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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOHN LINDSAY-POLAND,

Plaintiff,

v.

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

Defendants.

Case No. 3:22-cv-07663-EMC

**BRIEF OF *AMICUS CURIAE* GLOBAL
ACTION ON GUN VIOLENCE IN
SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

Date: October 19, 2023
Time: 1:30 pm
Judge: Hon. Edward M. Chen

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INTRODUCTION

Amicus curiae Global Action on Gun Violence (GAGV) submits this brief in support of Plaintiff’s July 31, 2023 Opposition to Defendant’s Motion for Summary Judgment and Cross-Motion for Summary Judgment (ECF 35).

Statement of Interest

GAGV is a non-governmental, non-profit organization dedicated to reducing gun violence throughout the world using litigation, human rights, advocacy and messaging, with a focus on stopping cross-border gun trafficking. In addition to U.S.-focused litigation, GAGV represents the Government of Mexico in the only lawsuits brought by a nation to stop gun trafficking, and is foreign legal counsel in gun litigation in Canada. GAGV has presented reports and testimony at the Organization of American States, the Inter-American Commission for Human Rights, the United Nations Office of Drugs and Crime, a side event at the U.N. Office of the High Commissioner on Human Rights, and numerous international conferences. GAGV’s founder and President, Jonathan Lowy, has litigated and written on firearms issues for over 25 years, including FOIA, before and after the “Tiahrt” amendments.

Summary of Argument

At its core, the Freedom of Information Act (FOIA) is a disclosure statute with a strong presumption of openness. *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978); *see Nat’l Archives & Record Admin. v. Favish*, 541 U.S. 157, 171 (2004) (explaining FOIA establishes right for “citizens to know what their Government is up to” and that “if the information is subject to disclosure, it belongs to all” (internal quotation marks omitted)); *see also* Office of the Attorney General, *Memorandum for Heads of Executed Departments and Agencies re Freedom of Information Act Guidelines* at 1 (Mar. 15, 2022), available at <https://www.justice.gov/media/1212566/dl?inline> (OAG FOIA Guidelines). To that end, FOIA’s exemptions do not mandate or compel withholding, and an agency should only apply an exemption when it “reasonably foresees that disclosure would harm an interest protected by an exemption.” *See* FOIA Improvement Act, Pub. L. No. 114-185, 130 Stat. 538 (June 30, 2016).

1 Quite simply, the exemptions are to be narrowly construed. *See Dep't of Air Force v. Rose*, 425
 2 U.S. 352, 372 (1976).

3 In a February 2023 report on gun crime, the Department of Justice's Bureau of Alcohol,
 4 Tobacco, Firearms, and Explosives (ATF) acknowledged that "[i]nformation is power" and that
 5 "gun trace data"—data derived from the systematic tracking of a firearm recovered by law
 6 enforcement officials from its first sale by the manufacturer or importer through the distribution
 7 chain to the first retail purchaser—which ATF collects and maintains "yield[s] important strategic
 8 intelligence for policy makers, law enforcement leaders and researchers considering new policies
 9 and programs to reduce gun violence." *See* ATF, National Firearms Commerce and Trafficking
 10 Assessment (NFCTA): Crime Guns – Volume Two, Director's Forward (2023), *available at*
 11 <https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-foreword-director/download>. The
 12 government's steadfast (and legally untenable) refusal to produce the aggregate trace data
 13 Plaintiff requests in this litigation is inconsistent with that acknowledgement.

14 GAGV submits this brief in support of Plaintiff to highlight the importance of the data
 15 Plaintiff seeks. Gun trafficking—the diversion of guns from legal to illegal streams of
 16 commerce—is a serious threat to public safety domestically, in Mexico, and throughout Latin
 17 America, as well as other parts of the world. Mexico has only a single gun retailer¹; neighboring
 18 Latin American countries do not manufacture firearms.² Nonetheless, gun violence in these
 19 countries is soaring because of firearms purchased in the United States and trafficked across the
 20 border. Between 2014 and 2018, ATF found that 70 percent of the firearms recovered in Mexico
 21 were traced back to a U.S. source. Likewise, in Belize, El Salvador, Guatemala and Honduras,
 22 ATF data shows that between 2015 and 2019, 40 percent of firearms recovered in those countries
 23 were sourced from the United States.

24
 25 ¹ Kate Linthicum, *There is Only One Gun Store in All of Mexico. So Why is Gun Violence*
 26 *Soaring?*, L.A. Times (May 24, 2018), *available at* <https://www.latimes.com/world/la-fg-mexico-guns-20180524-story.html>.

27 ² GOV'T ACCOUNTABILITY OFFICE, GAO-22-104680, *Firearms Trafficking: More*
 28 *Information Is Needed to Inform U.S. Efforts in Central America* (2022) at 2 (hereinafter, 2022
 GAO Report), *available at* <https://www.gao.gov/assets/gao-22-104680.pdf>.

1 The release of gun trace data tracking the flow of firearms would highlight jurisdictions
 2 that serve as the source of gun traffic, prompting public engagement, research, policy discussions,
 3 and, ideally, legislative intervention to stem the flow of illegal guns. Since 2003, however, ATF
 4 repeatedly has withheld much of this information from the public. ATF's refusals to produce
 5 such data—both in response to Plaintiff's FOIA requests here at issue (the "Request") and in
 6 general—are inconsistent with FOIA's express language and legislative intent. And as Plaintiff
 7 has explained (and GAGV reiterates), the government's purported legal justification for ATF's
 8 refusal withers under the slightest scrutiny.

9 As explained in more detail below, given the significant crisis associated with gun
 10 trafficking and the fact that trace data historically has been helpful in developing policies to curb
 11 this crisis, the Court should find that FOIA requires ATF to release the gun trace data Plaintiff
 12 seeks, and reject entirely the government's arguments opposing such production.

13 **ARGUMENT**

14 **I. Compelling Policy Reasons Weigh in Favor of Producing the Requested Trace Data.**

15 *A. Cross-Border Firearms Trafficking Poses a National Security Threat to Both the* 16 *United States and Neighboring Latin American Countries.*

17 Gun trafficking poses a serious risk to both the United States and neighboring Latin
 18 American countries. As to the United States, "[t]rafficking of U.S.-sourced firearms to Mexico is
 19 a U.S. national security threat, in part because it facilitates the illegal drug trade . . . threaten[ing]
 20 the safety of the United States and its citizens." U.S. GOV'T ACCOUNTABILITY OFFICE,
 21 GAO-21-322, *Firearms Trafficking: U.S. Efforts to Disrupt Gun Smuggling into Mexico Would*
 22 *Benefit from Additional Data and Analysis* (2021) at 3 (hereinafter, 2021 GAO Report), available
 23 at <https://www.gao.gov/assets/gao-21-322.pdf>. The fentanyl pandemic in the U.S. is largely
 24 fueled by Mexico's largest two criminal organizations, whose criminal operations are facilitated
 25 by U.S.-sourced guns.³ As the White House has explained, "[d]rug traffickers' supply of firearms

26 _____
 27 ³ Steven Dundley et al., *Mexico's Role in the Deadly Rise of Fentanyl*, Wilson Center Mexico
 28 Institute (Feb. 2019), available at https://www.wilsoncenter.org/sites/default/files/media/documents/publication/fentanyl_insight_crime_final_19-02-11.pdf.

enables them to grow their enterprises and move deadly drugs, including illicit fentanyl, into the United States” and accordingly “discovering, disrupting, and dismantling firearms trafficking networks is critical to . . . combat[ing] illicit fentanyl.” The White House, *Fact Sheet: Biden-Harris Administration’s Ongoing Efforts to Stem Firearms Trafficking to Mexico* (Jun. 14, 2023), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/14/fact-sheet-biden-harris-administrations-ongoing-efforts-to-stem-firearms-trafficking-to-mexico/>.

These harms are not limited to the U.S. Guns trafficked from the U.S. over the southern border cause instability and high levels of violence in Mexico and neighboring Latin American countries. See 2022 GAO Report at 2, 13-22. Examples abound:

Belize – ranks among the worst five countries in the world for homicides per capita. Belize Crime Observatory data for 2019 show that 89 of 134 homicides (66 percent) were committed with a firearm. 2022 GAO Report at 8-9.

El Salvador – violent, well-armed street gangs engage in street-level drug sales, extortion, arms trafficking, murder for hire, carjacking, and aggravated street crime, according to a 2020 State Department report. 2022 GAO Report at 8-9. In 2020, the homicide by firearm rate was 14.3 cases per 100,000.⁴

Guatemala –high murder rate driven by narcotics trafficking, gang-related violence, and a heavily armed population. 2022 GAO Report at 8-9. According to public reporting, there are over one million firearms circulating in the county.⁵

Honduras – gangs often use violence and specialize in murder for hire, carjacking, extortion, and other violent street crime, including narcotics trafficking and other illicit commerce, according to a 2020 State Department report. 2022 GAO Report at 8-9. 2018 data shows that 2,631 of 3,732 homicides (over 70 percent) were committed with a firearm.⁶

⁴ Knoema, *El Salvador – Homicide by firearm rate*, available at <https://knoema.com/atlas/El-Salvador/topics/Crime-Statistics/Homicide-by-Firearms/Homicide-by-firearm-rate> (last visited Jul. 29, 2023).

⁵ Claire O Neill McCleskey, *Guatemala to Sign Agreement with US to Trace Illegal Weapons*, InSight Crime (Nov. 8, 2012), available at <https://insightcrime.org/news/brief/guatemala-atf-trace-illegal-weapons/>.

⁶ GunPolicy, *Honduras – Gun Facts, Figures and the Law* (2022), available at <https://www.gunpolicy.org/firearms/region/honduras>

1 Though none of these countries manufacture firearms, criminals obtain them with
2 alarming ease. The GAO estimated that almost 40% of firearms used in violent crimes in these
3 four countries between 2015 through 2019 are purchased in the U.S. and trafficked across the
4 southern border. *Id.* at 2.

5 As for Mexico, it “continues to experience high rates of crime and violence due to the
6 intense competition among [transnational criminal organizations (TCOs)] to dominate lucrative
7 smuggling corridors.” 2021 GAO Report at 9. TCOs have orchestrated sophisticated attacks on
8 Mexican security forces, with increasing use of .50 caliber rifles, modified fully automatic rifles,
9 and belt-fed machine guns to counter Mexican security forces.” *Id.* In March 2018, TCOs
10 “ambushed Mexican security units in three locations in Nuevo Laredo, using at least 15
11 vehicles—many with improvised armor—and a .50 caliber gun capable of piercing the Mexican
12 units’ armored vehicles.” *Id.*

13 Violence of that magnitude does not spare civilians. Firearms are the leading cause of
14 homicide in Mexico, with over two-thirds of intentional deaths as a result of gun violence.⁷ More
15 than 25,000 people were murdered by firearms in Mexico in 2020.⁸ Once again, the guns
16 animating this violence are generally not acquired in Mexico—they are trafficked from the U.S.
17 Of the 80,000 firearms recovered in Mexico between 2014 and 2018, 56,000 were either
18 manufactured or illegally imported from the United States. *Id.* at 2.

19 *B. Trace Data Is an Important Tool for Robust Policy Advocacy and Education on*
20 *Gun Trafficking; the Limited Data that ATF Currently Makes Available Does Not*
21 *Serve That Goal.*

22 Comprehensive trace data plays a critical role both in identifying the root causes and
23 sources of the illicit gun trafficking trade and in evaluating gun policies and educating the public.
24 See Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and*
25 *Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277, 301-04 (2001). The
26 tracing process involves a law-enforcement agency submitting a trace request about a recovered

27 ⁷ Visions of Humanity, *Homicides in Mexico – Statistics*, available at
28 <https://www.visionofhumanity.org/homicides-in-mexico-statistics/> (last visited Aug. 3, 2023).

⁸ GunPolicy, *Mexico – Gun Facts, Figures and the Law* (2022), available at
<https://www.gunpolicy.org/firearms/region/mexico>.

1 firearm to ATF, and ATF then either checking the request against its vast database or
 2 investigating the identity of the retail seller. *Id.* at 280-81. Through this process, ATF is able to
 3 learn valuable information: where, when, and to whom the gun sold. *Id.* at 281.

4 A number of pre-2003 studies conducted prior to the enactment of the Tiahrt Riders that
 5 serve as the basis for ATF's refusal to produce trace data demonstrate the utility of that data in
 6 assessing the efficacy of policy surrounding gun violence. *Id.* at 302-04. In 1996, researchers
 7 studied the effects of a Virginia law limiting handgun purchases to one per month per individual
 8 to determine whether restrictions on the quantities and frequency of firearms purchases disrupted
 9 interstate trafficking. *See* Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun*
 10 *Purchases on Interstate Transfer of Firearms*, 275 J. Am. Med. Ass'n 1759 (1996). Those
 11 researchers answered that question affirmatively. Prior to the law's enactment, Virginia
 12 historically had been one of the leading sources of trafficked firearms in the Northeast. *Id.* at
 13 1760-61. Analyzing ATF trace data obtained via FOIA request, the researchers concluded that
 14 within 18 months of the law's enactment, illegally trafficked firearms recovered in the Northeast
 15 that were sourced from Virginia dropped from 34.8% to 15.5% of all firearms seized. *Id.*

16 Further illustrating the utility of trace data is a 2001 report in which researchers analyzed
 17 the impact of requirements for licensing, registration, and background checks on the availability
 18 of firearms for criminals. Daniel W. Webster, Jon S. Vernick & Lisa M. Hepburn, *Relationship*
 19 *Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*,
 20 7 Inj. Prevention 184 (2001). Here as well, researchers utilized ATF trace data—this time, for 25
 21 cities across the United States—to study the relationship between state gun laws and the
 22 proportion of crimes committed by firearms sold by in-state dealers. *Id.* at 184-86. Based on that
 23 data, researchers identified a positive correlation between states' more stringent registration and
 24 licensing systems affecting the availability of firearms and gun-related crimes. In those states the
 25 percentage of such crime was half that of the states with weaker gun laws. *Id.* at 186-88.

26 Additionally, a 2003 report used ATF trace data to analyze the benefits of “supply-side
 27 enforcement”—namely, strategies for focusing on the accountability of the sources and suppliers
 28

1 of firearms, not just the end user—on limiting gun trafficking. *See* Glenn L. Pierce et al.,
 2 *Characteristics and Dynamics of Crime Gun Markets: Implications for Supply-Side Focused*
 3 *Enforcement Strategies*, Final Report to the National Institute of Justice (Sept. 11, 2003). That
 4 report concluded “[c]rime gun traces are highly concentrated among a few federal licensed retail
 5 dealers,” “[t]raced crime guns are usually not recovered in the possession of the original retail
 6 purchasers,” “[a]ctive dealers with a high number of traces to a particular city are more likely to
 7 be associated with fast time-to-crime guns,” and that “[a]ctive dealers who make many multiple
 8 sales of handguns are more likely to be associated with fast time-to-crime guns.” *Id.* at 3-4.
 9 Building on this research, the report recommended policymakers consider a number of supply-
 10 side interventions to limit firearm traffic, including “developing new crime intelligence
 11 methodologies to analyze local gun markets” and “developing more complete and accurate
 12 information on crime guns to help reduce the great social burden of gun violence” especially in
 13 the “largely unregulated secondary firearms market.” *Id.* at 64.

14 The RAND Corporation confirmed the importance of trace data in a recent report,
 15 explaining that when released, it offers insight into:

- 16 • How criminals obtain their weapons;
- 17 • Whether States with more-restrictive guns laws create shortages of guns for
- 18 those individuals who may be prohibited from purchasing them;
- 19 • How guns move between states with less- and more-restrictive gun laws;
- 20 • The characteristics of gun sales likely to be associated with diversion to
- 21 prohibited possessors; and
- 22 • Other valuable, actionable, policy-relevant information.

23 *See* RAND Corp., *The Science of Gun Policy* 169 (3d ed. 2023).

24 Nonetheless, under a legally untenable reading of the Tiahrt Riders, ATF refuses to
 25 disclose this data in response to FOIA requests. In so doing, ATF “has denied most researchers
 26 access to detailed firearm trace data since 2003; therefore, while some law enforcement agencies
 27 may analyze such data, the information generally has not been available for research purposes.”
 28

1 *Id.* The significant limitations that ATF places on the released trace data has impeded the
 2 inferences that can be gleaned from it and obstructed adequate research. *Id.*

3 In fact, in those post-2003 occasions where ATF has released more detailed trace data,
 4 researchers have successfully analyzed that data and made important policy suggestions. *See*
 5 Jessica A. Eby, *Fast and Furious, or Slow and Steady? The Flow of Guns from the United States*
 6 *to Mexico*, 61 UCLA L. Rev. 1082 (2014). In 2012, as part of litigation in *National Shooting*
 7 *Sports Foundation, Inc. v. Jones*, 840 F. Supp. 2d 310 (D.D.C. 2012), ATF submitted detailed
 8 data of guns recovered and traced in Mexico, which became part of the public record and
 9 available to researchers. Eby, *supra* at 1086. After analyzing the data, a 2014 study revealed a
 10 “relationship between state gun control laws in the United States and the states’ crime gun export
 11 rates to Mexico” and recommended that the presence of stronger gun control measures in certain
 12 states would “significantly reduce[] the state’s exports of crime guns to Mexico” *Id.* at 1133.
 13 The study concluded, “[i]f the ATF were to release crime gun trace data from Mexico in their raw
 14 form, *it would facilitate even more granular and sophisticated analysis of the characteristics of*
 15 *Mexican crime guns sourced from the United States and their relationship with state*
 16 *characteristics*, such as gun control laws and gun prevalence.” *Id.* (emphasis supplied).

17 C. *ATF Trace Data Sought Will Provide Critical Insight Into Firearm Recoveries in*
 18 *Neighboring Latin American Countries Linked To The U.S. And Will Promote*
 19 *More Robust Policy Advocacy and Education.*

20 In sum, ATF trace data made publicly available to researchers can result in meaningful
 21 policy changes to help stem the inarguable harms resulting from the illegal gun trade. Requiring
 22 the release of the trace data at issue here will benefit both the United States and its neighbors in
 23 helping to stem the tide of gun trafficking and the resulting instability. Permitting researchers and
 24 investigators access to this data will ensure that policy debates over related to gun control are
 25 firmly rooted in fact, not guesswork and innuendo. History demonstrates that when ATF makes
 26 trace data of the type at issue available, researchers are able to conduct fact-based analysis that
 27 leads to development of enhanced strategic approaches for confronting the pandemic of the illegal
 28 gun trade and gun violence. The Court should allow for the same here.

II. Defendants Can Mitigate with Reasonable Effort Any Privacy “Concerns” Posed By Production of The Requested ATF Trace Data Under FOIA.

A. The FOIA Request Seeks De-Identified Aggregated Firearms Tracing Data.

ATF argues that the Request does not seek statistical aggregate data because some of the responsive information may constitute “individual units of data.” Def. MSJ at 18. ATF’s argument is based on the erroneous contention that because the request seeks “granular information”—*i.e.*, the zip code of traced firearms—such data could be used to identify an individual FFL linked to a particular recovered firearm. *Id.* Specifically, ATF only appears to take issue with the request for zip code information. ATF does not contend that the remaining data points in the Request—*i.e.*, state, county, type, caliber, and make of firearm—present the same concerns. *Id.* Nor could it in view of existing Ninth Circuit precedent. *See Ctr. for Investigative Reporting v. United States Dep’t of Just.*, 14 F.4th 916 (9th Cir. 2021) (finding number of firearms traced to each state annually and numbers of each type of firearm recovered annually are examples of statistical aggregate data within the meaning of Exception C). Nevertheless, and without explanation, the government argues that Plaintiff’s request impinges upon a privacy right because: (1) zip code information should be treated differently; and (2) on that basis alone the Request may be denied. These arguments lack merit.

Consumer Privacy Rights. In California and elsewhere, protecting an individual’s identity is an important principle. Since California enacted the California Consumer Privacy Act and subsequently the California Privacy Rights Act (Cal Civ Code § 1798.100 *et seq.*), ten states have followed suit in passing legislation aimed at protecting consumers’ personal information that is collected, stored, and sold by data controllers.⁹ Fredric D. Bellamy, *U.S. Data Privacy Laws to Enter New Era in 2023*, Reuters (Jan. 12, 2023), available at <https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-01-12/>. Across these states, personal information consists of data that “identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly

⁹ Like California, the following states have enacted consumer data privacy laws: Virginia, Colorado, Utah, Connecticut, Iowa, Indiana, Tennessee, Montana, Florida, Texas, and Oregon.

1 or indirectly, with a particular consumer.” Cal. Civ. Code § 1798.140(v)(1). Importantly,
 2 deidentified data or publicly available data is not personal information and thus their disclosure
 3 does not raise privacy concerns.¹⁰

4 Transparency, however, can trump privacy. California, like many other states, enacted
 5 legislation equivalent to the principles in FOIA. “State Freedom of Information Laws,” *National*
 6 *Freedom of Information Coalition*, available at [https://www.nfoic.org/state-freedom-of-](https://www.nfoic.org/state-freedom-of-information-laws/)
 7 [information-laws/](https://www.nfoic.org/state-freedom-of-information-laws/) (last visited Jul. 22, 2023). Akin to FOIA, under California’s Public Records
 8 Act (Cal. Civ Code § 7920.000 *et seq.*), an agency may deny a request if an express provision
 9 applies or if disclosure would not clearly outweigh nondisclosure in serving the public’s interest.
 10 Courts have declined to apply the latter exemption, known as the catch-all exemption, when a
 11 defendant-agency asserts a “speculative and vague prospect of adverse consequences” in
 12 declining a request for information. *See Voice of San Diego v. Superior Court of San Diego*
 13 *County*, 66 Cal. App. 5th 669, 689 (2021); *see also CBS, Inc. v. Block*, 42 Cal. 3d 646, 652 (1986)
 14 (holding that disclosure of unredacted conceal and carry licensee applications was necessary to
 15 assess whether Los Angeles sheriff’s abuse of discretion was prevalent).

16 Zip Code Information. ATF’s stated privacy concerns regarding the disclosure of zip code
 17 information are unsupported because the likelihood that disclosing a zip code may lead to
 18 identifying a particular licensee is negligible. Def. MSJ at 19. There is no such risk outweighing
 19 Plaintiff’s Request.

20 Here, the government argues that because aggregate data means a “collection of units,” an
 21 individual piece of information definitionally cannot constitute aggregate data. *See* Def. MSJ at
 22 18; Siple Decl. ¶ 31. ATF’s Chief of the Information and Privacy Governance Division explains
 23 that a zip code is not an aggregate data point. The government’s apparent logic is there are
 24 certain FFL license types that associate “with a zip code in which only one . . . or two FFLs have
 25
 26

27 ¹⁰ De-identified information means information that cannot reasonably be used to infer
 28 information about, or otherwise be linked to, a particular consumer. Cal. Civ. Code
 § 1798.140(m).

1 a place of business”¹¹ (Siple Decl. ¶ 31); therefore the requested information may return a “result
 2 of 1,” and thus the request becomes one for non-aggregated information.¹² But the total number
 3 of occurrences of an event (even if it is 0, 1, or 2) is an example of aggregate statistical data.
 4 *Twitter, Inc. v. Garland*, 61 F.4th 686, 693 (9th Cir. 2023) (even if the answer was “zero,” a
 5 request for total number of National Security Letter and FISA orders received by Twitter over a
 6 time period was a request for aggregate data).

7 Taking ATF’s logic to its conclusion, the agency could disclose zip code information if
 8 the number of firearms traced, buyers, or FFLs equaled three or more, but not for zip codes in
 9 which the total was two or less. For some unexplained reason, ATF considers a zip code with
 10 two instances to also be “non-aggregate” information. Siple Decl. ¶ 31 (noting that 17% of FFLs
 11 with a particular license type can be “associate[d] with a zip code in which only one . . . *or two* . .
 12 . FFLs have a place of business”) (emphasis added). If ATF’s grievance is with one instance
 13 being non-aggregate because it is an “individual unit,” it is unclear why it claims two instances
 14 also constitute non-aggregate statistics, where ATF defines aggregate as a “collection of units.”
 15 Def. MSJ at 18.¹³

16 This position is even more strained because information organized by zip code *is already*
 17 *considered aggregate data*. *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092, 1103 (9th Cir.
 18 2022) (holding information organized by zip code and non-identifying to a specific consumer was
 19 aggregate data). By comparison, a request for non-aggregate information would be a request for
 20 the identification of a particular FFL, the singular application of a particular FFL, the purchase
 21 records for a single firearm, the date of sale of an identified firearm, a single FFL’s business
 22

23 ¹¹ ATF admits that it publishes on its website a monthly list of all FFLs, and included in the
 24 *publicly available* dataset is information regarding the FFL zip code. This contravenes ATF’s
 25 claimed risks of reidentification of an FFL by using a zip code (Def. MSJ at 18 (“it is quite likely
 26 that producing the data . . . would identify particular federal firearm licensees”), when ATF
 27 provides to the public a list that identifies *each* FFL in a particular state by license type, license
 28 number, business name of the FFL, business address of the FFL, and business phone number.

¹² ATF identifies 17 percent of the applicable FFLs (based on ATF’s *own definition of*
 “applicable”), associate with a zip code in which only one or two FFLs have a place of business.
 Siple Decl. ¶ 31. If the concern is only with respect to this subset population, there is no reason
 that the zip codes associated with the remaining 83 percent cannot be disclosed.

¹³ Clearly two instances are a “collection of [two] units.”

1 address or other unique identifiers – items not at issue here. *Int’l Fed’n of Pro. & Tech.*
 2 *Engineers, Loc. 21, AFL-CIO v. Superior Ct.*, 42 Cal. 4th 319, 332 (2007); *cf. In re Google RTB*
 3 *Consumer Priv. Litig.*, 606 F. Supp. 3d 935, 947 (N.D. Cal. 2022) (finding Google account
 4 holder’s IP address is personal information because can readily identify an individual); *Calhoun*
 5 *v. Google LLC*, 526 F. Supp. 3d 605, 621 (N.D. Cal. 2021) (same). This, of course, is not what
 6 the Request seeks. Instead, the Request seeks information regarding (1) the *number* of firearms
 7 traced, (2) the *number* of buyers, and (3) the *number* of FFLs. ECF No. 1-1 (Lindsay-Poland
 8 FOIA Request). That the number of these occurrences may be “one” or “two” within a particular
 9 zip code does not take the request outside of the scope of a request for “aggregate statistical data,”
 10 given that, by definition, aggregate means “the whole sum or amount; sum total.” Aggregate,
 11 Merriam Webster Dictionary Online, available at [https://www.merriam](https://www.merriam-webster.com/dictionary/aggregate)
 12 [webster.com/dictionary/aggregate](https://www.merriam-webster.com/dictionary/aggregate).

13 *Partial Disclosure of Records.* FOIA’s presumption of “openness” requires that if an
 14 agency determines it is unable to make full disclosure, it must “consider whether partial
 15 disclosure of information is possible.” 5 U.S.C. § 552(a)(8)(A)(ii); *see also* OAG FOIA
 16 Guidelines at 1. To that end, and to support disclosure, FOIA directs agencies to “take reasonable
 17 steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii)(II).
 18 In taking issue with the zip code request only, the government effectively admits that the
 19 remaining information sought (state, county, type, caliber, and make of firearm) fall within
 20 statistical aggregate data within the meaning of Exception C. Accordingly, at minimum “partial
 21 disclosure of information” would have been possible and such information (*e.g.*, everything
 22 responsive except for the zip code information) should have been disclosed.

23 *B. ATF’s New Reliance on “Privacy” Considerations is Not A Basis for Denial.*

24 ATF argues that it is “quite likely” that producing records responsive to Plaintiff’s FOIA
 25 request would “identify particular federal firearms licensees.” Def. MSJ. at 18. Here, the
 26 government appears to argue that independent of Exemption 3, the Request seeks records
 27 protected from disclosure by some vague, quasi-“privacy” exemption. As discussed in Section
 28

1 II.A *supra*, these “privacy” concerns are unfounded and unsubstantiated. But this argument is
2 also procedurally improper.

3 In denying the Request, ATF only cited to Exemption 3 as a basis for refusing to disclosed
4 the records; it did not any other exemption. *See* ECF No. 1-2 (ATF denial). Accordingly, when
5 Plaintiff submitted his FOIA appeal, he only addressed the inapplicability of Exemption 3. *See*
6 ECF No. 1-3 (Lindsay-Poland Appeal). And, in denying the appeal, once again ATF only argued
7 that such disclosure was barred by Exemption 3. *See* ECF No. 1-4 (ATF denial of appeal). At no
8 point during the administrative review and appeal process—a process that Plaintiff was required
9 to *fully exhaust before* the filing of a lawsuit (*Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 61
10 (1990))—did ATF ever raise a separate “privacy”-related reason for denying the Request. Now,
11 for the first time in its opening summary judgment brief, ATF argues that in addition to
12 Exemption 3, a separate basis exists to prevent disclosure. In introducing a new alleged basis for
13 its refusal, ATF ignores the openness principles of FOIA, the established FOIA procedures, and
14 the way agencies are required to consider and construe exemptions. Relatedly, FOIA requires
15 that when an agency denies a request, “the requester is entitled to ***be told the reason for the***
16 ***denial.***” *See* Committee on Government Reform, *A Citizen’s Guide on Using the Freedom of*
17 *Information Act and the Privacy Act of 1974 to Request Government Records, Second Report*,
18 *available at* [https://www.atf.gov/resource-center/docs/citizensguideonusingthefoiapdf-](https://www.atf.gov/resource-center/docs/citizensguideonusingthefoiapdf-0/download)
19 [0/download](https://www.atf.gov/resource-center/docs/citizensguideonusingthefoiapdf-0/download) (Sept. 20, 2005) at 10¹⁴; *see also* “What will I receive in response to a FOIA
20 request?” *FAQ*, FOIA.gov, *available at* <https://www.foia.gov/faq.html> (“If any portions of the
21 records are withheld, . . . the agency will inform you ***of the specific FOIA exemption that is***
22 ***being applied.***” (emphasis supplied)). Additionally, ATF’s new arguments do not fit squarely
23 within any exemption. This too is improper, as the government can only withhold based on a
24 *specific, identified exemption*—it cannot withhold based on vague arguments. *Nat’l Sec. Couns.*
25 *v. C.I.A.*, 898 F. Supp. 2d 233, 286 (D.D.C. 2012), *aff’d sub nom. Nat’l Sec. Couns. v. Cent. Intel.*

27 ¹⁴ ATF provides a link to the *Citizen’s Guide* under the “Additional Resources” tab of ATF’s
28 FOIA webpage, *available at* <https://www.atf.gov/resource-center/freedom-information-act-foia>
(last visited Jul. 26, 2023).

1 Agency, 969 F.3d 406 (D.C. Cir. 2020) (if agency discloses redacted documents it must indicate
 2 “the exemption under which the deletion is made” on a redaction-by-redaction level); *Mead Data*
 3 *Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (“We require that when
 4 an agency seeks to withhold information it must provide a relatively detailed justification,
 5 specifically identifying the reasons why a particular exemption is relevant and correlating those
 6 claims with the particular part of a withheld document to which they apply.”).

7 *C. ATF Can Mitigate Any Alleged Privacy Concerns with Reasonable Efforts.*

8 Under FOIA, an agency is required to make “reasonable efforts” to search for the
 9 requested records. 5 U.S.C. § 552(a)(3)(C); *Inter-Coop. Exch. v. United States Dep’t of Com.*, 36
 10 F.4th 905, 910 (9th Cir. 2022) (“The adequacy of the search is a core aspect of the government’s
 11 duty under FOIA.”); *Citizens Comm’n on Hum. Rts. v. Food & Drug Admin.*, 45 F.3d 1325, 1328
 12 (9th Cir. 1995) (adequacy is measured “by a standard of reasonableness, construing the facts in
 13 the light most favorable to the requestor”).

14 Reasonable efforts include, in connection with digital records, the “sorting, extracting, and
 15 compiling pre-existing information from a database.” *Ctr. for Investigative Reporting*, 14 F.4th at
 16 938. “An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt
 17 that its search was “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena*
 18 *v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999); *Campbell v. United States Dep’t of*
 19 *Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) (agencies are required to do more than a “perfunctory
 20 search.”).

21 Despite these obligations, ATF admits it has not run the searches necessary to respond to
 22 the Request and states “it is impossible to know full-extent of the non-statistical, non-aggregate
 23 data that they would produce.” Def. MSJ at 18-19. Rather, ATF relies on a singular search with
 24 an arbitrary month as a basis for its denial. Thus, ATF did not even do an *inadequate* search,
 25 much less an adequate search as required by FOIA. ATF’s hypothetical concerns are merely an
 26 excuse to avoid disclosure under FOIA and “conjectural at best.” See *Voice of San Diego*, 66 Cal.
 27 App. 5th at 689.

1 Finally, even if ATF had a legitimate basis for its stated privacy concerns (it does not),
 2 ATF could mitigate those concerns with partial disclosure or using redactions. As discussed in
 3 Section II.A *supra*, FOIA expressly permits partial disclosure where some of the information
 4 requested is protected by an exemption and some of the information is not. Because FOIA is
 5 fundamentally about the policy of open government, FOIA prefers partial disclosure over
 6 complete withholding. *Transgender L. Ctr. v. Immigr. & Customs Enf't*, 46 F.4th 771, 782 (9th
 7 Cir. 2022); *Ctr. for Investigative Reporting v. U.S. Dep't of Lab.*, 424 F. Supp. 3d 771, 780 (N.D.
 8 Cal. 2019) (“Even if the Government showed that its application of Exemption 4 was justified,
 9 and there was some foreseeable harm, it would have to take reasonable steps to redact the
 10 documents. It made no such attempt.”). ATF complains that the zip-code related information is a
 11 request for non-aggregate information. Def. MSJ at 18. ATF makes no such argument with
 12 regard to the other information, appearing to concede that information such as county of
 13 purchase, number of buyers, make and caliber of firearm, purchases by year *are aggregate*
 14 *statistical information*. Accordingly, at minimum ATF would have been required to disclose this
 15 information, under its obligations to withhold the portions of the requested information that fit
 16 squarely within the FOIA exemptions. 5 U.S.C. § 552(a)(8)(A)(i). This failure contravenes
 17 ATF’s reasonable efforts obligations.

18
 19
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Respectfully submitted,

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 22
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