No. 02-322

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, PETITIONER

v.

CITY OF CHICAGO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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A. The 2003 Appropriations Law Requires Reversal Of The Court Of Appeals' Judgment

On February 20, 2003, President Bush signed into law the Consolidated Appropriations Resolution, 2003 (H.R. J. Res. 2, 108th Cong., 1st Sess. (enacted)). Section 644 of that law provides:

> No funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based upon any provision of 5 U.S.C. 552 with respect to records collected or maintained pursuant to 18 U.S.C. 846(b), 923(g)(3) or 923(g)(7), or provided by Federal, state, local, or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm, except that such records may continue to be disclosed to the extent and in the manner that records so collected, maintained, or obtained have

> been disclosed under 5 U.S.C. 552 prior to the date of the enactment of this Act.

§ 644. In explaining the need for the legislation, the House Report expressed the concern that disclosure under the FOIA of "certain law enforcement databases * * * on a comprehensive basis * * * would not only pose a risk to law enforcement and homeland security, but also to the privacy of innocent citizens." H.R. Rep. No. 575, 107th Cong., 2d Sess. 20 (2002) (2002 House Report); see Gov't Br. 38-39 n.20. Like the appropriations rider in *United States* v. *Bean*, 123 S. Ct. 584, 586-587 (2002), Section 644 bars ATF from taking the action requested of it under prior law. Section 644 thus compels reversal of the court of appeals' judgment.

1. Respondent acknowledges (Supp. Br. 2) that Section 644 "appears to bar [ATF] from spending appropriated funds to disclose under the [FOIA] multiple sales or trace data other than data it has previously disclosed." Respondent contends (Supp. Br. 2, 4-7), however, that ATF can require respondent to pay the costs of processing its FOIA request and can thereby effect release of the requested data without the expenditure of appropriated funds. That argument lacks merit. Indeed, the same argument was made in *Bean* (see 01-704 Br. in Opp. at 18), but to no avail.

a. Federal law provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. 3302(b). Thus, any fees that ATF might collect from respondent could not be retained by the agency or used to defray the costs of processing respondent's FOIA request, but must instead be deposited in the Treasury. Any costs involved in releasing additional information within the Trace and Multiple Sales Databases would therefore necessarily require the expenditure of appropriated funds.

b. The FOIA and implementing regulations limit the extent to which fees may be assessed against requesters who seek agency records for noncommercial purposes. See 5 U.S.C. 552(a)(4)(A)(ii)-(iv); 28 C.F.R. 16.11(c) and (d). Even if ATF were permitted to retain the fees charged for its processing of respondent's FOIA request, those limitations would effectively preclude the agency from recouping all of its costs, and the agency would be required to spend appropriated funds to make up the difference. Respondent suggests (Supp. Br. 6) that Section 644 may be treated as an implied repeal of the FOIA limitations on the amount of fees that may be collected. But there is no plausible basis for "harmonizing" the various statutory provisions in that manner, particularly when Congress's manifest purpose in enacting Section 644 was to prevent the harms that would result from comprehensive disclosure of the ATF databases, not to avoid the relatively minor monetary costs associated with FOIA processing.[1]

2. Section 644 applies to the present case even though respondent submitted its FOIA request before the 2003 ap-

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[1] In *Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 960 F.2d 105 (9th Cir. 1992), the court of appeals held that a statutory provision barring the expenditure of appropriated funds to release specified information did not preclude a judicial order requiring disclosure of that information under the FOIA. The court found that, in light of the requester's offer to supply its own copy machine and generator for the duplication of the relevant records, release of the records would entail no meaningful expenditure of government funds. *Id.* at 108. That holding was wrong, because the expenditure of appropriated funds (*e.g.*, for the salaries of federal employees) would have been required to make the records available to the requester. In any event, the rationale of *Cal-Almond* has no application here. Respondent does not dispute that disclosure of the data sought by respondent—which would entail, *inter alia*, significant computer programming activities—would require ATF to spend money. For the reasons stated in the text, the prospect that the Treasury (but not ATF) could recoup some of those expenses does not take this case outside the 2003 appropriations bar.

propriations law was enacted. Section 644 categorically forbids the expenditure of any appropriated funds "to take any action based upon any provision of 5 U.S.C. 552 with respect to" the databases at issue here, except in accordance with ATF's disclosure policies in effect when Section 644 was enacted. That language unambiguously encompasses any use of appropriated funds to make the releases of data contemplated by the district court's order in this case. And because Section 644 reflects Congress's effort to prevent the serious harms that it believed would result from comprehensive disclosure of the databases, the law can accomplish its intended purpose only if it is applied to *all* future disclosures, including those based on FOIA requests that predated the enactment of the 2003 appropriations law. Compare *Southwest Ctr. for Biological Diversity* v. *United States Dep't of Agriculture*, 314 F.3d 1060, 1061-1062 (9th Cir. 2002) (newly enacted statutory provision authorizing withholding of particular information in response to FOIA request held applicable to pending FOIA suit). Application of Section 644 to this case is also consistent with the established rule that "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 273 (1994). Actual disclosure of ATF records, rather than submission of respondent's FOIA request, is thus the "relevant retroactivity event." *Id.* at 291 (Scalia, J., concurring in the judgments); see *id.* at 293; cf. *Miller* v. *French*, 530 U.S. 327, 344-345 (2000).

Contrary to respondent's suggestion (Supp. Br. 4), applying Section 644 to the data respondent seeks in this case does not prevent the federal courts from exercising their authority under the FOIA "to order the production of any agency records improperly withheld." 5 U.S.C. 552(a)(4)(B). Rather, by operation of Section 644, the requested records are *not* now "improperly withheld" within the meaning of Section

552(a)(4)(B). This Court addressed an analogous situation in *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375 (1980). The Court held that a federal court could not order the disclosure, under the FOIA, of records that the relevant federal agency had been enjoined from releasing by another district court in a separate lawsuit. *Id.* at 384-387. The Court explained that "[t]o construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the [FOIA] would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." 445 U.S. at 387. Similarly here, ATF could not release the disputed portions of the Trace and Multiple Sales Databases without spending appropriated funds in violation of the 2003 appropriations law. Because ATF's current withholding of those databases under the FOIA is mandated by an Act of Congress, the disputed records are not being "improperly withheld," and there is no basis for a federal court to order their release.

3. Respondent's reliance (Supp. Br. 3) on *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), is misplaced. The Court in *Plaut* held that Congress had violated separation-of-powers principles "[b]y retroactively commanding the federal courts to reopen final judgments." *Id.* at 219. The Court recognized, however, that Congress may direct appellate courts to apply newly enacted laws to cases pending on appeal. *Id.* at 226-227. This case remains pending on appeal. Furthermore, the district court stayed the effect of its disclosure order pending appeal, see J.A. 15, and that stay remains in effect. Because the district court's judgment never became "final" in the relevant sense, the constitutional rule announced in *Plaut* has no application to this case. Furthermore, the Court made clear in *Plaut* that it was not calling into question Acts of Congress that altered the prospective effect of injunctions entered by Article III courts.

514 U.S. at 232; see *Miller*, 530 U.S. at 341-350. That is what Section 644 does, by removing an essential predicate—that particular records be "improperly withheld"—for maintaining the injunction in effect.

4. Finally, respondent is wrong in arguing (Supp. Br. 7) that Section 644 "has no bearing on either of the questions presented by ATF's petition for certiorari." The House Report's references (at 20) to the threat that comprehensive disclosure of the databases would pose to "law enforcement" and to personal "privacy" (see Gov't Br. 39 n.20) track the language of the FOIA exemptions invoked by ATF in this case. Moreover, Congress's passage of Section 644, based on the concerns expressed in the House Report, directly undermines the court of appeals' conclusions that "release of the requested names and addresses does not raise any legitimate privacy concern," Pet. App. 13a, and that ATF's predictions of harm to law enforcement "are not *reasonable*," *id.* at 18a. In any event, the judgment of the court of appeals must be reversed because Section 644 itself now *requires* ATF to withhold data from the two databases in accordance with the practices that ATF has defended in this case, irrespective of the application of Exemptions 7(A) and 7(C). But in addition, as explained below, respondent's contention that those exemptions are inapplicable is without merit.

B. The Decisions Of The Courts Below Do Not Rest On The District Court's Resolution Of Disputed Factual Issues

Respondent contends (*e.g.*, Br. 9-11, 25-26, 35-36, 42) that the decisions below rest on district court factual findings that can be reviewed only for clear error. That characterization of the lower court rulings is incorrect.

Although respondent and the government each submitted evidentiary materials bearing on the applicability of the claimed exemptions, the district court issued no explicit findings of fact, but instead granted summary judgment to

respondent. See Pet. App. 19a, 30a. Nor did the judgment reflect any implicit resolution of disputed factual issues. To the contrary, the district court's analysis (see *id.* at 23a-27a) of the pertinent FOIA exemptions contains *no reference whatever* to any of respondent's evidentiary submissions. Rather, the clear thrust of the court's opinion was that the government's declarations, *considered without regard to other record evidence*, were insufficient to establish the applicability of the claimed exemptions. See *ibid.*

Although the court of appeals referred in passing to a "clear error" standard of review in FOIA cases generally (see Pet. App. 5a), it did not suggest that the district court's disposition of the case turned on the resolution of disputed factual issues, or that its affirmance rested on a deferential standard of review. Rather, the court of appeals' opinion shows that it independently reached the same conclusions as had the district court, based on its own assessment of ATF's submissions. See Gov't Pet. Stage Reply Br. 3.

C. ATF Properly Withheld Individual Names And Addresses Pursuant To FOIA Exemption 7(C)

1. *The privacy interests implicated here are substantial*

a. Respondent contends (Br. 13-17) that the privacy interests of firearm purchasers are minimal because gun sales are closely regulated; purchasers are on notice that their names may be reported to ATF; and ATF is not foreclosed from releasing the names of individual gun buyers when it finds disclosure to be warranted. Those attempts to minimize the substantial privacy interests at stake lack merit.

Respondent correctly observes (Br. 13-14) that gun buyers have no constitutional right to avoid disclosure of their identities to the government. But because the FOIA applies *only* to records in the possession of a federal agency, precedents regarding the government's constitutional authority to

obtain information are of marginal relevance in determining whether *public disclosure* will impair significant privacy interests. See Gov't Br. 23.[2] Nor does the absence of a statutory ban on dissemination of the information by ATF (see Resp. Br. 15, 17) mean that the privacy interests implicated here are insubstantial. A separate FOIA provision (Exemption 3) shields from compelled disclosure information that is "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3). The balancing process required by Exemption 7(C) is reserved precisely for those cases in which no such specific statutory bar to disclosure exists.

b. Respondent suggests (Br. 17) that public identification of firearms buyers will impair no significant privacy interests because the purchase of a gun is a lawful transaction. Substantial privacy interests under Exemption 7(C), however, are not limited to information concerning conduct that is illegal or otherwise blameworthy. In *United States Department of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994), for example, the Court held that a federal employee's privacy interest in preventing public disclosure of his home address "is far from insignificant." Release of federal records identifying particular individuals as gun owners, like release of information linking individuals to other defining personal characteristics or interests, could, *inter alia*, cause such persons to be subjected to unwanted commercial and other solicitation. Compare *id.* at 500-501; *Minnis* v. *United States*

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[2] Contrary to respondent's suggestion (Br. 13-14 n.10), nothing in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*), suggests that the absence of a constitutional right to privacy with respect to particular information is relevant to the Exemption 7(C) balancing. Neither the government's acquisition nor its subsequent release of the information at issue in *Reporters Committee*—"rap sheets" detailing particular individuals' criminal histories—would have violated any constitutional right of the persons involved. The Court nevertheless found that "[t]he privacy interest * * * is substantial." *Id.* at 771.

Dep't of Agriculture, 737 F.2d 784, 787 (9th Cir. 1984) (records that would reveal individuals' "personal interests in water sports and the out-of-doors" held protected by Exemption 6), cert. denied, 471 U.S. 1053 (1985). And while lawful private gun ownership is widespread in this country, it is sometimes controversial (as respondent's pending state-court lawsuit against members of the firearms industry demonstrates). It is therefore reasonable to suppose that many individuals who have purchased firearms would prefer to avoid indiscriminate public disclosure of that fact.

c. Disclosure of individual names and addresses in the Trace Database implicates the substantial privacy interest of all persons—firearms owners and others—in avoiding public association with a criminal investigation. See Gov't Br. 25-26. Respondent attempts to discount that privacy interest by asserting (Br. 20-21) that the Trace Database "provides no indication that any of these individuals did anything wrong or is actually involved in the investigation as a subject, witness, or otherwise." That argument is specious. Many of the persons identified in the Trace Database—who include the last known possessors of firearms believed to be connected to crimes, as well as any persons found with them at the time firearms were recovered—are undoubtedly suspects in, or witnesses to, the underlying criminal activities that precipitated the traces, or have been interviewed in the investigations. See J.A. 40-41.

Respondent's theory apparently is that an individual who is publicly associated with a criminal investigation suffers no meaningful incursion on his privacy unless his specific status in the investigation (*e.g.*, as "suspect" or "witness") is expressly referenced on the face of the released document. That theory is contrary both to precedent and to common sense. The pertinent court of appeals decisions (see Gov't Br. 25-26) make clear that *all* persons who are connected to a

criminal investigation have a significant privacy interest in avoiding public disclosure of their involvement.

2. *Public disclosure of individual names and addresses in the databases would not further any public interest that is relevant to the Exemption 7(C) balancing*

a. In balancing private and public interests under Exemption 7(C), "the only relevant public interest * * * is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government*." *Dep't of Defense* v. *FLRA*, 510 U.S. at 495.[3] Respondent does not contend that the names and addresses contained in the Trace and Multiple Sales Databases are inherently or directly probative of the manner in which ATF performs its responsibilities. Rather, respondent asserts that analysis of the names and addresses, in combination with a broad range of other data, might help to illuminate the agency's conduct. By way of example, respondent suggests (Br. 24) that the names contained in the Multiple Sales Database might be compared to those in criminal history records, to determine how frequently multiple purchasers are involved in criminal activity. Respondent further suggests (Br. 24-25) that the degree of correlation between multiple purchases and criminal activity might in turn shed light on ATF's own success in investigating firearm-related crime.

Under respondent's theory, a significant public interest in disclosure would exist whenever private data in government

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[3] Nothing in the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, casts doubt on the principle quoted in the text. See *O'Kane* v. *Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999). The congressional finding on which respondent relies (Br. 29 & n.19) neither amends the FOIA nor overrules any judicial decision, and it recognizes that public access to agency records under the FOIA is "subject to statutory exemptions." 5 U.S.C. 552 note.

files could be used to replicate the government's own investigation or analysis. Nothing in this Court's decisions suggests that such speculation regarding the possible derivative uses of agency records establishes a meaningful public interest under Exemption 7(C), let alone one sufficient to outweigh the substantial privacy interests implicated here.[4] If the prospect of evaluating agency conduct by that means were sufficient to establish a relevant public interest in disclosure of names and other personal data under Exemption 7(C), it would be difficult to imagine any scenario in which a significant public interest would be lacking.

b. Respondent contends (Br. 27-28) that ATF's duties under the GCA include the provision of assistance to state and local authorities, and that release of the requested names and addresses would assist in the achievement of that mission. But even assuming, *arguendo*, that release of the names and addresses would aid respondent's efforts to enforce its own gun laws, and thus indirectly serve that goal of the GCA, the prospect of such assistance is irrelevant to the Exemption 7(C) balancing. In *Dep't of Defense* v. *FLRA*,

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[4] In *United States Department of State* v. *Ray*, 502 U.S. 164, 179 (1991), the Court found that it "need not address the question whether a 'derivative use' theory would ever justify release of information about private individuals." The Court recognized, however, that "[m]ere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy." *Ibid.*; see also, *e.g.*, *McCutchen* v. *Department of Health & Human Servs.*, 30 F.3d 183, 188 (D.C. Cir. 1994) ("mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C)"); *Miller* v. *Bell*, 661 F.2d 623, 630 (7th Cir. 1981) (asserted public interest that requester "would use the information to serve as a watchdog over the adequacy and completeness of an FBI investigation * * * would apparently apply to every FBI criminal investigation, severely vitiating the privacy and confidentiality provisions of exemption 7(C) and (D)"), cert. denied, 456 U.S. 960 (1982).

this Court rejected a similar contention that compelled release of federal employees' addresses was appropriate because the addresses would assist the employees' bargaining representative in fulfilling the purposes of the Federal Service Labor-Management Relations Statute. The Court acknowledged that disclosure "might allow the unions to communicate more effectively with employees," but it found that "[t]he *relevant* public interest supporting disclosure in this case is negligible, at best," because "such disclosure would reveal little or nothing about the employing agencies or their activities." 510 U.S. at 499 (emphasis added). The Court concluded that "because all FOIA requesters have an equal, and equally qualified, right to information, the fact that respondents are seeking to vindicate the policies behind the Labor Statute is irrelevant to the FOIA analysis." *Id.* at 497. The same principles apply here.

D. ATF's Withholding Policies With Respect To The Trace Database Are Appropriate Under Exemption 7(A)

ATF has determined that premature release of the various categories of information contained in the Trace Database could reasonably be expected to cause substantial *cumulative* harm to law enforcement, even if the extent of the risk associated with any particular trace may be difficult to ascertain. As ATF's declarant explained, immediate and comprehensive disclosure of trace-related data would subvert both (a) a significant number of the underlying investigations that precipitated the trace requests, and (b) ATF's own long-term investigations into suspected systemic violations of federal firearm laws. See Gov't Br. 40-45. Withholding practices based upon that determination easily satisfy the agency's obligation to establish that release of the vast quantity of additional information sought by respondent "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A); see 2002 House Report

20 (stating that "comprehensive" disclosure of databases would "jeopardiz[e] criminal investigations and officer safety" and thus "pose a risk to law enforcement and homeland security").

1. Respondent relies (Br. 35-36, 39, 40 n.24, 42) on its own witness's testimony that immediate release of trace-related information would not likely cause disruption of law enforcement proceedings. The district court in ordering disclosure of the Trace Database did not rely on that testimony. See pp. 6-7, *supra*. In any event, a judicial order requiring the release of records for which the agency has invoked Exemption 7(A) could not properly be based on the court's decision to credit the requester's witnesses rather than the government's.

The court in a FOIA case must "determine the matter de novo," and "the burden is on the agency to sustain" any withholding of responsive records. 5 U.S.C. 552(a)(4)(B); see Resp. Br. 43. As the Court observed in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978), however, "the mere fact that the burden is on the Government to justify nondisclosure does not * * * aid the inquiry as to what kind of burden the Government bears." Under Exemption 7(A), as amended in 1986, the relevant question is whether release of requested records "*could reasonably be expected* to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A) (emphasis added)—an objective standard that supports the sort of generic judgments made by ATF even more strongly than did Exemption 7(A) at the time *Robbins Tire* was decided. See Gov't Br. 36. And where (as here) the records at issue have not historically been released to the public, the inquiry is predominantly logical rather than empirical: the agency's burden is simply to "trace a rational link" between the nature of the pertinent records and the harm projected from disclosure. *Crooker* v. *BATF*, 789 F.2d

64, 67 (D.C. Cir. 1986) (R.B. Ginsburg, J.); Gov't Br. 36-37, 48.[5]

Through the Benton Declaration, the government plainly "traced a rational link" between the nature of the information at issue in the Trace Database and the substantial *cumulative* harm to law enforcement projected to result from the wholesale public disclosure respondent seeks. Although the government must demonstrate that Exemption 7(A) covers the records at issue here, it need not identify the particular investigations that would likely be disrupted. See *Robbins Tire*, 437 U.S. at 234-236. The fact that respondent's witnesses discounted the likelihood of interference with law enforcement provides no basis for concluding that ATF's expectation of harm was *unreasonable*.

2. Respondent acknowledges (Br. 33) that, under *Robbins Tire*, an agency in invoking Exemption 7(A) may rely on categorical judgments and "need not demonstrate that each requested document, if disclosed, would be likely to interfere with an ongoing or anticipated investigation." Respondent contends (Br. 32-33, 41), however, that ATF's withholding practices with respect to the Trace Database are deficient because (a) the agency is not certain at any given time pre-

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[5] Respondent asserts (Br. 42 n.26) that "ATF has released trace data on numerous occasions in the past to advocacy groups, journalists, and even purchasers," and that the agency identified no harms resulting from those disclosures. Respondent has not contended, however, that the Trace Database has ever been released to the public in its entirety; respondent's district court declarations asserted only that private individuals have occasionally obtained access to the database for brief periods of time, or that isolated data items have previously been released. The government has vigorously contested those contentions. See, *e.g.*, Gov't C.A. Reply Br. 14-15; Supplemental Declaration of Dorothy A. Chambers 4-5 (Dec. 7, 2000). The district court expressly declined to resolve that question, see Pet. App. 30a n.4, and the court of appeals decided the case on the understanding that "this type of information has never before been released," *id.* at 18a.

cisely which of the underlying investigations that precipitated the trace requests remain open, and (b) the agency does not attempt to identify those traces that are most likely to involve information that is the most "sensitive" (in the sense that its immediate release would be likely to compromise the investigation). Those observations provide no basis for rejecting ATF's disposition of respondent's FOIA request.

"This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the [FOIA]." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989). The need for "workable rules," *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Reporters Committee*, 489 U.S. at 779, is particularly evident here, since the Trace Database currently contains the results of well over one million firearm traces, conducted at the request of more than 17,000 law enforcement agencies. See Gov't Br. 7 & n.5. Unless ATF is directly involved in an investigation, it does not require the agency that requests a trace to provide any ongoing information regarding the nature and status of its enforcement proceedings, and it has no reason or responsibility under the GCA to monitor the progress of the investigations that precipitated the various trace requests. J.A. 23-25.

Nothing in the FOIA requires ATF to acquire, create, or maintain that information, see *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152 (1980), and any effort to do so with respect to 200,000 yearly trace requests would entail staggering administrative burdens. See J.A. 29. And even after the requesting agency's investigation has terminated, data initially obtained in connection with the trace may be used in ATF's own long-term investigations into possible systemic violations of the federal firearms laws. See Gov't Br. 7-8, 44-45. In processing respondent's FOIA request, ATF therefore necessarily relied on

reasonable judgments, based on the length of time that had expired since the submission of trace requests, to establish a categorical policy for ensuring that ongoing investigations would not be compromised.

As to the relative "sensitivity" of different trace requests: ATF requires the requesting agency to submit only limited information—the type and serial number of the firearm. J.A. 23. Even when the requesting agency voluntarily provides additional data (such as the address where the weapon was recovered, and the names of the gun's last known possessor and any persons with him at the time of recovery), ATF will lack the full range of information needed to assess the likelihood and extent to which public disclosure of data pertaining to a particular trace would compromise the underlying investigation. And even if ATF possessed the information needed to conduct that inquiry in a particular instance, any effort to perform trace-by-trace analysis on some 200,000 traces annually would be wholly infeasible. The present case thus vividly illustrates the need for the categorical approach to Exemption 7(A) that this Court endorsed in *Robbins Tire* and that Congress reinforced in the 1986 amendments.

Respondent suggests (Br. 41) that ATF could have adopted a policy under which each requesting agency would state, at the time it submits a trace request, whether it believes that immediate disclosure of trace-related information would impede the underlying investigation. Such an approach would entail substantial drawbacks. At the time a trace request is made, the requesting agency itself will often be unsure of all of the possible implications of trace-related information, and it will have no basis for judging the potential impacts of immediate disclosure on ATF's own long-term investigations (see p. 15, *supra*). A requirement that each requesting agency assess the sensitivity of its requests on a trace-by-trace basis would divert the agency's attention from the immediate needs of its unfolding investigation and

would add significant complexity to a tracing process that is intended to be expeditious so that it can be most effective.

Rather than attempt to determine the relative sensitivity of each individual trace request, ATF chose to treat all firearm traces in a consistent manner, but to apply different withholding periods to different *data elements* within the Trace Database. That method of processing respondent's FOIA request exemplifies the generic or categorical approach endorsed by this Court in *Robbins Tire*. See Gov't Br. 35-37, 40-41. ATF's declarant explained in detail the manner in which law enforcement interests could be impaired by premature disclosure of data contained within each of six general categories of information. See *id.* at 8-10, 40-41.

The great majority of data elements within the Trace Database, including the serial number and manufacturer of each traced weapon, are publicly disclosed after a one-year interval. And except for the individual names and addresses that the agency withholds indefinitely under Exemption 7(C), *all* information contained in the Trace Database is ultimately released to the public. ATF's nuanced disclosure practices with respect to the Trace Database are thus a far cry from the presumptive *permanent* withholding of *all* FBI interview reports in criminal cases that this Court characterized in *United States Dep't of Justice* v. *Landano*, 508 U.S. 165, 175 (1993), as "not so much categorical as universal."

Finally, even if ATF could accurately and expeditiously identify those firearm traces for which the immediate release of associated data is *most* likely to disrupt ongoing investigations, a policy of withholding *only* data pertaining to those traces would not adequately protect the law enforcement interests at stake. Rather, ATF has determined that trace-related data should be released to the public only when, and to the extent that, the agency can conclude with reasonable assurance that disclosure will *not* interfere with

enforcement proceedings. That approach is wholly reasonable, in light of (a) the vast size of the Trace Database and the consequent prospect that substantial *cumulative* harm would result from release of the database as a whole, (b) the fact that every trace is premised on a "bona fide criminal investigation" (18 U.S.C. 923(g)(7)) concerning suspected misuse of a firearm, and (c) the "standard operational security practice in the law enforcement community that shared investigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure could compromise an investigation or reveal the identities of law enforcement personnel or third parties" (J.A. 28-29). The danger of interference with enforcement proceedings is especially acute in light of the computerized format of the records, which increases the accessibility of the data and exacerbates the risk of widespread public dissemination. See 2002 House Report 20 (noting that information in ATF databases, "once released, might easily be disseminated through the Internet").

3. The government's declarant identified a variety of situations in which premature release of trace-related information could compromise law enforcement interests. See Gov't Br. 41-45. Respondent discounts that evidence, chiefly on the ground that no one of those scenarios is likely to recur in a large percentage of cases. See Resp. Br. 38-40. That assertion misses the point. Given the vast size of the Trace Database, and the wide variety of ways in which public disclosure of trace-related data could facilitate obstruction of investigative efforts, immediate release of the database as a whole "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A), even if no *particular* chain of events can be identified as the likely consequence of a premature release of information about any given trace.

For example, respondent emphasizes (Br. 34) that "some 70% of all traces identify the individual who possessed the firearm at the time the authorities recovered it," so that "in most cases, the persons from whom the firearm was recovered know full well that it has been seized by the authorities." But because ATF performs approximately 200,000 traces per year (J.A. 24), the remaining 30% of the Trace Database contains the results of some 60,000 traces annually, as to which immediate release of trace information could well alert the prior possessors of hidden or discarded firearms that their guns have been recovered. Respondent also observes (Br. 37, 38) that a criminal can seek to intimidate potential witnesses or otherwise obstruct an investigation even if he is unaware that law enforcement officials have acquired the gun that was used in the crime. Efforts to impede an investigation, however, entail risks of their own; and it is eminently reasonable to suppose that a criminal will be more likely to run those risks if he knows that police are on his trail. Similarly, although higher-ranking members of a criminal organization often may be aware that a subordinate has been arrested (see Resp. Br. 38), there is no reason to believe that this is always the case. See Gov't Br. 41-42.

4. When the law enforcement agency that requests a trace suspects that a particular firearms dealer may be involved in criminal activity, it can utilize a "do not contact" code to alert ATF that the dealer should not be contacted in the course of the tracing process. Gov't Br. 35 n.18. Data associated with those "coded" traces are excluded from the disclosure obligation imposed by the court of appeals. *Ibid*; see Pet. App. 9a. Respondent asserts (Br. 36) that "the only category of trace data identified in the record as likely to be sensitive is the data that is specially coded or shielded" in that manner.

That assertion is incorrect. The "do not contact" code is used only to address a specific law enforcement problem (*i.e.*,

the danger that contact by ATF with a particular dealer during its tracing of a specific firearm might compromise an investigation into suspected dealer misconduct); it is not used to determine whether and when particular trace data should be disclosed *to the public*. Although the government's declarant relied in part on illustrative scenarios involving investigations of corrupt dealers (see Resp. Br. 37), in which the requesting agency might reasonably be expected to utilize the coding process, the declarant also identified a range of situations in which premature disclosure of trace-related information could be expected to disrupt ongoing investigations even though no dealer misconduct is suspected. See Gov't Br. 41-45.[6]

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For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

FEBRUARY 2003

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[6] There is no merit to respondent's contention (Br. 43-49) that, if this Court finds some but not all of the requested information (*e.g.*, names and addresses of private individuals) to be exempt from compelled disclosure under the FOIA, ATF can be required to "encrypt" the exempt data. Although the court in a FOIA case may order disclosure of "[a]ny reasonably segregable portion of a record * * * after deletion of the portions which are exempt," 5 U.S.C. 552(b), the encryption methodology advocated by respondent and approved by the district court is improper because it would result in something other than the mere deletion of exempt material. The district court required not simply that each item of exempt information (*e.g.*, an individual's name) be excised or rendered indecipherable, but that each such item be replaced with a "unique identifier code." Pet. App. 28a; see Resp. Br. 46. Because the FOIA does not authorize a reviewing court to order the creation of new agency records, see, *e.g.*, *Kissinger*, 445 U.S. at 152; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975), ATF may not be required to "encrypt" exempt data in that manner.