ¶¶ 11, 18), not once since GOF filed its FOIA request in April 2011 has ATF ever indicated a specific date by which GOF would receive any documents. Even when counsel for GOF contacted government counsel hoping to obviate the need for GOF's Motion for Partial Judgment on the Pleadings, ATF would provide **no time estimate whatsoever** of how long its processing of GOF's request would take. Even now, in its Memorandum in Opposition, ATF has not given GOF or this Court any estimate.

ATF simply states that this “Court has ... acknowledged that “[s]earches that last a year or more are not uncommon in FOIA cases.” Mem. Opp., p. 5. While this is no doubt true, ATF has not given GOF any substantive response whatsoever to its FOIA request in over 15

months — which is well over a year. And even now, ATF refuses to give GOF an idea of when such a response will occur. ATF's position appears to be that since courts have accepted **finite delays** in other cases, this Court should accept a potentially **unlimited delay** in this case, with ATF free to take as much time as it alone determines is necessary, subject to no time frame or deadline.

ATF believes this to be “reasonable,” claiming it to be the “most efficient and effective manner possible.” Mem. Opp., p. 2. GOF understands that not all FOIA requests can be completed within the statutorily imposed 20-day limit, and that some searches can take months or even longer. GOF has been patient throughout, but with GOF's request pending well over a year, ATF still has not provided even an estimate of how much longer it will be. ATF's answer — essentially “we can't say” — is unreasonable and unacceptable.

D. ATF Makes the Erroneous Claim that Responding to Individual Requests Will Result in “Repetitive, Overlapping Searches.”

ATF claims that if it were forced to respond to FOIA requests sequentially, rather than concurrently, such a process “would result inevitably in repetitive, overlapping searches for and processing of documents commonly responsive to multiple, overlapping FOIA requests.” Mem. Opp., p. 7. ATF has even claimed — without any factual support or analysis — that it “would have to apply exemptions repeatedly, often to the same documents.” Mem. Opp., Exhibit A, p. 2. GOF believes that ATF's contention is meritless.

First, once ATF has determined a particular document to be exempt or non-exempt in response to a particular request, it would not need to make the same determination later in

response to an additional request. The document, once “processed,” would simply be labeled as such, and would require no duplicative work if it arose in the future.

Second, at some point it will be necessary for ATF to respond **individually** to each request. ATF will have to determine which particular records are responsive to which particular request. It is unlikely that ATF plans to turn over **all** Fast and Furious documents to **all** requesters **regardless** of the content of the individual FOIA request. Thus, regardless of whether ATF proceeds sequentially or holistically, it will still be forced to consider whether document X is responsive to request Y, and again whether it is responsive to request Z.

III. IN LIGHT OF ATF’S LONG DELAY, AND ITS FAILURE TO MEET THE “EXCEPTIONAL CIRCUMSTANCES” EXCEPTION, GOF’S REQUEST FOR PRODUCTION WITHIN 30 DAYS IS REASONABLE.

Prior decisions in this circuit illustrate the unreasonableness of ATF’s position. In Buc v. FDA, 762 F. Supp. 2d 62 (D.D.C. 2011), where the FDA had failed to respond to plaintiffs’ FOIA request for well over a year and suit was filed to compel the FDA to respond, the agency claimed “exceptional circumstances,” arguing that it had a long queue of other requests, and asking the court for a stay of “seventeen months ... in order to complete its review and release the records....” *Id.* at 63.⁴ While the court in Buc noted that it was “mindful of the substantial backlog of pending FOIA requests,” it nevertheless found that the agency had failed to show any “exceptional circumstances” justifying its failure to meet its statutory obligations. *Id.* The fact that the agency had failed to respond for so long, coupled with the absurdly long stay

⁴ ATF’s position in this case is even less forthcoming than that of the FDA in Buc, which asked for 17 months. Here, the ATF offered neither plaintiff nor this Court **any idea of how long** it will take to complete the processing of GOF’s FOIA request.

requested, led the court to order the agency to “begin processing Plaintiffs’ outstanding requests **immediately** [and] promptly produce any responsive documents [and] complete its production” **within 30 days**. *Id.* at 63 (emphasis added).⁵

Here, ATF has similarly attempted to demonstrate its eligibility for the “exceptional circumstances” exception found in 5 U.S.C. § 552, as discussed in Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). ATF claims that “[u]ltimately, what FOIA requires of an agency is ‘good faith and due diligence.’” Mem. Opp., p. 6. That claim is only half true. **In fact, the Open America exception requires a showing of an additional element not mentioned by ATF: “exceptional circumstances.”** 5 U.S.C. § 552(a)(6)(C)(ii); Open Am., 547 F.2d at 610-13. The words “exceptional circumstances” do not appear anywhere in ATF’s Memorandum in Opposition.

“Exceptional circumstances” require (i) that the agency be “deluged with [a] volume of requests ... vastly in excess of that anticipated by Congress,” and also (ii) that “existing resources are inadequate.” *See Buc v. FDA*, 762 F. Supp. 2d 62, 66 (D.D.C. 2011). ATF has failed to make either of these required showings.

First, ATF states in its Memorandum in Opposition that the House of Representatives Oversight and Government Reform Committee has “conducted numerous hearings into Fast and Furious and has obtained voluminous records” on the topic, leading to a finding of contempt against the Attorney General for failure to produce some records. Mem. Opp., pp. 2-3. ATF

⁵ Thirty days was also the time given to the agency to respond, as well as to produce a Vaughn index, in Electronic Privacy Information Center v. Department of Justice, 416 F. Supp. 2d 30 (D.D.C. 2006).

already has devoted significant resources to locate documents and respond to Congressional inquiries on this subject. ATF cannot now claim surprise, or that it is unprepared to deal with this issue.

Nor has ATF made any showing that it has made “reasonable progress in reducing its backlog of pending requests,” as required by 5 U.S.C. § 552(a)(6)(C)(ii). In fact, there is no indication in ATF’s Memorandum in Opposition that **it has responded to a single FOIA request regarding Fast and Furious**, even though half of them had been pending before GOF’s request was filed in April of 2011. *See* Mem. Opp., p. 3-4. A **zero percent response rate** cannot possibly be considered “reasonable progress.”

Second, while ATF claims to have added three persons to the task of responding to Fast and Furious FOIA requests,⁶ that fact alone does not demonstrate that “existing resources are inadequate.”⁷ ATF never bothers to say when this staff was added,⁸ and has never claimed that no additional staff could be added. ATF never states how many staff it has available or what

⁶ ATF’s Memorandum in Opposition makes no claim that the agency has any backlog of FOIA requests. In *Buc*, the FDA made the claim that it had received thousands of FOIA requests, which established a long queue. 762 F. Supp. 2d at 68. But in this case, the 20 Fast and Furious FOIA requests claimed by ATF theoretically could be the only FOIA requests the agency currently has pending — ATF has made no claim to the contrary. Thus, there is no ground to believe the agency has an overall “deluge” of pending requests which it cannot possibly hope to answer.

⁷ ATF also states that, by devoting more employees to the task, it is “making active efforts to improve its ability to respond to these various FOIA requests,” but has not claimed this additional manpower is necessary to respond to GOF’s request.

⁸ GOF’s FOIA request was filed in April of 2011, and other Fast and Furious FOIA requests apparently were filed prior to that date. In the span over more than fifteen months, ATF claims it has only been able to review 8,000 pages of documents, although it has a staff of five working full time.

the agency's current workload is.⁹ ATF claims only that it has been "understaffed" (Mem. Opp., Exhibit A, p. 3), but has not given any concrete facts or figures to back up this cookie-cutter agency assertion. ATF has not claimed that adding additional personnel would jeopardize other agency missions.

ATF claims that "[t]his Court in other cases has rejected a proposal by a FOIA plaintiff that would require significant expansion of an agency's FOIA response," such as adding additional personnel. Mem. Opp., p. 8. But ATF's argument is a straw man, since GOF's request is limited. ATF has never claimed that it would need to change its tactics to reply to GOF's request within 30 days, only that it would need to do so to respond to **all** requests within 30 days, which is not what GOF seeks.

IV. ATF'S "CONCURRENT" APPROACH TO FAST AND FURIOUS FOIA REQUESTS IS WITHOUT PRECEDENT AND SHOULD BE REJECTED.

ATF's entire Memorandum in Opposition revolves around its novel idea that it can only respond to Fast and Furious FOIA requests as a group. But ATF has not cited a single case where an agency has tried (or much less been permitted) to group FOIA requests together, refusing to respond to any until it has processed all. Such a technique violates the letter of the law, and the spirit of the Freedom of Information Act, which addresses individual requests. FOIA requests should be dealt with individually, and responded to as they are processed.

⁹ In fact, the Department of Justice, of which ATF makes clear it is a "component" (Answer, ¶ 5), recently reported that "the Department of Justice ... reduced [its] backlog [of pending FOIA requests] by 26%...." "2012 Chief FOIA Officer Report Assessment," <http://www.justice.gov/oip/docs/sum-2012-chief-foia-officer-rpt.pdf>.

ATF cites several cases which it claims demonstrate that searches may take great lengths of time, well over a year.¹⁰ But every one of the cases relied upon by ATF dealt with how long it would take an agency to respond to the one FOIA request at issue, not how long it would take the agency to respond to a group of FOIA requests.

CONCLUSION

ATF's pattern in this case has been to seek indefinite delay, despite the national significance of this issue among the American public, the news media, the halls of Congress, and even on the international stage. The Fast and Furious scandal is politically embarrassing, but it cannot justify ATF's dragging out all FOIA requests until the issue has faded from the headlines. ATF has steadfastly resisted Congressional inquiries, forcing the filing on August 13, 2012 of a complaint in this Court to enforce a congressional subpoena.¹¹

ATF would have this Court believe that it can be trusted to complete GOF's FOIA request in a timely manner, and assures the Court that it will now produce records on an

¹⁰ ATF's Memorandum in Opposition states that "this Court has long recognized that it is not possible for agencies often times to respond ... within the time [limits] ... [and] that 'a lack of timeliness ... does not ... mandate summary judgment for the requester.'" Mem. Opp., p. 5. For this proposition, ATF cites Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 59, 68 (D.D.C. 2003). That case does not support ATF's claim. In Landmark Legal, by the time the court was asked to rule, the agency **had responded** to the FOIA request, albeit "belatedly." Thus, even though the agency responded late, there was "no further judicial function" the court could perform, the issue being "moot" because the agency "has now responded." But in this case, ATF **has not responded** to GOF's request. This issue is not moot, and thus ATF's delay is not immaterial.

¹¹ "House Asks Federal Court to Rule Against Attorney General's Stonewalling in Fast and Furious," August 13, 2012, <http://oversight.house.gov/release/house-asks-federal-court-to-rule-against-attorney-generals-stonewalling-in-fast-and-furious/>.

“ongoing basis.” While ATF claims that GOF is upset that ATF has not produced “**all**” the documents it has, the truth is that ATF has produced **none** of the documents. ATF admits that it **has not produced a single page of a single document to a single requester**, even though it has completed review of many records. Clearly, ATF will not comply unless required to do so by this Court.

ATF asks the Court simply to deny GOF’s request, but does not suggest any alternative time frame in which to respond. Thus, GOF respectfully renews its request that this Court order ATF to produce all documents responsive to GOF’s request within 30 days of the date of the Court’s order, together with a Vaughn index of any documents withheld.

Respectfully submitted,

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