

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-2167

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

Appellant

v.

CITY OF CHICAGO,

Appellee

**BRIEF AMICUS CURIAE OF THE NATIONAL RIFLE ASSOCIATION
OF AMERICA, INC., IN SUPPORT OF THE UNITED STATES
DEPARTMENT OF JUSTICE, AND IN SUPPORT OF REVERSAL**

Appeal from the U.S. District Court
for the Northern District of Illinois, Eastern Division
District Ct. No. 00 C 3417

On Remand From the United States Supreme Court, No. 02-322

Stephen P. Halbrook
Richard E. Gardiner
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The National Rifle Association of America, Inc. (hereinafter “NRA”), has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock.

The following counsel have appeared before this court:

1) For Appellee City of Chicago: David Graver, Office of the Corporation Counsel, City of Chicago, 30 North LaSalle Street, Suite 800, Chicago, IL 60602.

2) For Appellant U.S. Department of Justice: Steve Frank, Department of Justice, Civil Division, Appellate Section, 601 D Street N.W., Room 9534, Washington, D.C. 20530.

3) For Plaintiff in the court below: Michael A. Forti, Deputy Corporation Counsel, and Matthew M. Getter and Adam M. Kingsley, Assistant Corporation Counsel, Office of the Corporation Counsel, City of Chicago, 30 N. LaSalle Street, Chicago, IL 60602.

4) For Defendant U.S. Department of Treasury in the court below: Thomas P. Walsh, United States Attorney’s Office, 219 South Dearborn Street, Suite 500, Chicago, IL 60604; William Alvarado Rivera and Youngjae Lee, United States Department of Justice, 901 E Street, N.W., Suite 1078, Washington, DC 20530.

STEPHEN P. HALBROOK

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. (“NRA”) is a New York not-for-profit membership corporation founded in 1871. NRA has four million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;
2. To promote public safety, law and order, and the national defense

NRA represents the interests of its members, including both consumers and federally-licensed firearm dealers, with respect to the application of federal statutes which protect its members’ privacy interests.¹ These interests are not adequately advanced by the Appellant Department of Justice. When this case was previously before this court, Appellant (then the Department of the Treasury) failed to bring to this court’s attention significant privacy protections in the Gun Control Act (“GCA”). This court denied NRA’s unopposed motions to file amicus curiae briefs, despite NRA’s explanation that it wished to bring to the court’s attention the GCA’s privacy protections.² This court proceeded to hold that “one does not possess any privacy interest in the purchase of a firearm.” *City of Chicago v. U.S. Dept. of Treasury*,

¹ Such NRA members would include, for instance, victims of firearm thefts whose identities appear in trace reports, and licensees who lawfully made multiple handgun sales and filed the required reports.

² See this court’s orders dated July 23, 2001 (denying motion to file amicus brief), July 27, 2001 (denying motion for reconsideration), and June 26, 2002 (denying motion to file amicus brief in support of petition for rehearing). Cf. order dated June 13, 2002 (granting motion to file amicus brief of Fraternal Order of Police in support of petition for rehearing).

287 F.3d 628, 636 (7th Cir. 2002).

In its briefs filed in the Supreme Court, the United States, for the first time in this litigation, brought to a court's attention two of the pertinent GCA privacy protections which NRA had endeavored to bring to this court's attention.³ The United States, however, ignored the contents of another critical provision concerning the privacy issues before this court.⁴ This brief seeks to bring before this Court all of the pertinent provisions of law which are necessary to understand the applicable appropriations riders of 2003 and 2004.

This Court originally denied NRA's motion filed on March 19, 2004, to file an amicus curiae brief, but upon reconsideration,⁵ issued an order on June 7, 2004, granting NRA leave to file an amicus curiae brief and instructing that the brief be tendered with its original motion filed on March 19, 2004.

SUMMARY OF ARGUMENT

The Supreme Court remanded this case for this court to consider the effect, if any, of Division J., Title 6, § 644, of the Consolidated Appropriations Resolution, H.J. Consolidated Resolution 2, 108th Cong., 1st Sess., P.L. 108-7, 117 Stat. 11 (2003). The following year, however, Congress enacted the Consolidated Appropriations Act, 2004, P.L. 108-199, 118 Stat. 53 (2004), which states in pertinent part:

³ Brief for the Petitioner, *U.S. Dept. of Treasury, BATF v. Chicago*, No. 02-322, at 24-25 (noting "Section 923(g)(3)(B)'s strict prohibition on retention and release of multiple sales information"); *id.* at 26 (citing § 926(a) and noting that "the GCA specifically precludes ATF from imposing any system for the registration of firearms"). This brief may be found at <http://www.usdoj.gov/osg/briefs/2002/3mer/2mer/2002-0322.mer.aa.html>.

⁴ 18 U.S.C. § 923(g)(1)(D) (ATF authorized to release licensee information only to law enforcement agencies and only about persons prohibited from firearm possession).

⁵ The City of Chicago opposed NRA's motion for leave to file an amicus brief. The Department of Justice neither consented to nor opposed the motion.

Provided further, That no funds appropriated under this or any other Act may be used to disclose to the public the contents or any portion thereof of 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 section 923(g) of title 18, United States Code, except that this provision shall apply to any request for information made by any person or entity after January 1, 1998

Id., Division B, Title I.

This prohibits ATF from disclosing any of the information which is the subject of this litigation. The provision is applicable to Chicago, which made its FOIA request after January 1, 1998. All of the records Chicago sought are encompassed generally within 18 U.S.C. § 923(g) and specifically within §§ 923(g)(3) and (7).

Section 923(g)(3)(A) provides that licensed dealers shall prepare a report of any sale of two or more pistols or revolvers to a nonlicensee in a five-day period. The dealer forwards the report to the ATF and also “to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction” where the sale took place. Section 923(g)(3)(B) requires such State and local law enforcement agencies to keep the information confidential and to destroy it within 20 days, except that such requirements do not apply regarding persons prohibited from receipt of firearms.

Obviously, Congress intended that such multiple sales information be kept confidential. None of the parties previously brought this, or any of the other GCA provisions protecting the privacy of firearm owners and licensees, to the attention of this court, which ruled that “one does not possess any privacy interest in the purchase of a firearm.” *Chicago v. U.S. Dept. of Treasury*, 287 F.3d 628, 636 (7th Cir. 2002). P.L. 108-199 settles that “the contents or any portion thereof” of multiple sales reports are not subject to disclosure.

Section 923(g)(7) requires licensees to report to ATF information from the licensee's records to determine the disposition of a firearm "in the course of a bona fide criminal investigation." ATF uses this information to trace firearms. Common sense suggests that such records would be confidential, and § 923(g)(1)(D) (see discussion below) limits ATF's authority to disclose information from licensee records only to law enforcement agencies and only regarding prohibited persons. P.L. 108-199 resolves any doubt that "the contents or any portion thereof" of trace records are not subject to disclosure.

In addition to the above specific items prohibited from disclosure, P.L. 108-199 generally prohibits disclosure of any licensee information required to be kept by § 923(g). Section 923(g) encompasses all of the information licensees must keep. Moreover, § 923(g)(1)(D) limits ATF's authority to disclose licensee information to law enforcement agencies and only in regard to prohibited persons who have received firearms. Not only may ATF not disclose licensee information, but also § 926(a) provides that ATF may not require that licensee records "be recorded at or transferred to" any federal, State, or local governmental facility, "nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established."

In other words, ATF itself may not possess licensee information other than as expressly permitted, much less may ATF be required to disclose such information to the public. If any doubt existed on the subject, P.L. 108-199 resolves the issue.

ATF previously disclosed certain multiple sales data after two years, and certain trace data after five years. In addition to preexisting restrictions on disclosure, P.L. 108-199 makes clear that these disclosures are prohibited. While ATF argues that P.L. 108-7 permits these disclosures, P.L. 108-199 supersedes that provision to the extent any conflict exists between the two.

In conclusion, P.L. 108-199 completely prohibits disclosure of any of the records which are sought in this litigation. Chicago's action herein must be dismissed.

ARGUMENT

Introduction

The Supreme Court issued the following order in this case: "Judgment vacated, and case remanded to the United States Court of Appeals for the Seventh Circuit to consider what effect, if any, Division J., Title 6, § 644, of the Consolidated Appropriations Resolution, H. J. Consolidated Resolution 2, 108th Congress, 1st Session (2003),⁶ has on this case." *Dept. Of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives v. City of Chicago*, 537 U.S. 1229 (2003) (mem.). Section 644 states:

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

Since § 644 applies to "this Act or any other Act with respect to any fiscal year," it remains valid to the extent it is consistent with subsequently-passed legislation. After specifying the records prohibited

⁶ Later published as P.L. 108-7, 117 Stat. 11.

⁷ The House Report expressed the concern that disclosure under the Freedom of Information Act of "certain law enforcement databases . . . on a comprehensive basis . . . would not only pose a risk to law enforcement and homeland security, but also the privacy of innocent citizens." House Report 107-575, Treasury, Postal Service, and General Government Appropriations Bill, 2003, 107th Cong., 2d Sess. 20 (July 15, 2002). The reference to "the privacy of innocent citizens" was consistent with the existing prohibition on law enforcement disclosure of multiple sale reports and the restriction on ATF disclosure of licensee records to law enforcement to those involving ineligible persons who received firearms. 18 U.S.C. § 923(g)(1)(D), (3)(B).

from disclosure (discussed below), it excepts disclosure “to the extent and in the manner” such records “have been disclosed under 5 U.S.C. 552” previously. The Department of Justice contends that this sanctions ATF’s previous disclosure practices, ignoring that the above makes this exception only to the extent the records were “disclosed under 5 U.S.C. 552.” Previous disclosures that were inconsistent with § 552 are not sanctioned by this provision.

Section 552(b)(3) exempts from disclosure under Exemption 3 records that are “specifically exempted from disclosure by statute.” Here, records protected by the Gun Control Act’s privacy guarantees are “specifically exempted from disclosure by statute.” All of the records sought by Chicago here, as well as records which ATF has previously disclosed, are exempt under Exemption 3.⁸ Disclosure of these records were not sanctioned by § 644 because they were not “disclosed under 5 U.S.C. 552.”

Yet the application of § 644 need not be definitively resolved, because the latest appropriations rider clearly prohibits disclosure of all of the records sought by Chicago as well as the more limited records that ATF previously provided. Division B of Title I of the Consolidated Appropriations Act, 2004, P.L. 108-199, 118 Stat. 53 (2004), states in pertinent part:

Provided further, That no funds appropriated under this or any other Act may be used to disclose to the public the contents or any portion thereof of 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 section 923(g) of title 18, United States Code, except that this provision shall apply to any request for information made by any person or entity after January 1, 1998

⁸ As explained below, these include the complete multiple-sale records involving Chicago residents and trace records involving the Chicago Police Department, which ATF disclosed to Chicago, as well as the same records in redacted form that ATF discloses to any requester on zip disks after two years for multiple-sales records, and after five years for trace records.

Under this provision, ATF may not disclose “the contents or any portion thereof” of the records kept by federal firearms licensees under § 923(g). Nor may ATF disclose any records reported under § 922(g)(3) (multiple handgun sale reports) and § 922(g)(7) (trace reports). These restrictions apply to information requests made after January 1, 1998. This encompasses Chicago’s request which is the subject of this litigation, as it was made in late 1998.

P.L. 108-199 imposes a blanket prohibition of the disclosure of *any* licensee information, including *any* information from multiple sale and tracing reports. This includes the records Chicago seeks here as well as the records ATF previously released on zip disks after the expiration of two and five year periods. Moreover, the enactment of the blanket prohibition in P.L. 108-199 renders moot any need for this court to determine the application of the exception in § 644 for continued disclosure “under 5 U.S.C. 552” before the date of enactment. As P.L. 108-199 provides, “no funds appropriated under this or any other Act may be used to disclose” the records in question, without any allowance for disclosure at a later date.

As is indicated by the more absolute language of the 2004 rider (in contrast to the 2003 rider), Congress meant to lay to rest any doubt that the records at issue may not be disclosed. “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003) (rejecting reading that would render amendment “an exercise in futility”).

This case implicates the privacy interests of millions of Americans who lawfully chose to own firearms.⁹ This court previously held that “the City seeks records pertaining to gun buyers and sellers. . .

⁹ See *Staples v. United States*, 511 U.S. 600, 613-14 (1994) (“owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm . . .”).

. [O]ne does not possess any privacy interest in the purchase of a firearm.” *Chicago v. U.S. Dept. of Treasury*, 287 F.3d at 636.¹⁰ This court also decided that “every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF. . . . As a result, there can be no expectation of privacy in the requested names and addresses.” *Id.* at 637.

This court’s above conclusions overlooked the following provisions of the GCA: 18 U.S.C. § 923(g)(3) (records of multiple handgun sales received by State or local law enforcement may not be disclosed and must be destroyed within 20 days of receipt); § 923(g)(1)(D) (licensee records may be disclosed to law enforcement agencies only regarding persons ineligible to possess firearms); §§ 923(g)(1)(B)(iii) & 923(g)(7) (licensee records available for tracing are limited to a “bona fide criminal investigation”); and § 926(a) (licensee records may not be transferred to any federal, State, or local facilities, and firearms, firearm owners, and firearm transactions may not be registered). Under these provisions, the government’s access to licensee information and dissemination thereof are strictly limited.¹¹

¹⁰ For its holding that it is “well established” that firearm purchasers have no privacy rights, this court relied on a single district court opinion which also failed to mention any of the GCA provisions discussed herein. 287 F.3d at 636-37, citing *Center to Prevent Handgun Violence v. U.S. Dept. of Treasury*, 981 F. Supp. 20, 23 (D. D.C. 1997). This court also cited *United States v. Biswell*, 406 U.S. 311 (1972), but that case only upheld regulatory inspections of licensee records and had nothing to do with the disclosure thereof to the public. Indeed, *Biswell* held that firearms dealers *have* “justifiable expectations of privacy.” *Id.* at 316.

¹¹ Moreover, “[t]he fact that an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.” *U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989). *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000), notes:

This type of privacy interest in which individuals seek to keep information from the general public while simultaneously divulging it for limited purposes to others is not unusual. Of course, FOIA’s privacy exemption is a prime example: individuals divulge personal information to the government for limited purposes with the expectation that the information

These privacy protections go to the core of what Congress sought to buttress by enactment of P.L. 108-199. These are the key provisions pertinent to the prohibition in P.L. 108-199 of disclosure of “the contents or any portion thereof of 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 section 923(g) of title 18, United States Code.” As explained below, the information sought by Chicago is absolutely precluded from disclosure by these provisions.

I. REPORTS OF MULTIPLE HANDGUN SALES MAY NOT BE DISCLOSED

P.L. 108-199 provides in part that no funds may be used to disclose “the contents or *any portion* thereof¹² of any information . . . required to be reported pursuant to” 18 U.S.C. § 923(g)(3) (emphasis added). Section 923(g)(3)(A) provides that licensed dealers shall prepare a report of any sale of two or more pistols or revolvers to a nonlicensee in a five-day period.¹³ The dealer forwards the report to the ATF and also “to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction” where the sale took place. Section 923(g)(3)(B) provides:

Except in the case of forms and contents thereof regarding a purchaser who is prohibited

will not become available to the general public.

¹² “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’ *Webster’s Third New International Dictionary* 97 (1976). Congress did not add any language limiting the breadth of that word” *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

¹³ This is a mere reporting requirement – such multiple handgun sales are lawful. Transfers are made only after the national instant criminal background check system (“NICS”) verifies that the purchaser is eligible to receive a firearm, after which NICS must destroy all records related to the person and the transfer, other than an identifying number and the date. 18 U.S.C. § 922(t).

by subsection (g) or (n) of section 922 of this title from receipt of a firearm,¹⁴ the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received.¹⁵

As the Solicitor General has stated, “Section 923(g)(3)(B)’s strict prohibition on retention and release of multiple sales information by state and local authorities would be wholly pointless if any member of the public could obtain the same data from ATF pursuant to the FOIA.” Brief for the Petitioner, *U.S. Dept. of Treasury, BATF v. Chicago*, No. 02-322, at 24-25. Having prohibited law enforcement agencies from disclosing information of multiple handgun sales to any entity – which would include the City of Chicago – and from keeping it for more than twenty days, Congress surely could not have intended that the information would be available for the asking by anyone via the FOIA.

If it was previously not clear enough that § 923(g)(3) on its face prohibits disclosure through the FOIA or otherwise, P.L. 108-199 categorically provides that no funds may be used to disclose “the contents *or any portion thereof* of any information . . . required to be reported pursuant to” § 923(g)(3) (emphasis added). That not only precludes any disclosure to Chicago in this litigation, but it also prohibits ATF from disclosing “any portion” of that information as it has done previously. “After two years, ATF releases the entire Multiple Sales Database, except for individual names and addresses of retail firearms purchasers” Brief for the Petitioner, *U.S. Dept. of Treasury, BATF v. Chicago*, No. 02-322,

¹⁴ These provisions prohibit convicted felons and certain other limited classes of persons from receiving a firearm.

¹⁵ Section 923(g)(3)(B) continues that once every 6 months, State and local law enforcement agencies must certify to the Attorney General that no disclosures have been made and that all records and the contents thereof have been destroyed.

at 11. The released database includes firearm information (manufacturer, type, serial number and caliber) and dealer identification. If any doubt existed about whether such disclosure may be made despite the privacy guarantees of § 923(g)(3), P.L. 108-199 absolutely prohibits such disclosure.

ATF previously made other disclosures to Chicago. The purpose of this FOIA suit is to obtain data to use in Chicago's civil suit against the firearms industry.¹⁶ To further its interests in that litigation, Chicago sought immediate access to the entire Trace and Multiple Sales databases. In his Supreme Court brief in this case, the Solicitor General stated:

In accordance with its practice of cooperating with local law enforcement agencies under the GCA, ATF chose to make a discretionary release to respondent of all data related to (a) trace requests submitted by the Chicago Police Department, and (b) multiple-sales purchasers who are residents of Chicago. See . . . 18 U.S.C. 923(g)(1)(D).

Brief for the Petitioner, *U.S. Dept. of Treasury, BATF v. Chicago*, No. 02-322, at 12.

ATF should have known at the time that, since the Chicago Police Department could not retain or release multiple-sales information and must destroy it within 20 days, the City of Chicago was not entitled to that information.¹⁷ Moreover, the release was not made to cooperate with law enforcement agencies, for the City of Chicago is not a law enforcement agency and it wanted the records for civil litigation. Finally, as analyzed in more detail below, § 923(g)(1)(D) authorizes ATF to “make available to any

¹⁶ Chicago began its FOIA request by noting that it was being made “in conjunction with its lawsuit against members of the firearms industry.” Chicago to ATF, July 7, 1999, attached to Complaint in this case. See *City of Chicago v. Beretta*, 337 Ill. App.3d 1, 785 N.E.2d 16 (2002), *appeal allowed*, 203 Ill.2d 544, 788 N.E.2d 727, 273 Ill. Dec. 136 (2003).

¹⁷ An agency may not make a discretionary release of records which are “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3). *Ass’n. of Retired Railroad Workers, Inc. v. U.S. Railroad Retirement Bd.*, 830 F.2d 331, 335-36 (D.C. Cir. 1987); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1187 (8th Cir. 2000); *Sherman v. U.S. Dept. of Army*, 244 F.3d 357, 364 (5th Cir. 2001) (only person whose privacy is protected may waive privacy interests).

Federal, State, or local law enforcement agency” – not to a municipality – information obtained under the GCA “with respect to the identification of persons prohibited from purchasing or receiving firearms . . . who have purchased or received firearms”¹⁸

At any rate, P.L. 108-199 is perfectly clear. Each and every item in a multiple sales form – “the contents or any portion thereof” – is barred from disclosure. This prohibition has no time limit, whether of two years or other time period.¹⁹ Chicago is not entitled to *any* information from the multiple sales data base, and ATF is prohibited from releasing any information from that data base.

II. TRACE RECORDS MAY NOT BE DISCLOSED

P.L. 108-199 provides in part that no funds may be used to disclose “the contents or any portion thereof of any information . . . required to be reported pursuant to” § 923(g)(7). Section 923(g)(7) provides in pertinent part: “Each licensee shall respond immediately to . . . a request by the Attorney General for information contained in the records required to be kept by this chapter as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation.”

¹⁸ ATF said just that in opposition to subpoenaed records in New York’s suit against the firearms industry:

Section 923(g)(1)(D) and [27 C.F.R.] § 478.25 deal solely with information regarding the identification of “prohibited persons,” *i.e.*, convicted felons, who have purchased or received firearms or ammunition. The trace data, multiple sales data and FFL records that the plaintiffs seek is much broader, as it includes *inter alia*, the names of FFL’s which have manufactured and sold traced weapons.

Bureau of Alcohol, Tobacco, Firearms and Explosives’ Objections to Order of Magistrate Judge Dated May 19, 2004, *City of New York v. Beretta USA Corp.*, No. CV-00-3641 (E.D. N.Y.), 39, n.16.

¹⁹ “Confidentiality interests cannot be waived through prior public disclosure or the passage of time.” *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999).

If it was previously not clear enough that § 923(g)(7) prohibits disclosure through the FOIA,²⁰ P.L. 108-199 categorically provides that no funds may be used to disclose “the contents *or any portion thereof* of any information . . . required to be reported pursuant to” § 923(g)(7) (emphasis added). That not only precludes any disclosure to Chicago in this litigation, but it also prohibits ATF from disclosing “any portion” of that information as it has done previously. After five years, ATF releases the following items from the trace database which were reported by licensees pursuant to § 923(g)(7) and ATF’s regulations thereunder: firearm data (serial number and manufacturer/importer name), firearms dealer identification data, and date of retail purchase. Brief for the Petitioner, *U.S. Dept. of Treasury, BATF v. Chicago*, No. 02-322, at 8-9. ATF should have known that that practice was inconsistent with § 923(g)(3), but in any event, P.L. 108-199 absolutely prohibits such disclosure.

In sum, under P.L. 108-199 information reported by a licensee pursuant to a trace request, including “the contents or any portion thereof,” is absolutely barred from disclosure. This prohibition has no time limit. Chicago is not entitled to any information from the trace database, and ATF is prohibited from releasing any information from that database.

III. ALL LICENSEE RECORDS ARE KEPT PURSUANT TO § 923(g) AND MAY NOT BE DISCLOSED

Besides prohibiting disclosure specifically of multiple sale and trace records, P.L. 108-199 more generally prohibits disclosure of the licensee records from which they are derived and all other licensee

²⁰ It is common sense that records which ATF may obtain only in a bona fide criminal investigation and may make available only to law enforcement agencies are not somehow transmogrified by the FOIA into public records. In any event, § 923(g)(1)(D) authorizes ATF to make licensee information available only to law enforcement agencies and then only regarding prohibited persons.

records. P.L. 108-199 provides that no funds may be used to disclose “the contents or any portion thereof of any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code”

Section 923(g)(1)(A) begins:

Each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe.²¹

This makes clear that *all* licensee records are encompassed within the purview of the prohibition in P.L. 108-199. Moreover, § 923(g)(1)(D) itself mandates that ATF keep licensee records confidential other than providing information to law enforcement agencies about prohibited persons:

The Attorney General may make available to any Federal, State, or local *law enforcement agency* any information which he may obtain by reason of this chapter with respect to the identification of *persons prohibited from purchasing or receiving firearms or ammunition who have purchased or received firearms or ammunition*, together with a description of such firearms or ammunition, and he may provide information to the extent such information may be contained in the records required to be maintained by this chapter, when so requested by any Federal, State, or local law enforcement agency. (emphasis added).²²

Thus, the only information from licensee records which ATF may disclose to a local law

²¹ Regulations require the licensee to keep a bound book of receipts and dispositions of firearms and also to keep detailed forms showing transfer of firearms to non-licensees (Form 4473). 27 C.F.R. §§ 476.124, 476.125(e).

²² This provision was enacted by the Firearms Owners Protection Act (“FOPA”), P.L. 99-308, 100 Stat. 449, 455 (1986). It repealed the broader authority delegated by § 923(g) to “make available to such State or any political subdivision thereof, any information . . . with respect to the identification of persons . . . who have purchased or received firearms or ammunition.” Gun Control Act, P. L. 90-618, 82 Stat. 1213 (1968).

enforcement agency concerns felons and other prohibited persons.²³ See Senate Report 98-583, 98th Cong., 2d Sess., 16 (1984) (Secretary may share with local law enforcement licensee information “which relates to the identification of prohibited persons who have purchased or received firearms”); *id.* at 18 (provision reduces “potential for unwarranted intrusions into the business affairs of law-abiding licensees”). Nothing in § 923(g)(1)(D) authorizes disclosure to the public of this information, much less information about non-felons.

Not only is ATF prohibited from disclosing records other than to law enforcement agencies concerning prohibited persons, but ATF itself may not obtain information from licensee records, subject to explicit exceptions such as the multiple sales reports and trace records. Section 926(a) provides:

No such rule or regulation prescribed after the date of the enactment of the Firearms Owners’ Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States *or any State or any political subdivision thereof*, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Attorney General’s authority to inquire into the disposition of any firearm in the course of a criminal investigation. (Emphasis added.)

²³ *United States v. Marchant*, 55 F.3d 509, 516 (10th Cir. 1995), which involved disclosure to local law enforcement of a licensee transfer form (Form 4473) falsified by a felon, commented:

This legislative distinction between law-abiding citizens and persons prohibited from possessing or receiving firearms under 922(g) is central to the FOPA amendments Further, although *Congress restricted the BATF’s ability to release information obtained from ATF Form 4473s to state or local law enforcement agencies*, FOPA authorized the BATF to release “any information . . . with respect to the identification of persons prohibited from purchasing or receiving firearms.” [. . . 18 U.S.C. 923(g)(1)(D).] FOPA, therefore, allowed the BATF to release information regarding prohibited persons such as Defendant without regard for privacy or confidentiality. (emphasis added.)

Thus, while ATF has the authority to trace firearms, no licensee records – which includes the contents of trace records – may “be recorded at or transferred to a facility owned, managed, or controlled by . . . any State or any political subdivision thereof.” Moreover, the privacy interests include not just the “firearms owners” but also the “firearms” and “firearms transactions or dispositions.” Those terms encompass licensees in their capacities as firearms owners as well as their records of firearms transactions.

In sum, § 923(g) already prohibited release of licensee records to the public, and now P.L. 108-199 makes even more explicit that ATF may not disclose “the contents or any portion thereof of any information required to be kept by licensees pursuant to section 923(g).” Chicago is not entitled to any of the records it has requested.

CONCLUSION

This court should hold that none of the records sought here under the Freedom of Information Act are subject to disclosure.

Respectfully submitted,

National Rifle Association of America, Inc.
By Counsel

Stephen P. Halbbrook

Richard E. Gardiner

10560 Main St., Suite 404
Fairfax, VA 22030
(703) 352-7276

CERTIFICATE OF COMPLIANCE

Compliance with F.R.App.P. 32(a)(7)(B) has been met, in that the brief contains 5,437 words.

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Brief Amicus Curiae were mailed, first class postage prepaid, this 17th day of June, 2004, to:

David Graver
Office of the Corporation Counsel
City of Chicago
30 North LaSalle Street, Suite 800
Chicago, IL 60602

Steve Frank
Room 3343
Department of Justice
Civil Division, Appellate Section
601 D Street N.W.
Washington, D.C. 20530-0001

David A. Handzo
JENNER & BLOCK LLP
601 13th Street, NW
Washington, DC 20005

Lucy A. Dalglish
1815 North Fort Myer Drive, Suite 900
Arlington, VA 22209

Eric Mogilnicki
Wilmer, Cutler & Pickering
2445 M St., N.W.
Washington, D.C. 20037

Stephen P. Halbrook