

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN LINDSAY-POLAND,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE, et al.,

Defendants.

Case No. 22-cv-07663-EMC

**ORDER GRANTING IN PART
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT; AND
DENYING IN PART DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT**

Docket Nos. 32, 35

Plaintiff John Lindsay-Poland filed a request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to obtain certain records related to firearms from Defendants United States Department of Justice (“DOJ”) and Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). After Defendants denied Plaintiff’s initial request and subsequent appeal, Plaintiff filed the instant action. Now pending before the Court are the parties’ cross-motions for summary judgment. For the following reasons, the Court hereby **GRANTS** in part Plaintiff’s motion, **DENIES** in part Defendants’ motion, and remands for further proceedings consistent with this decision. The Court also stays further proceedings in this suit pending the remand.

I. FACTUAL & PROCEDURAL BACKGROUND

The evidence of record reflects as follows.

ATF is a criminal and regulatory enforcement agency within DOJ. *See* Siple Decl. ¶ 3. ATF’s responsibilities include enforcing federal firearms laws such as the Gun Control Act of 1968 (“Gun Control Act”), which, *inter alia*, established a licensing system for persons or entities engaged in manufacturing, importing, dealing, and collecting firearms. Licensees are referred to as Federal Firearm Licensees or “FFLs.” *See* Siple Decl. ¶ 3.

Pursuant to the Gun Control Act, the Attorney General is authorized to administer firearms tracing. “‘Tracing’ a firearm is the systematic tracking of a recovered firearm from its manufacturer or importer, through its subsequent introduction into the distribution chain (wholesaler/retailer), to identify an unlicensed purchaser.” Siple Decl. ¶ 5. Law enforcement can use trace data “to link a suspect to a firearm-related criminal investigation, to identify any potential firearms traffickers, and to detect patterns in the sources and kinds of firearms that are used in a crime.” Siple Decl. ¶ 6.

The Attorney General has delegated the authority to trace firearms to ATF. *See* Siple Decl. ¶ 4. In conjunction with this responsibility, ATF maintains a law enforcement information database known as the Firearms Tracing System (“FTS”). *See* Siple Decl. ¶ 4. Trace data is maintained in the FTS and “includes the 8-digit identification number of the FFLs involved in the sale or transfer of the firearm, along with any information regarding the retail purchaser of the firearm.” Siple Decl. ¶ 6.

In March 2021, Plaintiff submitted a FOIA request to ATF via an online form. *See* Siple Decl. ¶ 11 & Ex. A (FOIA request); *see also* Compl. ¶ 66. Plaintiff sought, in essence, information from the FTS. The FOIA request stated in relevant part as follows:

I request records based on a database query containing data on firearms recovered in Mexico, Guatemala, Honduras, and El Salvador, and traced by the ATF, since Dec. 31, 2014. From this, I request database query results with the following data:

1. Number of firearms traced, and with the following disaggregation, for each country where firearm was recovered and each year:
 - state of FFL where firearm was purchased
 - county of FFL where firearm was purchased
 - zip code of FFL where firearm was purchased
 - type of firearm (rifle, shotgun, pistol, revolver, other)
 - caliber of firearm
 - make of firearm
2. Number of buyers to which recovered firearms were traced as purchases, by year, by country where firearm was recovered, and by county of purchase
3. Number of FFLs to which recovered firearms were traced as purchases, with the following disaggregations for each country

and year of purchase:

- county and state of purchase
- type of firearm (rifle, shotgun, pistol, revolver, other)
- caliber of firearm.

Siple Decl., Ex. A.

In his FOIA request, Plaintiff also stated that he was seeking the information “as a representative of the news media. I have published extensively on issues related to firearms trafficking in the Americas, including widely cited research reports, op-eds in publications such as the Los Angeles Times, a documentary film, and a web site dedicated to the issue.” Siple Decl., Ex. A (underlining in original). The underlined items were hyperlinks. See Siple Decl. ¶ 19. For instance, the hyperlink for the *Los Angeles Times* led to an op-ed piece in which Plaintiff was the co-author. See Siple Decl. ¶ 21. The hyperlink for the documentary film led to a film co-directed by Plaintiff. See Siple Decl. ¶ 22. And the hyperlink for the website led to the website for Stop US Arms to Mexico (stopusarmstomexico.org), an organization for which Plaintiff is the coordinator. See Siple Decl. ¶ 23; Siple Decl., Ex. A.

Finally, Plaintiff requested a fee waiver. Although FOIA provides for a limit on fees when records are sought by a representative of the news media for noncommercial use (providing for “reasonable standard charges for document duplication”), 5 U.S.C. § 552(a)(4)(A)(ii)(II),¹ Plaintiff

¹ Section 552(a)(4)(A)(ii) provides:

In this clause, the term “a representative of the news media” means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the

asked for a complete waiver of fees pursuant to § 552(a)(4)(A)(iii) (providing for no charge or a reduced charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester”). See Siple Decl., Ex. A (“I request a waiver of all costs associated with fulfilling this submission pursuant to 5 U.S.C. [§] 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k). Disclosure of the requested records will contribute significantly to public’s understanding of the operations or activities of the government.”).

In May 2021, ATF acknowledged receipt of Plaintiff’s FOIA request. See Siple Decl., Ex. B (letter). In the same letter, ATF stated: “We have determined that you are a non-media, non-commercial requester pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(III).” Siple Decl., Ex. B.

Several months later, in December 2021, ATF issued its ruling on Plaintiff’s FOIA request. It stated:

You have requested material that ATF is required to maintain pursuant to the Gun Control Act (GCA) and/or is contained in ATF Firearms Trace System database. This information is exempt from disclosure pursuant to Exemption (b)(3) of the FOIA. Exemption (b)(3) of the FOIA permits the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met: the statute either (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, *or* (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. Thus, a statute falls within the exemption’s coverage if it satisfies any one of its disjunctive requirements.

Beginning in 2003, Congress placed restrictions on ATF’s disclosure of certain GCA related information. In short, ATF can only provide certain GCA data to a law enforcement agency or a prosecutor solely in connection with a criminal investigation or prosecution. Beginning in Fiscal Year 2006 [with the Tiahrt Rider], Congress included a provision within each iteration of the restriction on disclosure that effectively made that restriction permanent.

The most recent iteration of these various restrictions was included in ATF’s 2012 Appropriation Bill, Public Law 112-55, 125 Stat. 552

journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

5 U.S.C. § 552(a)(4)(A)(ii).

[the current version of the Tiahrt Rider]. Some of the information in the requested records falls within this restriction. Because the Fiscal Year 2006 through 2008 restrictions satisfy all the requirements of FOIA Exemption (b)(3), and the 2012 language [in the Tiahrt Rider] . . . carries forth those restrictions, I am withholding the trace data pursuant to 5 U.S.C. § 552 (b)(3) and Public Law 112-55, 125 Stat. 552.

Siple Decl., Ex. C (letter). ATF’s decision did not address the fact that the Tiahrt Rider contained certain exceptions – *i.e.*, allowing for disclosure in certain circumstances.

In March 2022, Plaintiff appealed the ATF’s decision. *See* Siple Decl. ¶ 16 & Ex. D (letter). In the appeal, Plaintiff argued, *inter alia*, that the Tiahrt Rider did not meet the statutory requirements for Exemption (b)(3) of FOIA. Plaintiff also argued that, even if the Tiahrt Rider did meet the statutory requirements, disclosure was still warranted because the Tiahrt Rider contained an exception (Exception (C)) allowing for disclosure of statistical aggregate data.

In October 2022, ATF denied Plaintiff’s appeal. It reiterated that it had “properly withheld [the] information [sought] in full because it is protected from disclosure under the FOIA pursuant to 5 U.S.C. § 552(b)(3). This provision concerns matters specifically exempted from release by a statute other than the FOIA (in this instance, [the Tiahrt Rider] which prohibits ATF from using appropriated funds to disclose firearms database information).” Siple Decl., Ex. E (letter). The appeal did not address whether Exception (C) to the Tiahrt Rider applied.

Having exhausted his administrative remedies, Plaintiff filed this lawsuit, seeking to compel production of the requested documents.

In support of their motion for summary judgment, Defendants have submitted a declaration from Adam Siple, Chief of ATF’s Information and Privacy Governance Division. Mr. Siple’s declaration addresses for the first time Plaintiff’s contention that, even if the Tiahrt Rider applies, ATF should still have disclosed the records sought under Exception (C) to the Rider. *See* Siple Decl.

Exception (C) to the Rider states that the Rider

“shall not be construed to prevent: . . . (C) **the publication of** annual statistical reports on products regulated by the [ATF], including total production, importation, and exportation by each licensed importer (as so defined) and licensed manufacturer (as so defined), or **statistical aggregate data regarding firearms traffickers and**

trafficking channels, or firearms misuse, felons, and trafficking investigations.”

Center for Investigative Reporting v. United States DOJ, 14 F.4th 916, 933 (9th Cir. 2021) [hereinafter *CIR*] (quoting 123 Stat. at 3129; emphasis added). According to Mr. Siple, Plaintiff’s FOIA request did not fall within the scope of Exception (C) because it did not establish the element of “publication” – specifically, because Plaintiff failed to establish that he is a news media representative. See Siple Decl. ¶ 24 (stating that “Plaintiff’s FOIA request did not demonstrate that he is a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii), which the Ninth Circuit has suggested [in *CIR*] should guide ATF’s application of Exception C to the 2012 Tiahrt Rider”); see also *CIR*, 14 F.4th at 934 (stating that “news media organizations are precisely the sort of ‘representative[s] of the public’ through which individuals and entities commonly distribute information to the public”).

Mr. Siple added that, to the extent Plaintiff sought the zip code of any FFL where a traced firearm was purchased, there was an independent problem. Exception (C) allows only for disclosure of “aggregate data,” but at least in some instances revealing a “FFL’s zip code would reveal the identities of individual FFLs.” Siple Decl. ¶ 30.

ATF publishes on its website a monthly list of all FFLs. See <https://www.atf.gov/firearms/listing-federal-firearms-licensees>. As of June 2023, this includes monthly reports dating back to January 2014. Included in each of the publicly released data sets is the FFL’s zip code. As of May 31, 2023, there were 78,593 licensees with a license type of 1, 2, or 7. The holders of any of these three license types are authorized to conduct retail firearm sales and are thus most likely to be involved in a traced crime gun. Of the 78,593 FFLs with a license type of 1, 2, or 7, 13,544 FFLs (or approximately 17 percent of all FFLs with these license types) associate with a zip code in which only one (8,818) or two (4,726) FFLs have a place of business. Accordingly, by identifying the zip codes to which recovered firearms were traced, there is a statistically significant chance that individual FFLs will be revealed. As such, this data point cannot be considered aggregate data.

Siple Decl. ¶ 31.

In turn, in support of his motion for summary judgment, Plaintiff has submitted a declaration in which he provides more detail about his work “as a journalist, researcher and analyst.” Lindsay-Poland Decl. ¶ 3. As reflected in the declaration, prior to his current job, Plaintiff was an editor and staff writer for Latin-America-focused publications, and he has

dedicated much of his 30-year career to researching and writing human rights and U.S. security policy in Latin America. *See* Lindsay-Poland Decl. ¶ 4. Currently, Plaintiff serves as the coordinator of Stop U.S. Arms to Mexico, an organization that analyzes and reports on the flow of firearms to Mexico and other countries. *See* Lindsay-Poland Decl. ¶ 3. Part of his present work includes communicating with local experts and human sources, reviewing relevant open-source intelligence sources, and gathering information from sources and disseminating it to the public. *See* Lindsay-Poland Decl. ¶ 5.

II. DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure 56 provides that a “court shall grant summary judgment [to a moving party] if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). An issue of fact is genuine only if there is sufficient evidence for a reasonable jury to find for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). “The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party].” *Id.* at 252. At the summary judgment stage, evidence must be viewed in the light most favorable to the nonmoving party and all justifiable inferences are to be drawn in the nonmovant’s favor. *See id.* at 255.

The Ninth Circuit has observed that “[m]ost FOIA cases are resolved by the district court on summary judgment, with the district court entering judgment as a matter of law,” although, “if there are genuine issues of material fact in a FOIA case, the district court should proceed to a bench trial or adversary hearing.” *Animal Legal Def. Fund v. United States FDA*, 836 F.3d 987, 989-90 (9th Cir. 2016). It is a common practice for the government to submit an agency affidavit (or declaration) to explain the search done for documents and/or why there any documents were not disclosed. *Cf. Hamdan v. United States DOJ*, 797 F.3d 759, 772 (9th Cir. 2015) (“[W]e . . . give considerable deference to agency affidavits made in apparent good faith where the affidavits reasonably describe the justifications for nondisclosure and show that the content withheld falls within one of FOIA’s exemptions.”). A court may rely on an affidavit “so long as the affiants are

knowledgeable about the information sought and the affidavits are detailed enough to allow the court to make an independent assessment of the government’s claim.” *Lane v. DOI*, 523 F.3d 1128, 1135 (9th Cir. 2008); *see also id.* at 1136 (adding that, if “the court finds that the government affidavits are ‘too generalized,’ it may examine the disputed documents in camera to make a ‘first-hand determination of their exempt status’”). If an agency affidavit is deficient, then a court may ask the government to supplement the affidavit or it may remand to the agency. *See Frost v. United States DOJ*, No. 17-cv-01240-JCS, 2018 U.S. Dist. LEXIS 57767, at *27-28 (N.D. Cal. Apr. 4, 2018); *see also Nw. Coal for Alternatives to Pesticides v. EPA*, 254 F. Supp. 2d 125, 133 (D.D.C. 2003) (noting that a remand to the agency is appropriate where a court cannot properly perform judicial review because the agency has not sufficiently explained the reasons for its decision); *cf. People for the Ethical Treatment of Animals, Inc. v. Bur. of Indian Affairs*, 800 F. Supp. 2d 173, 178 (D.D.C. 2011) (stating that, “in a FOIA case, even if defendant had failed in obtaining summary judgment because of an inadequate search, it does not necessarily follow that plaintiff prevails[;] [r]ather, the usual remedy is for the Court to remand to the agency to expand its search or to provide more detailed declarations regarding the scope of the search”).

B. FOIA

FOIA is animated by “the fundamental principle of public access to Government documents.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989). It is “broadly conceived,” and “disclosure, not secrecy” is its dominant objective. *Id.* at 151-52. At the same time, Congress has exempted some information “under clearly delineated statutory language.” *Id.* at 152 (citing *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976)). These exemptions are “limited” and “must be narrowly construed.” *Rose*, 425 U.S. at 361. “Furthermore, ‘the burden is on the agency to sustain its action.’” *John Doe Agency*, 493 U.S. at 152 (citing 5 U.S.C. § 552(a)(4)(B)). In other words, “[g]iven FOIA’s overarching purpose, ‘the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.’” *Civil Beat Law Ctr. for the Pub. Int., Inc. v. Centers for Disease Control & Prevention*, 929 F.3d 1079, 1084 (9th Cir. 2019) (citing *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)).

In the case at bar, ATF denied Plaintiff's FOIA request, citing Exemption (b)(3) of FOIA and the 2012 Tiahrt Rider. Under Exemption (b)(3) of FOIA, disclosure is not required for a matter

specifically exempted from disclosure by statute . . . if that statute –

(A)

- (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
- (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3). The OPEN FOIA Act “added the requirement in subsection (b)(3)(B),” *Whitaker v. DOC*, No. 5:17-cv-192, 2017 U.S. Dist. LEXIS 210967, at *11 (D. Vt. Dec. 20, 2017) – *i.e.*, requiring that a statute specifically cite to Exemption (b)(3). The purpose of the requirement was to “ensure an open and deliberative process in Congress by providing for related legislative proposals to explicitly state such required citations . . .” 111 S. 612 (2009).

In the instant case, ATF cited the 2012 Tiahrt Rider as the statute that relieved it of its obligation to disclose material under FOIA.² Under the 2012 Tiahrt Rider,

no funds appropriated under this or any other Act may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section . . .

except that

[the Tiahrt Rider] shall not be construed to prevent . . . (C) the publication of annual statistical reports on products regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives, including production, importation, and exportation by each licensed importer (as so defined) and licensed manufacturer (as so defined), or statistical

² In the present case, there is no dispute that the only relevant statute applicable here is the 2012 Tiahrt Rider, which is an unaltered version of the 2010 Rider. The Ninth Circuit has expressly held that the 2010 Rider “impliedly repealed the 2005 and 2008 Riders [*i.e.*, earlier versions of the Rider] in full.” *CIR*, 14 F.4th at 927.

aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations . . .

Pub. L. No. 112-55, 125 Stat. 552 (2012).

As reflected in the parties' cross-motions for summary judgment, the instant case presents two issues for the Court to resolve: (1) whether the 2012 Tiahrt Rider exempts the information Plaintiff seeks from disclosure under FOIA (*i.e.*, whether Exemption (b)(3) of FOIA applies), and (2) if so, whether Exception C of the 2012 Tiahrt Rider nevertheless applies such that the information should still be disclosed to Plaintiff.

C. Exemption (b)(3) of FOIA

There is limited authority on the issue of whether Exemption (b)(3) of FOIA applies where the Tiahrt Rider is implicated. The only circuit court that appears to have directly addressed the issue is the Second Circuit. In *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 984 F.3d 30 (2d Cir. 2020), the Second Circuit held that the Tiahrt Rider exempted FTS data from FOIA disclosure pursuant to Exemption (b)(3). *See id.* at 38. The court acknowledged that the Rider failed to expressly cite Exemption (b)(3) as required by FOIA. But it stated that,

[w]hen Congress enacted the 2012 Tiahrt Rider, . . . it was not bound to follow the specific-citation requirement it had adopted in the OPEN FOIA Act. When enacting subsequent legislation, Congress "remains free . . . to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." And when it adopts the later statute, Congress "remains free to express any such intention either expressly or by implication as it chooses."

Accordingly, the specific-citation requirement of the OPEN FOIA Act does not dictate the outcome in this case. It provides a "background principle of interpretation" of which we assume Congress is "aware . . . when it enacts new . . . statutes." But if "ordinary interpretive considerations" nevertheless indicate that Congress intended to depart from the background principle when it adopted the later statute, we must give that statute the full effect that its "plain import or fair implication" demands.

Id. at 39 (quoting *Dorsey v. United States*, 567 U.S. 260, 274-75 (2012)). The court rejected the plaintiff's contention that a more rigorous standard for an implied repeal applied. *See id.* at 42 (citing *Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (stating

that “repeals by implication are not favored and are a rarity[:] [p]resented with two statutes, the Court will regard each as effective – unless Congress’ intention to repeal is clear and manifest or the two laws are irreconcilable”) (internal quotation marks omitted).

The Second Circuit concluded that ordinary interpretive considerations did clearly indicate that the plain import or fair implication of the Rider was to exempt FTS data from FOIA disclosure. First, the court looked at the text of the Rider on its face.

The text of the rider . . . provides that no appropriated funds may be used to disclose “the contents of the Firearms Trace System database” and other specified information collected by the ATF – subject to exceptions for law enforcement, national security, and intelligence uses – and that “all such data shall be immune from legal process.” Because the ATF operates only with appropriated funds, and because FOIA disclosure occurs subject to legal process, the rider exempts FTS data from FOIA disclosure.

Everytown, 984 F.3d at 40.

Second, the court considered the history and prior text of the Rider:

The enactment of the 2012 Tiahrt Rider marked the eighth time that Congress passed such a rider in the decade spanning 2003 to 2012. Congress passed the first Tiahrt Rider after the Seventh Circuit affirmed a district court decision requiring FOIA disclosure of FTS data. It strengthened the rider’s antidisclosure language to include the phrase “all such data shall be immune from legal process,” after the Seventh Circuit continued to maintain that FTS data was subject to FOIA disclosure. The Seventh Circuit then recognized that Congress’s “intent to bar access to [FTS] information is unmistakable.” Congress continued to use this antidisclosure language throughout the 2000s and courts uniformly held that the Tiahrt Riders exempted FTS data from FOIA disclosure.

Id. at 40-41. The Second Circuit then pointed out that,

[b]ecause the 2009 Tiahrt Rider applied to “fiscal year 2009 *and thereafter*,” that disclosure exemption would remain in effect today if Congress had not passed a subsequent Tiahrt Rider, and it unquestionably did not require a citation to Exemption Three.

When Congress employed the same antidisclosure language in the 2010 Tiahrt Rider and later the 2012 Tiahrt Rider, Congress is best understood to have intended that language to continue to exempt FTS data from FOIA disclosure [*i.e.*, in spite of the failure to cite Exemption (b)(3) of FOIA]. The interceding enactment of the OPEN FOIA Act’s specific-citation requirement does not overcome the elementary principle that Congress uses the same language to accomplish the same objective.

Id. at 41 (emphasis in original); *see also Abdeljabbar v. Bureau of Alcohol, Tobacco & Firearms*, 74 F. Supp. 3d 158, 175 (D.D.C. 2014) (“Congress’s decision to incorporate similar language into appropriations bills after 2009 demonstrates its intent to continue the disclosure prohibition.”)

Unlike the Second Circuit, the Ninth Circuit has not squarely addressed the issue now before the Court. In *CIR*, the plaintiff was an organization that “participated in the national debate surrounding guns in America.” *CIR*, 14 F.3d at 922. It filed a FOIA request asking ATF for “records depicting the ‘[t]otal number of weapons traced back to former law enforcement ownership, annually from 2006 to the present.’” *Id.* ATF took the position that the Tiahrt Rider barred disclosure of the information; it also asserted that “FOIA did not require [it] to run [the] search [requested by the plaintiff] in the FTS database because such a query would require it to create a new agency record.” *Id.*

The majority expressly declined to address the issue of whether the Rider applied in the first instance due to its failure to refer to Exemption (b)(3) of FOIA. It noted:

[T]his is not the case to address that question, for the issue is clearly waived. Neither party raised this point before the district court, and no party or amici discussed this issue in briefing on appeal. Indeed, the parties did not “frame[] this case as [] whether the Tiahrt Amendment or the OPEN FOIA Act governs.”

Id. at 932.

In a footnote, however, the majority implied the Rider did not repeal the OPEN FOIA Act. *See id.* at 932 n.7. Specifically, the majority stated as follows:

because the 2010 and 2012 Tiahrt Riders do not explicitly purport to repeal the OPEN FOIA Act, this issue at least implicates the following: (1) whether there exists an “irreconcilable conflict” between the Rider and the OPEN FOIA Act, , *see, e.g., In re Glacier Bay*, 944 F.2d 577, and (2) the Supreme Court’s “especially strong” aversion to implied repeals of standalone laws through appropriation riders. *Me. Comty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (internal quotation marks and citation omitted).

Id. Based on (1) above, the majority implicitly rejected the dissent’s suggestion that a more

1 relaxed standard for implied repeals applied (*i.e.*, under *Dorsey*)³ and instead favored the typical
 2 and more rigorous standard for implied repeals as used in *Glacier Bay* and *Maine Community*. In
 3 *Maine Community*, the Supreme Court noted that “repeals by implication are not favored” and in
 4 fact are a “rarity. Presented with two statutes, the Court will regard each as effective – unless
 5 Congress’ intention to repeal is clear and manifest, or the two laws are irreconcilable.” *Me.*
 6 *Comty.*, 140 S. Ct. at 1323 (internal quotation marks omitted).⁴ As to (2), the majority implicitly
 7 suggested that an implied repeal based on an appropriations rider in particular (as opposed to a
 8 statute) should be viewed with some skepticism. *Cf. Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190
 9 (1978) (noting that “both substantive enactments and appropriations measures are ‘Acts of
 10 Congress,’ but the latter have the limited and specific purpose of providing funds for authorized
 11 programs,” and, “[w]hen voting on appropriations measures, legislators are entitled to operate
 12 under the assumption that the funds will be devoted to purposes which are lawful and not for any
 13 purpose forbidden”), *superseded by statute on other grounds*.

14 Judge Bumatay, however, indicated in his dissent that he agreed with some of the Second
 15 Circuit’s reasoning in *Everytown*, writing that he believed Exemption (b)(3) was “merely a
 16 ‘background principle of interpretation’” and that the 2012 Tiahrt Rider controlled. *See CIR*, 14
 17 F.4th at 944 (Bumatay, J., dissenting). On the other hand, it could be argued that Congress had
 18 every opportunity to add language to the 2012 Tiahrt Rider referencing Exemption (b)(3) if it
 19 wanted to insure the applicability of Exemption (b)(3). It did not.

20 At this juncture of the proceedings, the Court need not resolve the issue of whether
 21 Exemption (b)(3) applies because the bulk of the pending summary judgment motions can be
 22 resolved on other grounds. Specifically, even if Defendants are correct that Exemption (b)(3)
 23 applies, that in and of itself does not bar disclosure because Exception (C) of the Tiahrt Rider
 24 provides an independent basis for disclosure, at least as to most of the information sought by
 25 Plaintiff. As discussed below, binding Ninth Circuit precedent – namely, the *CIR* decision –

26
 27 ³ As indicated above, the Second Circuit in *Everytown* used the more relaxed standard in *Dorsey*.

28 ⁴ Plaintiff here fairly argues that the two laws are not irreconcilable since the Rider could have application to disclosures other than FOIA.

dictates this result.

D. Exemption (C) of Tiahrt Rider

As noted above,

[the Tiahrt Rider] shall not be construed to prevent . . . (C) **the publication of** annual statistical reports on products regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives, including production, importation, and exportation by each licensed importer (as so defined) and licensed manufacturer (as so defined), or **statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations**

Pub. L. No. 112-55, 125 Stat. 552 (2012) (emphasis added). Defendants argue that Exception (C) does not apply to the instant case for two reasons: (1) Plaintiff is not a member of the news media and therefore disclosure of information to him will not lead to any “publication”; and (2) even if the “publication” requirement is not at issue, at least some of the information sought by Plaintiff – specifically, the zip code information – does not constitute “aggregate” data.

1. Publication

In *CIR*, the Ninth Circuit expressly addressed what the term “publication” means for purposes of the Tiahrt Rider. The plaintiff CIR was an organization that reported, *inter alia*, on the topic of guns in the United States. *See CIR*, 14 F.4th at 934. It submitted a FOIA request to ATF asking for “records depicting the ‘[t]otal number of weapons traced back to former law enforcement ownership, annually from 2006 to the present.’” *Id.* at 922. One of the issues the Ninth Circuit discussed was whether ATF’s production of such records to CIR would “result in the ‘publication’ of this data.” *Id.* at 934. The court held that it would based on its interpretation of the term “publication” as used in the Rider.

[W]e begin with that word’s plain meaning. The plain meaning of “publication” signifies “**disclosure to the public**, rather than the disclosure of information to another individual or corporation within the context of a business or professional relationship.” *Integrated Genomics, Inc. v. Gerngross*, 636 F.3d 853, 861 (7th Cir. 2011) (collecting dictionary definitions); *see also* Oxford English Dictionary Online (“The action of making something publicly known.”). In the legal context, the phrase generally suggests “the act of declaring or announcing to the public,” Black’s Law Dictionary (11th ed. 2019), or “[n]otification or communication to a third party or to a limited number of people regarded as

representative of the public,” Oxford English Dictionary Online. Turning over data regarding firearms in the United States to “a reporter” or “a representative of the news-media” like [the plaintiff] CIR, which reports on the topic of guns in the United States, will **make that data “generally known” to the public.** Indeed, the record reveals that the requested data will play a role in CIR’s upcoming “project” on gun violence. That ATF’s compliance with its FOIA obligation will thus result in the publication of the data CIR seeks is not surprising: news media organizations are precisely the sort of “representative[s] of the public” through which individuals and entities commonly distribute information to the public. *Cf. Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (“We have observed that the news media, when asserting the right of access, are surrogates for the public.” (internal quotation marks and citation omitted)). Given that complying with its legal obligation under FOIA will make generally known the statistical aggregate data that CIR seeks here, the Tiahrt Rider authorizes ATF’s expenditure of funds to complete this request.

CIR, 14 F.4th at 934 (emphasis added). The Ninth Circuit rejected the contention that “‘publication’ refers only to the formalized distribution of prepared, formal information.” *Id.* at 934; *see also id.* at 936 (noting that the Rider “permits publication of ‘statistical aggregate data’ and not just statistical reports; “[t]he word ‘data’ does not carry an inference of formal dissemination”).

As reflected above, the Ninth Circuit defined “publication” broadly: any release of information to an entity or person that will result in the information becoming generally known to the public may satisfy the publication requirement under Exception C. In his FOIA request, Plaintiff provided sufficient information to show that disclosure of the records requested would result in that information becoming generally known to the public. Contrary to what Defendants argue, Plaintiff’s FOIA request was not conclusory. He stated in the request: “I have published extensively on issues related to firearms trafficking in the Americas, including widely cited research reports, op-eds in publications such as the Los Angeles Times, a documentary film, and a web site dedicated to the issue.” Siple Decl., Ex. A (FOIA request) (underlining in original). As noted above, the underlined items were hyperlinks, *see* Siple Decl. ¶ 19 – *e.g.*, the hyperlink for the *Los Angeles Times* led to an op-ed piece in which Plaintiff was the co-author; the hyperlink for the documentary film led to a film co-directed by Plaintiff; and the hyperlink for the website led to the website for Stop US Arms to Mexico (stopusarmstomexico.org), an organization for which

Plaintiff is a director or coordinator.⁵ See Siple Decl. ¶¶ 21-23 & Ex. A. In his declaration, Mr. Siple suggests that the hyperlinked information should not be considered. See Siple Decl. ¶¶ 25-26 (stating that “ATF rests its determination on the contents of the FOIA request presented to the agency” and that, “[e]ven if ATF were to consider the hyperlinked material referenced in that request, it would still conclude that Plaintiff has not demonstrated that he is a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii) [the fee provision in FOIA]”) (emphasis added). But there is no principled reason to refuse consideration of the hyperlinks; the hyperlinks were effectively attachments to the FOIA request.

Defendants protest that, even if the hyperlinks are considered, the publication requirement has not been satisfied because they do not establish that Plaintiff is a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii) (which is the fee provision in FOIA). There are several problems with this argument. First, even though *CIR* made clear that “[t]urning over data regarding firearms in the United States to ‘a reporter’ or ‘a representative of the news-media’ . . . will make that data ‘generally known to the public,’” 14 F.4th at 934, that does not mean that information can *only* become public if provided to a reporter or member of the news media. *CIR* could have easily so held but it did not do so. It implicitly rejected the notion. Second, even if the publication requirement could be met only if information were given to a reporter or member of the news media, Plaintiff meets the criteria of being a member of the news media under § 552(a)(4)(A)(ii).⁶ Section 552(a)(4)(A)(ii) provides that the “term a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii). Particularly in light of Plaintiff’s op-ed piece

⁵ The hyperlink for research reports led to an investigative report in the *Guardian* that cited Plaintiff and identified him as the director of Stop US Arms to Mexico. See Siple Decl. ¶ 20; see also <https://www.theguardian.com/world/2020/dec/09/mexico-cartel-project-weapons-import-trafficking> (last visited 11/7/2023).

⁶ For purposes of this opinion, the Court assumes, but does not hold, that the definition of “representative of the news media” in the fee provision of FOIA governs. See 5 U.S.C. § 552(a)(4)(A)(ii).

and his documentary film, Plaintiff is or is at the very least the functional equivalent of a member of the news media for purposes of qualifying under Exception (C) of the Tiahrt Rider.⁷

2. Statistical Aggregate Data

Defendants acknowledge that, if the Court rules in Plaintiff's favor on the publication requirement, then the majority of Plaintiff's FOIA request is valid. He seeks aggregate data. Defendants contend, however, that one portion of the FOIA request is improper – specifically, to the extent Plaintiff requested the zip code of any FFL where a traced firearm was purchased. Exception (C) allows only for disclosure of “statistical *aggregate* data,” but Defendants maintain that, in at least some instances, revealing a “FFL's zip code would reveal the identities of individual FFLs” and therefore would not be aggregate in nature. Siple Decl. ¶ 30.⁸ Effectively, Defendants argue that all zip code data must be precluded from release, given Defendants have not yet run the dataset to determine specifically how many zip codes only contain one FFL and threaten anonymity. The Siple declaration explains as follows:

ATF publishes on its website a monthly list of all FFLs. See <https://www.atf.gov/firearms/listing-federal-firearms-licensees>. As of June 2023, this includes monthly reports dating back to January 2014. Included in each of the publicly released data sets is the FFL's zip code. As of May 31, 2023, there were 78,593 licensees with a license type of 1, 2, or 7. The holders of any of these three license types are authorized to conduct retail firearm sales and are

⁷ For purposes of this opinion, the Court need not consider Plaintiff's declaration, *i.e.*, because the information contained in Plaintiff's FOIA request sufficiently establishes that he is a member of the news media. Nevertheless, the Court notes that Defendants conceded during the motion hearing that the information provided in Plaintiff's declaration sufficiently established that Plaintiff is, in fact, a member of the news media. In light of this concession, even if the Court were to find that Plaintiff's FOIA request did not provide adequate information to show that he is a member of the news media, Plaintiff could simply submit a new FOIA request, seeking the same information and also providing his declaration in support. Requiring Plaintiff to go through this exercise would exalt form over substance. Remanding the matter back to the ATF to address this issue would serve no useful purpose. It would also disregard the fact that the government, in denying the FOIA request, never questioned whether Plaintiff was a member of the news media. See Siple Decl., Exs. C, E (showing that Defendants rejected Plaintiff's FOIA request and appeal on the basis that the Tiahrt Rider applied, but not evaluating Exception (C), including whether Plaintiff was a member of the news media such that the publication requirement could be satisfied).

⁸ The general public may access a list of FFLs online at <https://www.atf.gov/firearms/listing-federal-firearms-licensees>. In theory, one could cross-reference zip codes of trafficked firearms with the publicly available list to ascertain which FFL sourced a specific firearm.

thus most likely to be involved in a traced crime gun. Of the 78,593 FFLs with a license type of 1, 2, or 7, 13,544 FFLs (or approximately 17 percent of all FFLs with these license types) associate with a zip code in which only one (8,818) or two (4,726) FFLs have a place of business. Accordingly, by identifying the zip codes to which recovered firearms were traced, there is a statistically significant chance that individual FFLs will be revealed. As such, this data point cannot be considered aggregate data.

Siple Decl. ¶ 31. The Siple declaration does not expressly explain what is meant by the phrase “statistically significant chance,” but presumably the government is simply referring back to the fact that 17% figure above.⁹

Although Defendants’ position here is not without any merit, there are several problems with the Siple declaration and the government’s argument.

First, the Siple declaration proceeds on the assumption that “aggregate” data means anonymized data. While this is not an unreasonable interpretation of the Tiahrt Rider, Defendants do not cite any authority in support for this interpretation of the Tiarht Rider. The Ninth Circuit’s *CIR* decision does not clearly so state; the court simply defined “aggregate” as “a summary form of information ‘formed by the collection of units or particles into a body, mass or amount’”; adding that “[t]he total number of weapons traced back to former law enforcement ownership, annually from 2006 to the present’ . . . reflects an aggregated statistic derived from an underlying set of data”). *CIR*, 14 F.4th at 933. Plaintiff’s FOIA request falls literally within that literal definition.

Second, Mr. Siple’s numbers analysis is predicated on only three license types being considered (types 1, 2, and 7). Mr. Siple asserts that “the holders of . . . these three license types are authorized to conduct retail firearm sales and are thus most likely to be involved in a traced crime gun,” Siple Decl. ¶ 31, but this is a relatively barebones explanation of why other license types should not be taken into account and how, if they are taken into account, this would change the statistics he cites.¹⁰

⁹ If the Court were to consider zip codes with only one associated FFL (*i.e.*, instead of zip codes with two associated FFLs) for license types 1, 2, or 7, the percentage would be smaller: 11% (*i.e.*, 8,818/78,593).

¹⁰ The types of licenses are:

Finally, and most importantly, the Siple declaration reflects that ATF has not actually run Plaintiff's FOIA request; rather, the agency has simply made an assessment that there is a "statistically significant chance" that individual FFLs would be revealed. Siple Decl. ¶ 31. But it is entirely possible that, if the agency were to actually act on Plaintiff's FOIA request, this problem may not be encountered at all, or only a few single-FFL zip codes would be implicated. It would not be surprising if firearms recovered in Mexico, Guatemala, Honduras, and El Salvador were largely traced to larger, more metropolitan areas, which are more likely to have more than one FFL in a zip code; it is also conceivable that zip codes where there is only one FFL with an applicable license(s) do not originate firearms recovered in the four subject countries. Notably, in *CIR*, the Ninth Circuit essentially admonished ATF for "not conduct[ing] a search of the FTS database in response to CIR's request for statistical aggregate data." *CIR*, 14 F.4th at 939-40; see also *id.* at 940 (stating that "[w]e have an insufficiently developed record from which to determine with any certainty whether the information CIR seeks could be produced by a reasonable search of the FTS database or would require more significant analysis").

Given the deficiencies identified above, the Court has the discretion to ask the government to supplement the Siple declaration or remand for further proceedings to ATF. See *Frost*, 2018 U.S. Dist. LEXIS 57767, at *27-28. The discretion to remand is particularly appropriate where the government does not simply fail to explain what search it did and what documents were

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- Type 01 - Dealer in Firearms Other Than Destructive Devices
 - Type 02 - Pawnbroker in Firearms Other Than Destructive Devices
 - Type 03 - Collector of Curios and Relics
 - Type 06 - Manufacturer of Ammunition for Firearms Other Than Ammunition for Destructive Devices or Armor Piercing Ammunition
 - Type 07 - Manufacturer of Firearms Other Than Destructive Devices
 - Type 08 - Importer of Firearms Other Than Destructive Devices or Ammunition for Firearms Other Than Destructive Devices, or Ammunition Other Than Armor Piercing Ammunition
 - Type 09 - Dealer in Destructive Devices
 - Type 10 - Manufacturer of Destructive Devices, Ammunition for Destructive Devices or Armor Piercing Ammunition
 - Type 11 - Importer of Destructive Devices, Ammunition for Destructive Devices or Armor Piercing Ammunition

<https://www.atf.gov/resource-center/fact-sheet/fact-sheet-federal-firearms-and-explosives-licenses-types> (last visited 12/16/2023).

withheld, but rather fails to actually conduct the search. To ensure that the agency will provide a sufficient explanation for the basis of its decision, the Court concludes that a remand would be more appropriate under the circumstances presented here. *See Nw.*, 254 F. Supp. 2d at 133; *cf. CIR*, 14 F.4th at 940 (stating that, “[b]ecause ATF bears the burden of justifying that records were properly withheld, we remand to the district court to provide ATF the opportunity to better explain the nature of the FTS database, and determine whether CIR’s search query will yield the responsive information it seeks”).¹¹

III. CONCLUSION

For the reasons stated herein, the Court hereby grants in part Plaintiff’s motion for summary judgment, denies in part Defendant’s motion, and remands for further proceedings consistent with this decision. The Court also stays further proceedings in this suit pending the remand.

This order disposes of Docket Nos. 32 and 35.

IT IS SO ORDERED.

Dated: December 19, 2023


EDWARD M. CHEN
United States District Judge

¹¹ The Court shall ensure no prejudice to Plaintiff by staying proceedings in this suit pending remand to the agency. If, after remand, ATF continues to withhold documents, the Court should have the benefit of a fuller explanation as to why, and Plaintiff may continue to litigate this suit to seek disclosure of any withheld documents. *Cf., e.g., Bonnichsen v. United States Dep’t of Army*, 969 F. Supp. 628, 651 (D. Or. 1997) (staying proceedings “pending completion of the administrative proceedings”; retaining jurisdiction “to ensure the protection of the [human] remains [that had been seized by the army], and the parties’ respective interests concerning them, and to address any related problems that may arise on remand”).