

When Must the Government Disclose Gun Owners' Names and Addresses?

by David Kopel

PREVIEW of *United States Supreme Court Cases*, pages 289–293. © 2003 American Bar Association.

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ISSUE

Are federal databases about firearms purchasers and possessors subject to public disclosure under the Freedom of Information Act?

FACTS

In November 1998, Chicago became the second city to sue handgun manufacturers and their trade associations. *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH-15596 (Cir. Ct., Cook County, Ill.). Chicago's lawsuit against handgun manufacturers alleges that the marketing practices of the manufacturers—although compliant with federal, state, and local law—facilitate violation of Chicago's gun laws (which outlaw handgun acquisition) and constitute a public nuisance.

The trial court dismissed Chicago's suit for failure to state a claim, but the suit was reinstated by an intermediate court of appeals. *City of*

Chicago v. Beretta U.S.A. Corp., No. 1-00-3541, 2002 WL 31455180 (Ill. App. Ct. Nov. 4, 2002). The defendants have filed a petition for rehearing in the court of appeals and a petition for leave to file an appeal with the Illinois Supreme Court. The case is currently stayed.

Treasury v. Chicago grows out of an effort by Chicago, using the federal Freedom of Information Act (FOIA), to obtain firearms records held by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE).

The Bureau of Alcohol, Tobacco, Firearms and Explosives in January 2003 became part of the United States Department of Justice. Before then, it was the Bureau of Alcohol, Tobacco and Firearms (BATF or ATF) and a part of the Treasury Department. This case arose when BATFE was still at Treasury and is captioned accordingly.

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DEPARTMENT OF THE TREASURY,
ATF BUREAU V. CITY OF CHICAGO
DOCKET No. 02-322

ARGUMENT DATE:
MARCH 4, 2003
FROM: THE SEVENTH CIRCUIT

Case at a Glance

Chicago has sued handgun manufacturers, alleging that their marketing practices violate Chicago's gun laws (which outlaw handgun acquisition) and constitute a public nuisance. Now the city seeks to use the Freedom of Information Act to obtain firearms records held by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives. The Bureau argues that these records are exempt from disclosure because their release could interfere with law enforcement proceedings and constitute an unwarranted invasion of gun owners' personal privacy.





At the request of federal, state, or local law enforcement officers, BATFE attempts to trace firearms that are suspected of being involved in or related to crime or possessed by a suspected criminal. Firearms manufacturers, importers, wholesalers, and retailers must document every firearms transfer they conduct and must record the gun's serial number on federal forms. The companies retain the required federal paperwork and do not file the forms with the government. Having the firearms dealer, rather than the federal government, keep the retail purchase forms was one of the privacy compromises that enabled passage of the Gun Control Act of 1968, the foundation of federal gun laws.

When law enforcement supplies a gun's serial number, make, and model to BATFE, BATFE can trace the gun from its manufacturer or importer to its wholesaler and its retailer. All these entities are required to provide information to BATFE when requested for a trace in the course of a "*bona fide* criminal investigation." 18 U.S.C. 923(g)(1)(B) & (g)(7).

BATFE keeps records of its tracing activities in a Trace Database. As of November 2000, the Trace Database contained data from 1,261,593 traces. The data include more than 300 data elements, including the names of the first retail purchaser of the gun, the name of the person who possessed the gun when police requested the trace, the names of suspects and witnesses, the police officers who requested the trace, and the gun's model and serial number.

Ever since the Gun Control Act of 1968, licensed firearms dealers have been required to send BATFE a special form whenever a customer buys two or more handguns within a five-

business-day period. 18 U.S.C. § 923(g)(3)(A). BATFE keeps the data from these forms in a Multiple Sales Database.

The city of Chicago sought access to BATFE's Trace Database and Multiple Sales Database under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. BATFE refused, citing two FOIA exemptions.

The first, Exemption 7(A), protects law enforcement records from disclosure if disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A).

BATFE currently uses Exemption 7(A) to withhold Trace Database information for at least one year following the trace request. BATFE states that follow-up investigations to a trace (e.g., contacting the consumer purchaser identified by the trace, then trying to find where the gun went after the first consumer disposed of it) can take many weeks or months to complete. Withholding traces that are less than one year old helps prevent interference with ongoing investigations, BATF believes.

BATFE does not collect information about what a requesting agency does with a trace. Accordingly, BATFE does not know which trace requests relate to cases that are still open and which do not. BATFE also believes that keeping the trace data secret helps prevent illegal firearms traffickers from discovering that law enforcement is monitoring their activities.

After a year, BATFE releases most but not all of these elements in the Trace Database. Some elements are withheld for five years; these include the agency that requested the trace, the firearms serial number, whether the gun was part of a

multiple purchase, the firearms importer, the firearms retailer, and the date of retail purchase. BATFE argues that release of these data "would enable members of the general public to trace firearms used in crimes and interfere with law enforcement investigations."

BATFE believes that trace information becomes "stale" after five years, and that data can safely be released then—especially since most violations of the Gun Control Act have a five-year statute of limitations. 18 U.S.C. § 3282.

Except in a few states, it is entirely lawful to purchase more than one handgun within five business days. BATFE's Multiple Sales Database is withheld from FOIA for two years, pursuant to Exemption 7(A). After that, all information is released, except for the name and address of the consumers, which is permanently withheld under Exemption 7(C).

The second exemption used by BATFE in the Chicago case is Exemption 7(C), codified at 5 U.S.C. § 552(b)(7)(C). That exemption protects from disclosure "records or information compiled for law enforcement purposes" if the production of those records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

BATFE points out that many individuals in the Trace Database (such as the first retail consumer purchaser) may be entirely innocent of any crime or wrongdoing. Again, BATFE's database does not collect information about whether the trace request ever led to a criminal conviction or accusation. Accordingly, BATFE believes that release of names in the Trace Database could subject the individuals to "harassment and stigma." The privacy exemption for names in the Multiple

Sales Database is defended on the basis of pervasive federal law creating privacy rights for gun owners, as detailed below.

While BATFE refused Chicago's request for full access to both databases, BATFE did give Chicago the trace requests submitted by the Chicago Police Department and the multiple sales forms involving Chicago residences.

Chicago sued for full disclosure and won summary judgment (after the presentation of some evidence) in an unpublished district court opinion. The Seventh Circuit affirmed. The court of appeals stated that BATFE's arguments about potential harm to law enforcement, under Exemption 7(A), were "far-fetched hypothetical scenarios." Exemption 7(C) was rejected because "the purchase of a firearm is not a private transaction." 287 F.3d 628 (Apr. 25, 2002), amended at 297 F.3d 672.

The Supreme Court granted Treasury's petition for a writ of certiorari in September 2002.

CASE ANALYSIS

In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court ruled that Exemption 7(A) could be invoked without a particularized showing of harm. Rather, the agency could make a generic or categorical determination that the type of record that might be released could harm law enforcement.

Because a trace may only be requested pursuant to a *bona fide* criminal investigation [18 U.S.C. §§ 923(g)(1)(B)(iii) & (g)(7)], every name in the Trace Database was put there in connection with a criminal investigation. Treasury cites court of appeals cases that have recognized the special privacy

interests of such persons, including witnesses and even persons who once were suspects.

In the district court, BATFE offered an extensive affidavit from one of its agents, detailing the kinds of harms that might result from disclosure of the databases. For example, if a criminal found out that a discarded gun of his were being traced, he would be alerted that investigators are closing in. A criminal who knew that an investigation was taking place could still use trace information to discover who was present when the gun was found by the police, who the first retail buyer of the gun was, what the names of police officers involved were as well as what other suspected crimes, witness information, and which law enforcement agency were involved in the investigation. Alternatively, the news media might obtain trace data, begin their own criminal investigation, and contact witnesses or suspects, thus compromising the law enforcement investigation.

Chicago countered with its own affidavits and witnesses, including a former supervisor of the National Tracing Center who stated that the data requested by Chicago would not harm law enforcement in any way. Further, Chicago argues that a few extreme hypotheticals proffered by BATFE are insufficient to justify withholding an entire database of more than a million traces.

BATFE agents use the Trace Database to look for links in cases of firearms smuggling that might appear unrelated. For example, BATFE used the Trace Database to connect a case of arms smuggling from a Middle Eastern country to Florida with a "much larger conspiracy in Ohio." BATFE worries that its ability to investigate arms smugglers would be impaired if the arms smug-

glers had access to the same database that BATFE uses. As smugglers saw that particular guns (identified by serial number) were being traced, they would be alerted as to which smuggling methods were being intercepted and which were succeeding. Chicago's expert, however, was involved in the Miami/Ohio case and states that the investigators there used techniques not available to the general public, rather than the simple trace information that would be disclosed if Chicago wins its case.

Treasury argues that it was infeasible for BATFE to remove from its database of more than 1 million traces the particular traces that might endanger law enforcement. Chicago disagrees. The city also urges that, if BATFE prevails on the privacy issues, it should be required to disclose the databases while using encryption to conceal the names of firearms purchasers; this process would, for example, allow Chicago to see that the same anonymous individual had purchased multiple handguns in May 2000 and in April 2001. Treasury claims that this would create a new record (not required under FOIA), rather than disclose an existing record.

Disclosure of the Trace Database, says Treasury, might make local law enforcement reluctant to submit trace requests to BATFE in the first place. More than 40 police departments (including Chicago's) have signed memoranda of understanding with BATFE in which BATFE promises not to release the department's trace requests to a third party without the department's consent. Chicago dismisses these agreements as the creations of BATFE for litigation purposes, rather than a reflection of the spontaneous desires of the police departments.

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Treasury argues that the court of appeals's standard that BATFE must make "reasonable" predictions of possible interference with law enforcement is too high. The proper standard, says Treasury, is that BATFE need show only "a rational link."

On the 7(C) privacy exemption, the Seventh Circuit reasoned that because gun buyers disclose their identity to the government, they have waived all privacy rights. Treasury responds that "[r]eporting of personal information to the government cannot reasonably be equated with disclosure of the same information to the public at large."

Indeed, suggests Treasury, the Seventh Circuit's argument would nullify Exemption 7(C), since every personal or private item in a federal law enforcement database is by definition known to the federal government.

Treasury points to the federal Gun Control Act (GCA) for evidence that Congress has repeatedly recognized and protected the privacy interests of firearms owners. (And, therefore, they have reasonable privacy expectations that must be considered in interpreting FOIA.) Of particular relevance are the GCA provisions involving the multiple sales forms: the statute requires that a copy of the form be sent to local law enforcement when the guns are purchased, forbids local government officials from disclosing the multiple sales information, requires that the multiple sales forms be destroyed by local governments after 20 days, and requires local agencies to certify periodically that they are complying with the destruction requirement. 18 U.S.C. § 923(g)(3)(B). (The destruction requirement does not apply if the purchaser is legally barred from owning guns.) The records destruction requirement

would be pointless, Treasury argues, if anyone could obtain the same records from BATFE.

The court of appeals wrote that firearms buyers are "on notice that their name and address must be reported to state and local authorities and ATF." Actually, only multiple handgun purchasers are reported to the federal government, and most state and local governments require no reporting. Indeed, Congress has forbidden BATFE to compile registration lists of firearms or firearms owners. 18 U.S.C. § 926(a). This provision likewise forbids the federal government to give registration information to state or local agencies.

Treasury further argues that "many of the individuals whose names and addresses appear in the Trace Database are not firearms purchasers at all, and therefore cannot be said to have voluntarily subjected themselves to the regulatory scheme governing commercial firearms transactions." For example, some of the people in the Trace Database are people who lived in an apartment where a discarded firearm was found or are associates of someone who purchased a firearm.

Treasury's position is supported by *amicus* briefs from the Fraternal Order of Police (the largest police organization in the United States, with more than 300,000 members) and by the National Rifle Association. The NRA *amicus* brief points to additional gun-owner privacy protections in federal law, such as annual Treasury appropriation riders that forbid the expenditure of any funds for gun or gun owner registration. The NRA adds that the Brady Act specifically requires the federal government to destroy all its records from the National Instant Check System (which conducts

background checks on retail firearms buyers) relating to the lawful purchase of a firearm by an individual. 18 U.S.C. § 922(t)(2).

The NRA argues that BATFE's current disclosures of old data from the Trace Database and Multiple Purchase Database are illegal, as was BATFE's disclosure of limited data on multiple sales to Chicago. The BATFE may never, in the NRA's reading of the statutes, release trace/multiple sales data about lawful gun sales; even for unlawful owners, the data may be released only to law enforcement agencies—not to civil litigants such as the city of Chicago. 18 U.S.C. § 923(g)(1)(D) & (g)(3)(B). Although BATF always permanently withholds the name and address of a gun buyer, the NRA argues that the statutory language is broad enough to forbid the release of lists of guns and their serial numbers. (Chicago asserts that the statutes authorize particular disclosures but do not explicitly forbid other disclosures.)

Ever since the Gun Control Act of 1968, licensed firearms dealers have been required to fill out registration forms for their customers, recording who bought the gun and what particular gun was purchased. These records must be produced when BATFE asks for them "in the course of a bona fide criminal investigation." 18 U.S.C. 923(g)(7). Records may also be examined once a year by BATFE during regulatory audits. Also, a licensed firearms dealer could choose to sell his customer list to someone else. Chicago concludes, therefore, that gun purchasers have at most a minimal expectation of privacy.

According to the Supreme Court, the "only relevant public interest" to balance against privacy or law enforcement interests under FOIA is "the extent to which disclosure of



the information would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994). The Seventh Circuit acknowledged this standard, even while repeatedly noting the importance of Chicago's lawsuit and its firearms ordinances.

While Treasury concedes that there was a public interest in Chicago being able to monitor BATFE's performance of its duties, Treasury claims that release of individual names was not necessary to that interest. Chicago counters that police departments could match the names involved in traces or the names from the Multiple Sales Database with the names of convicted criminals; this information would help the public evaluate if BATFE is enforcing the gun laws aggressively enough or cracking down on firearms trafficking adequately. Chicago also notes a 1996 amendment to FOIA specifying that disclosure may be sought "subject to statutory exemptions, for any public or private purpose."

SIGNIFICANCE

Under FOIA, it is irrelevant by whom or for what purpose a disclosure request is made. *United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489, U.S. 749, 771 (1989). Accordingly, if Chicago can obtain

the gun buyer data, so can anyone else. Thus, if Chicago wins, entrepreneurs, anti-gun activists, pro-gun activists, and others will be able to obtain the Trace Database and the Multiple Sales Database. Gun companies might purchase the Multiple Sales Database to use for promotional mailings. Anti-gun activists might purchase the databases to expose "closet" gun owners in areas where gun ownership is unpopular (e.g., Manhattan). Burglars might purchase the database to find out where guns are located. Private and public litigants in civil gun cases might find useful information in the databases.

In 2002, the House of Representatives passed appropriations that would specifically forbid BATFE from using funds to disclose trace and multiple sales data, other than data that have traditionally been disclosed voluntarily by BATFE. (BATFE currently issues many reports based on trace and multiple sales data). Although the House language (in section 642 of the Treasury Appropriation bill passed by the House) was not enacted by Congress, a victory by Chicago in this case would doubtless spur an effort to enact similar legislation in the new Congress. The fight over such legislation would likely become one of the top priorities of the pro-gun and anti-gun lobbies.

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