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**THE SEVENTH CIRCUIT'S  
STATUTORY INTERPRETATION MISFIRES,  
WOUNDING THE ALREADY FRAGILE  
FREEDOM OF INFORMATION ACT**

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INTRODUCTION

In a time like the present, when political turmoil and allegations of government corruption dominate our news, the Freedom of Information Act ("FOIA")<sup>1</sup> should be on the forefront of every American's mind. FOIA was enacted in 1966 to provide the American public with the right to access information about certain government activities, thereby minimizing the risk of government secrecy and corruption.<sup>2</sup> The United States Supreme Court has stated that the "basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."<sup>3</sup>

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<sup>1</sup> 5 U.S.C. § 552 (2000).

<sup>2</sup> See Openness Promotes Effectiveness in our National Government Act of 2005, S. 394, 109th Cong. (2005) (listing recent Congressional findings on FOIA).

<sup>3</sup> Nat'l Labor Relations Bd. ("NLRB") v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

Under FOIA, accessibility to information is based upon the fundamental principle that the American people have a “right to know,” rather than determined based on their “need to know.”<sup>4</sup> Thus, FOIA requires government agencies to disclose information and records upon request and without question.<sup>5</sup> While government agencies are still permitted to withhold from disclosure certain information that falls within one of FOIA’s nine exemptions,<sup>6</sup> these exemptions are to be narrowly construed so as to promote the statute’s broad disclosure policy.<sup>7</sup> Furthermore, federal courts may review an agency’s denial of a FOIA request to determine whether the information was improperly withheld.<sup>8</sup>

In 2002, the United States Court of Appeals for the Seventh Circuit was faced with such a review in *City of Chicago v. United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms* (“ATF”), the first of what was to become a series of three cases decided by the court regarding the City of Chicago’s (the “City”) FOIA request from ATF.<sup>9</sup> Pursuant to FOIA, the City had requested data contained in two ATF databases regarding the tracing and sale of firearms, and ATF had repeatedly refused to disclose all of the requested information to the City, claiming that various exemptions warranted its refusal.<sup>10</sup>

In its first two opinions, the Seventh Circuit was a champion for public disclosure of the trace and multiple sales data, arguing

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<sup>4</sup> See S. 394 § 2.

<sup>5</sup> See Alan B. Morrison, *Balancing Access to Government-Controlled Information*, 14 J.L. & POL’Y 115, 117 (2006); Meredith Fuchs, *Information Regulation: Controlling the Flow of Information to and from Administrative Agencies*, 58 ADMIN. L. REV. 131, 144 (2006).

<sup>6</sup> 5 U.S.C. § 552(b).

<sup>7</sup> See *NLRB*, 437 U.S. at 236; *In re Wade*, 969 F.2d 241, 246 (7th Cir. 1992).

<sup>8</sup> 5 U.S.C. § 552(a)(4)(B).

<sup>9</sup> See *City of Chicago v. ATF* (“*Chicago III*”), 423 F.3d 777 (7th Cir. 2005); *City of Chicago v. ATF* (“*Chicago II*”), 384 F.3d 429 (7th Cir. 2004); *City of Chicago v. ATF* (“*Chicago I*”), 287 F.3d 628 (7th Cir. 2002).

<sup>10</sup> See *Chicago III*, 423 F.3d 777; *Chicago II*, 384 F.3d 429; *Chicago I*, 287 F.3d 628.

incessantly that the public interest in the disclosure of this information far outweighed any private interest or other government justification for its withholding.<sup>11</sup> However, in September 2005, the Seventh Circuit radically switched roles from a FOIA advocate to a FOIA foe in the court's third and final *City of Chicago* opinion.<sup>12</sup> In this final opinion, the Seventh Circuit held that Congress effectively changed the substantive law under FOIA, and completely banned the disclosure of this information to the public, by inserting a rider in the Consolidated Appropriations Act of 2005 ("2005 rider"),<sup>13</sup> granting the information in question immunity from legal process.<sup>14</sup> In doing so, the court gave a significant and misplaced amount of weight to the apparent intent of Congress to ban the information from disclosure and quickly set aside established principles of statutory interpretation and construction to reach a convenient but faulty conclusion.<sup>15</sup>

Part I of this Note sets out the factual and procedural background of the three *City of Chicago* decisions and details the reasoning and holding of each decision. Part II discusses the Seventh Circuit's faulty interpretation of the 2005 rider in greater detail. Part III describes the United States District Court for the Eastern District of New York's more logical interpretation of the same statutory text. Finally, Part IV compares the two interpretations and examines more specifically the flaws and possible impact of the Seventh Circuit's interpretation.

### I. BACKGROUND OF THE *CITY OF CHICAGO* LITIGATION

Since late 1998, the City of Chicago has attempted, unsuccessfully, to gain access to firearms sales and trace records

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<sup>11</sup> See *Chicago II*, 384 F.3d at 435-36; *Chicago I*, 287 F.3d at 637-38.

<sup>12</sup> See *Chicago III*, 423 F.3d at 784.

<sup>13</sup> Pub. L. No. 108-447, 118 Stat. 2809, 2859-60, *codified as amended* at 18 U.S.C. § 923 (2004).

<sup>14</sup> *Chicago III*, 423 F.3d at 782.

<sup>15</sup> See *id.* at 780-82.

contained in two databases compiled and maintained by ATF.<sup>16</sup> The City's long and documented struggle to retrieve these records began in response to a separate action it brought against certain manufacturers, distributors, and dealers of firearms, who the City claimed created a public nuisance by intentionally marketing firearms to Chicago residents and other residents likely to use or possess the weapons in Chicago.<sup>17</sup> The City alleged that the defendants' conduct interfered with the City's ability to enforce its gun control ordinances.<sup>18</sup> Therefore, pursuant to FOIA, the City requested specific information from ATF's Multiple Sales and Trace Databases ("Trace Data") in an effort to determine the distribution practices of these gun manufacturers and establish liability.<sup>19</sup>

ATF is a law enforcement agency within the United States Department of Justice<sup>20</sup> which, among other things, is responsible for the enforcement of federal criminal laws and the regulation of the firearms industry.<sup>21</sup> The Seventh Circuit stated that "ATF has acknowledged that its missions include analysis of firearm distribution and trafficking patterns, aiding local governments to enforce their own gun control laws and informing the public of the nature and extent of

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<sup>16</sup> See *City of Chicago v. ATF*, 2001 WL 34088619, at \*1-2 (N.D. Ill. Mar. 8, 2001).

<sup>17</sup> See *City of Chicago v. ATF* ("*Chicago I*"), 287 F.3d 628, 631 (7th Cir. 2002); *City of Chicago*, 2001 WL 34088619, at \*1; see generally *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004) (holding in favor of the defendant by refusing to extend the law of nuisance to apply to the state and federally regulated firearms industry and stating that the regulation of the manufacture, distribution and sale of firearms should be left to the legislature, not the courts).

<sup>18</sup> See *Chicago I*, 287 F.3d at 631.

<sup>19</sup> *Id.*

<sup>20</sup> 6 U.S.C. § 531-33 (transferring ATF from the Department of Treasury to the Department of Justice, with the exception of ATF's administration and revenue collection functions, and establishing an explosives training and research facility with the Bureau. ATF is now known as the Bureau of Alcohol, Tobacco, Firearms and Explosives).

<sup>21</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, About ATF, <http://www.atf.gov/about/mission.htm> (last visited Oct. 19, 2006).

illegal gun trafficking.”<sup>22</sup> These gun control laws include the Gun Control Act (“GCA”), which requires firearms manufacturers, importers, dealers and collectors to disclose certain information to ATF.<sup>23</sup> As part of its duties, ATF then compiles and maintains the information in comprehensive databases.<sup>24</sup> During the last decade, ATF has refused to disclose and has fiercely fought to prevent the disclosure of the content of these databases to cities, including the City of Chicago, and private organizations around the country.<sup>25</sup>

The first database at issue in the *City of Chicago* litigation was the “Trace Database,” which as its name suggests contains information regarding the manufacture, distribution and purchase history of a particular weapon recovered by a law enforcement agency in connection with a crime.<sup>26</sup> The second database, the “Multiple Sales Database,” contains information submitted to ATF by dealers on any non-licensed individuals who purchased two or more firearms from the same dealer within a five-day period.<sup>27</sup> Despite the City’s repeated requests, ATF failed to provide the city with all of the requested Trace Data, citing numerous reasons why the information was exempt from disclosure.<sup>28</sup> This four-year court battle in the Seventh Circuit ensued.

A. *Chicago I - The Applicability of Exemptions 6, 7(A) and 7(C) of FOIA*

The Seventh Circuit first became involved in the *City of Chicago* litigation in 2002, after the United States District Court for the Northern District of Illinois granted the City’s summary judgment

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<sup>22</sup> *Chicago I*, 287 F.3d at 637.

<sup>23</sup> 18 U.S.C. § 923(g) (2000).

<sup>24</sup> *See Chicago I*, 287 F.3d at 631-32.

<sup>25</sup> *See City of Chicago v. ATF (“Chicago III”)*, 423 F.3d 777, 778-79 (7th Cir. 2005); *City of New York v. Beretta U.S.A. Corp.*, 429 F.Supp.2d 517, 519-21 (E.D.N.Y. 2006).

<sup>26</sup> *See Chicago I*, 287 F.3d at 631-32.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 632 (noting that ATF provided the City with some of the requested information, but withheld a significant portion).

motion and ATF appealed.<sup>29</sup> The issues at both the district court level and the initial appellate review were whether certain FOIA exemptions, namely Exemption 6,<sup>30</sup> Exemption 7(A),<sup>31</sup> and Exemption 7 (C),<sup>32</sup> permitted ATF to withhold this information from the City.<sup>33</sup> Relying on the long established rule that exemptions to FOIA are to be narrowly construed, the Seventh Circuit reviewed each exemption and held that neither of the exemptions was applicable to the requested information.<sup>34</sup> At the end of its analysis, the court firmly stated:

Inherent in the City's request for records is the public's interest in ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun

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<sup>29</sup> *See id.* at 631; *City of Chicago v. ATF*, 2001 WL 34088619, at \*6 (N.D. Ill. Mar. 8, 2001).

<sup>30</sup> Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6).

<sup>31</sup> Exemption 7(A) provides that records "compiled for law enforcement purposes" are exempt from disclosure, "but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with law enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

<sup>32</sup> Under Exemption 7(C), "records or information compiled for law enforcement purposes" may be withheld "to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

<sup>33</sup> *City of Chicago v. ATF* ("*Chicago I*"), 287 F.3d 628, 632 (7th Cir. 2002); *City of Chicago*, 2001 WL 34088619, at \*2.

<sup>34</sup> *Chicago I*, 287 F.3d at 636. The Seventh Circuit held that the names and addresses of individuals who purchased firearms were not of "such a sensitive nature that their disclosure would harm or embarrass the individual," and so, Exemption 6 did not apply. *Id.* The court also held that Exemption 7(C) does not apply to any of the requested information, and noted that the purchase of a firearm does not raise any legitimate privacy concerns as it is not a private transaction and purchasers are on notice that their names and addresses will be reported to the proper authorities. *Id.* at 637. Finally, the court found that disclosure of the information in question would not interfere with enforcement proceedings "within the meaning of Exemption 7(A) of FOIA." *Id.* at 635; *see also City of Chicago v. ATF*, 297 F.3d 672 (7th Cir. 2002) (amending portions of the *Chicago I* opinion relating to FOIA Exemption 7(A)).

trafficking, as well as determining whether stricter regulation of firearms is necessary. . . . There is a strong public policy in facilitating the analysis of national patterns of gun trafficking and enabling the City to enforce its criminal ordinances. Disclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny.<sup>35</sup>

The court then affirmed the district court's decision ordering ATF to disclose the requested information to the City.<sup>36</sup>

ATF appealed the Seventh Circuit's 2002 decision and the Supreme Court granted certiorari.<sup>37</sup> However, while the case was pending, Congress passed the Consolidated Appropriations Resolution of 2003, which contained a rider ("2003 rider") that prohibited the use of appropriated funds "to take any action based upon any provision of [FOIA] with respect to records collected or maintained pursuant to [certain sections of the GCA]," including the information in question.<sup>38</sup> Thus, the Supreme Court vacated the Seventh Circuit's judgment and remanded the case back to the court to determine "what effect, if any, this rider had on the case."<sup>39</sup>

### *B. Chicago II – Interpreting the 2003 and 2004 Riders*

In September 2004, the Seventh Circuit rendered its second opinion regarding the City of Chicago's FOIA request in light of the 2003 rider and a rider contained in the Consolidated Appropriations

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<sup>35</sup> *Chicago I*, 287 F.3d at 637.

<sup>36</sup> *Id.* at 638.

<sup>37</sup> *ATF v. City of Chicago*, 537 U.S. 1229, 1229 (2003).

<sup>38</sup> *Id.*; Pub. L. No. 108-7, § 644, 117 Stat. 11, 473-74 (2003).

<sup>39</sup> *City of Chicago*, 537 U.S. at 1229.

Act of 2004 (“2004 rider”).<sup>40</sup> Both riders expressly precluded the use of federal funds to disclose the Trace Data, and impliedly, as ATF argued, prohibited the disclosure of the data to the public.<sup>41</sup> This second opinion also introduced a fourth potential exemption to the controversy, Exemption 3,<sup>42</sup> which permitted government agencies to withhold information that was specifically exempt from disclosure by another statute.<sup>43</sup> Therefore, the court’s task was to interpret the 2003 and 2004 riders to determine whether the funding restrictions in effect exempted the requested data from disclosure and amounted to a substantive change in FOIA.<sup>44</sup>

Relying once again on FOIA’s underlying policy “to establish a general philosophy of full agency disclosure,” the court stated that there is a “strong presumption in favor of disclosure” and that exemptions to FOIA are to be interpreted narrowly.<sup>45</sup> The court then diligently began its interpretation of the 2003 and 2004 riders by first reviewing the express language of the two acts.<sup>46</sup> After finding no express language in either rider exempting the information from disclosure, the issue then became whether Congress intended to exempt the Trace Data from disclosure, even though it did not

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<sup>40</sup> Pub. L. No. 108-199, 118 Stat. 3, 53 (2004).; *see* *City of Chicago v. ATF* (“*Chicago I*”), 384 F.3d 429, 432 (7th Cir. 2004) (noting that the Consolidated Appropriations Act of 2004 was passed after the remand by the Supreme Court but before the Seventh Circuit reheard the case).

<sup>41</sup> *Chicago II*, 384 F.3d at 432.

<sup>42</sup> Exemption 3 permits withholding of information that is “specifically exempted from disclosure by statute (other than [FOIA]), provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3).

<sup>43</sup> *Chicago II*, 384 F.3d at 432.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 432-33 (noting that only direct language had been used to create substantive FOIA exemptions in the past, such as language expressly indicating that certain information “may be withheld from the public in response to a FOIA request.”).

explicitly indicate such intent.<sup>47</sup> This congressional practice is referred to as “repeal by implication.”<sup>48</sup> As the court noted, repeals by implication are a disfavored practice, especially when the repeal is to have occurred through an appropriations measure.<sup>49</sup> While appropriations acts are permitted to change substantive law, “there is a strong presumption that they do not.”<sup>50</sup> Further, in the event that appropriations legislation conflicts with a substantive statute, the court is to narrowly construe the appropriations legislation.<sup>51</sup>

The Seventh Circuit outlined the two instances where repeal by implication may be found: (1) where one act is “clearly intended as a substitute” for the other or (2) where the two statutes are in “irreconcilable conflict.”<sup>52</sup> The court quickly dismissed the idea that either rider was a clearly intended substitute for portions of FOIA.<sup>53</sup> It, however, gave a great deal of consideration to whether FOIA and the funding restrictions imposed by the riders were in irreconcilable conflict.<sup>54</sup> The court eventually came to the conclusion that there was “no irreconcilable conflict between prohibiting the use of federal funds to process the request and granting the City access to the databases.”<sup>55</sup>

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<sup>47</sup> *Id.* at 433-34.

<sup>48</sup> *Id.* at 433.

<sup>49</sup> *Chicago II*, 384 F.3d at 433 (citing *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 189-90 (1978) (stating that “the policy [that repeals by implication are disfavored] applies with even greater force when the claimed repeal rests solely on an Appropriations Act, and that [the Court] recognizes that both substantive enactments and appropriations measures are “Acts of Congress,” but the latter have the limited and specific purpose of providing funds for authorized programs.”).

<sup>50</sup> *Chicago II*, 384 F.3d at 433.; *see generally* Jack M. Beermann, Congressional Administration, 43 *SAN DIEGO L. REV.* 61, 84-90 (2006) (briefly discussing the controversy surrounding use of appropriations riders, and noting that one main criticism is the ability of riders to “fly below the political radar,” by being “placed in a bill by a few connected members of Congress and voted on by members who may not even be aware of their presence in the bill.”).

<sup>51</sup> *Chicago II*, 384 F.3d at 433.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 433-34.

<sup>54</sup> *Id.* at 434-35.

<sup>55</sup> *Id.* at 435.

The Seventh Circuit reasoned that FOIA is mainly focused on ensuring that the public has access to agency information, and it “only peripherally deals with the allocation of funds.”<sup>56</sup> Where appropriations legislation had changed substantive law in the past, the substantive statutes in most cases had only dealt with the transfer of funds; thus, “by making the funds in question unavailable Congress was able to squarely defeat the purpose of those statutes.”<sup>57</sup>

Therefore, the Seventh Circuit concluded that the funding restrictions imposed by the two riders were merely a procedural obstacle that the City could easily overcome and advocated the City’s suggestion to use a court-appointed special master, paid for by the City, to retrieve the data.<sup>58</sup> The court again affirmed the district court’s decision and ordered ATF to disclose the Trace Data to the City.<sup>59</sup>

### C. *Chicago III* – Interpreting the 2005 Rider

The Seventh Circuit’s third and final *City of Chicago* opinion stemmed from the passage of a third rider, the 2005 rider,<sup>60</sup> which prompted the rehearing of the case and resulted in the reversal of the district court’s decision.<sup>61</sup> Like the previous two riders, the 2005 rider precluded the use of federal funding to access the databases in question.<sup>62</sup> However, this new rider also contained additional language declaring that “all such data shall be immune from legal process.”<sup>63</sup> The Seventh Circuit’s interpretation of this language, and in particular the phrase “such data,” is the focus of the remainder of this Note and the center of this continuing debate.

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<sup>56</sup> *Id.*

<sup>57</sup> *Chicago II*, 384 F.3d at 434.

<sup>58</sup> *Id.* at 436.

<sup>59</sup> *Id.*

<sup>60</sup> 118 Stat. at 2859-60.

<sup>61</sup> *City of Chicago v. ATF (“Chicago III”)*, 423 F.3d 777, 778 (7th Cir. 2005).

<sup>62</sup> *Id.* at 779-80.

<sup>63</sup> *Id.*; 118 Stat. at 2860.

The three-judge panel, consisting of Circuit Judges Bauer, Rovner, and Williams, again heard the case in *Chicago III*.<sup>64</sup> Judge Bauer, delivering the opinion of the court, began by straightforwardly referencing the Seventh Circuit's history with the case: "For the third time in four years, we consider whether [FOIA] entitles the City of Chicago to information from the [ATF] databases regarding the sale and tracing of firearms."<sup>65</sup> After a brief description of the court's prior decisions and the series of riders that were passed by Congress during the pendency of the case, the court set out the language of the 2005 rider<sup>66</sup> and jumped right into a discussion of its meaning.<sup>67</sup>

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<sup>64</sup> All three *City of Chicago* decisions were rendered by Judges William Bauer, Ilana Diamond Rovner and Ann Williams, and all three opinions were delivered by Judge Bauer. See *Chicago III*, 423 F.3d at 778; *Chicago II*, 384 F.3d at 431; *City of Chicago v. ATF* ("*Chicago I*"), 287 F.3d 628, 631 (7th Cir. 2002).

<sup>65</sup> *Chicago III*, 423 F.3d at 778.

<sup>66</sup> The 2005 rider provides:

No funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms, and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section 923(g), to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure and not for use in any civil action or proceeding other than an action or proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or a review of such an action or proceeding, to enforce the provisions of chapter 44 of such title [18 USCS §§ 921 et seq.], and *all such data shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to enforce the provisions of that chapter, or a review of such an action or proceeding; except that this proviso shall not be construed to prevent the disclosure of statistical information*

With little elaboration, the Seventh Circuit agreed with ATF that the 2005 rider dramatically changed the legal landscape since the court's 2004 opinion.<sup>68</sup> The court stated: "Congress' obvious intention in adding the 'immune from legal process' language to the funding restriction that existed under prior riders was to cut off access to the databases for any reason not related to law enforcement."<sup>69</sup> In short, the court interpreted the new rider as prohibiting ATF from acting on any request for disclosure of the Trace Data, and providing the requesting party with no judicial remedy.<sup>70</sup> This reading of the 2005 rider also made *Chicago II*'s court-appointed special master solution untenable, as the court determined that such a court order was unquestionably "legal process" and prohibited under the provisions of the new rider.<sup>71</sup> Ultimately, the Seventh Circuit held that the 2005 rider qualified as an Exemption 3 statute and substantively changed FOIA law by exempting from disclosure data to which the public was previously entitled.<sup>72</sup> The court reversed the district court's judgment and released ATF from its obligation to give the City access to the Trace Data.<sup>73</sup>

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concerning total production, importation, and exportation by each licensed importer (as defined in section 921(a)(9) of such title) and licensed manufacturer (as defined in section 921(a)(10) of such title).

118 Stat. at 2859-60 (emphasis added highlighting relevant 2005 additions).

<sup>67</sup> *Chicago III*, 423 F.3d at 779-80.

<sup>68</sup> *Id.* at 780.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 781; *see also* City of Chicago v. ATF ("*Chicago II*"), 384 F.3d 429, 436 (7th Cir. 2004) (advocating the use of a court-appointed special master to retrieve the data).

<sup>72</sup> *Chicago III*, 423 F.3d at 782. The court also heard and dismissed the City's separation of powers and first amendment arguments, which are beyond the scope of this Note.

<sup>73</sup> *Id.* at 784.

## II. THE SEVENTH CIRCUIT'S FAULTY INTERPRETATION

Unlike most statutory interpretation cases, the Seventh Circuit did not lay out any rules or guidelines in its opinion by which to interpret the language of the 2005 rider in *Chicago III*.<sup>74</sup> Instead, the court purported to know, from the very beginning, the clear meaning of the language, the structure, and the intent of the 2005 rider.<sup>75</sup> In its analysis, the court repeatedly stated that Congress' intent to cut off access to the Trace Data was clear and unmistakable, citing both the use of the language "immune from legal process" and the history of the litigation as its reasoning.<sup>76</sup>

In fact, throughout the opinion, the Seventh Circuit predominantly focused on the language "immune from legal process," and only incidentally addressed the immediately preceding language "such data."<sup>77</sup> Even then, the court reluctantly considered the possibility that the language "such data" limited the application of the rider to the Trace Data in any way.<sup>78</sup> In its only mention of the construction of the rider and the language "such data," the court noted: "The only data mentioned in the paragraph prior to the reference to "such data" is the tracing data and the data regarding multiple sales, and those data are the clear antecedent to the phrase 'such data.'"<sup>79</sup> With this statement, the court surprisingly disregarded all of the language contained after the reference to the tracing and multiple sales data and before the reference to "such data."<sup>80</sup> The court also did not address any other language or structural aspects of the 2005 rider.<sup>81</sup>

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<sup>74</sup> *See id.* at 778-79.

<sup>75</sup> *Id.*

<sup>76</sup> *Chicago III*, 423 F.3d. at 780, 782.

<sup>77</sup> *Id.* at 780-82.

<sup>78</sup> *Id.* at 780-81.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* The 2005 rider states, in part:

No funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of [the Trace Data], to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and

Finally, the court ignored its own language from *Chicago II* regarding the proper treatment and priority accorded appropriations legislation which purported to change substantive law,<sup>82</sup> and quickly dismissed the City's policy concerns on the matter, citing, yet again, Congress' clear intent as its reasoning.<sup>83</sup> The court stated: "Even if we shared [the City and various *amici*'s] concerns . . . we cannot ignore clear expressions of Congressional intent, regardless of whether the end product is an appropriations rider or a statute that has proceeded through the more typical avenues of deliberation."<sup>84</sup> The court did not address any of FOIA's policy considerations.<sup>85</sup>

### III. A MORE LOGICAL INTERPRETATION OF "SUCH DATA"

#### A. Background: *City of New York v. Beretta U.S.A. Corp.*

The Seventh Circuit's faulty reading of the language "such data" in the 2005 rider is identified and critiqued in the factually

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*for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure and not for use in any civil action or proceeding other than an action or proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or a review of such an action or proceeding, to enforce the provisions of chapter 44 of such title [18 USCS §§ 921 et seq.], and all such data shall be immune from legal process.*

118 Stat. at 2859-60 (emphasis added highlighting the language disregarded by the court).

<sup>81</sup> See *Chicago III*, 423 F.3d at 780-782.

<sup>82</sup> See *City of Chicago v. ATF* ("*Chicago II*"), 384 F.3d 429, 433 (7th Cir. 2004) (noting that there is "a very strong presumption" that appropriations acts do not substantively change existing law, and that when appropriations legislation and a substantive statute are in conflict, the appropriations legislation is to be construed narrowly).

<sup>83</sup> *Chicago III*, 423 F.3d at 782.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

similar case of *City of New York v. Beretta U.S.A. Corp.*<sup>86</sup> Like the City of Chicago, the City of New York had brought a nuisance suit against the handgun industry for its use of “improper merchandising methods that create unnecessary hazards to the people in the City [of New York].”<sup>87</sup> During discovery, the City of New York served ATF with a subpoena to compel disclosure of certain trace data.<sup>88</sup> ATF refused to comply and argued that the 2004 rider, the same rider that was reviewed by the Seventh Circuit in *Chicago II*, barred the disclosure of the requested data.<sup>89</sup> Similar to the Seventh Circuit’s holding in *Chicago II*, the magistrate judge at the Eastern District of New York held, and the district court later affirmed, that the 2004 rider only prohibited the use of appropriated funds in making a disclosure, and not the disclosure itself.<sup>90</sup>

After finding no support with the United States Court of Appeals for the Second Circuit, ATF produced some of the requested data to the City of New York, and the City of New York filed a motion to compel the production of the remaining data.<sup>91</sup> By this time, the 2005 rider had gone into effect and ATF cited the new immunity provision of the 2005 rider as grounds for withholding the data.<sup>92</sup> However, rather than interpret the language of the 2005 rider at that time, the magistrate judge held, and the district court affirmed, that “the [2005] rider could not retroactively relieve ATF of a responsibility that [the judge] ordered it to respond to before the rider

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<sup>86</sup> 429 F.Supp.2d at 529.

<sup>87</sup> *Id.* at 519.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 520-21; *see City of Chicago v. ATF (“Chicago II”)*, 384 F.3d 429, 436 (7th Cir. 2004).

<sup>90</sup> *City of New York*, 429 F.Supp.2d at 520-21; *see Chicago II*, 384 F.3d at 436; *see also City of New York v. Beretta U.S.A. Corp.*, 222 F.R.D. 51, 54 (E.D.N.Y. 2004); *Johnson v. Bryco Arms*, 222 F.R.D. 48, 50 (E.D.N.Y. 2004).

<sup>91</sup> *City of New York*, 429 F.Supp.2d at 521.

<sup>92</sup> *Id.*

was passed.”<sup>93</sup> Thus, ATF was left with no choice but to turn over the data to the City of New York.<sup>94</sup>

Nonetheless, in April 2006, the District Court for the Eastern District of New York was faced with the task of interpreting a rider located within the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006 (“2006 rider”)<sup>95</sup> in *City of New York*.<sup>96</sup> The 2006 rider was identical to the 2005 rider, but also included additional language directly after the 2005 immunity provision making “such data...inadmissible in evidence.”<sup>97</sup> Thus, the *City of New York* court was faced with the task of interpreting the language “such data,” the same language which the Seventh Circuit

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<sup>93</sup> *Id.* at 522; *see also* *City of New York v. Beretta U.S.A. Corp.*, 228 F.R.D. 134, 146-147 (E.D.N.Y. 2005); *City of New York v. Beretta U.S.A. Corp.*, 228 F.R.D. 147, 157 (E.D.N.Y. 2005).

<sup>94</sup> *City of New York*, 429 F.Supp.2d at 522.

<sup>95</sup> Pub. L. No. 109-108, 119 Stat. 2290, 2295-96 (2005).

<sup>96</sup> 429 F.Supp.2d at 522.

<sup>97</sup> *Compare* 119 Stat. at 2295-96, *with* 118 Stat. at 2859-60. The 2006 rider provides, in part:

No funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the [Trace Data], to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure and not for use in any civil action or proceeding other than an action or proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or a review of such an action or proceeding, to enforce the provisions of chapter 44 of such title [18 USCS §§ 921 et seq.], and all such data shall be immune from legal process and shall not be subject to subpoena or other discovery, *shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data*, in any civil action pending on or filed after the effective date of this Act in any State (including the District of Columbia) or Federal court.

119 Stat. at 2295-96 (emphasis added highlighting relevant 2006 additions).

determined had one and only one possible meaning – all of the Trace Data.<sup>98</sup>

*B. The Eastern District of New York’s Interpretation of “Such Data”*

The *City of New York* court began its analysis of the 2006 rider by setting out the appropriate method of statutory interpretation.<sup>99</sup> First, a court should look at the plain language of the statute and consider both the bare meaning of the words and their placement and purpose in the statutory scheme.<sup>100</sup> Second, a court may take into account broader congressional policies and “Congress’ awareness of its own responsibility to promote the ends of justice in the federal court system.”<sup>101</sup> Finally, if necessary, a court may look at the legislative history of the act.<sup>102</sup>

The district court then proceeded to conduct a careful review of the entire appropriations act, noting first and foremost that the rider was a budgetary provision enacted as part of a vastly larger federal spending bill.<sup>103</sup> After reviewing the entire section of the appropriations act in which the rider appeared, and paying close attention to the context in which the language at issue appeared, the court concluded that the phrase “such data” could only refer to the data to be disclosed to law enforcement agencies, since that was the only data for which the use of federal funds was permitted.<sup>104</sup> The court reasoned:

The 2006 rider bars the use of appropriated funds for the future disclosure of ATF trace data to anyone

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<sup>98</sup> *City of New York*, 429 F.Supp.2d at 523; see *City of Chicago v. ATF (“Chicago III”)*, 423 F.3d 777, 781 (7th Cir. 2005).

<sup>99</sup> *City of New York*, 429 F.Supp.2d at 523-24.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 524.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 526.

besides law enforcement recipients and then imposes further restrictions in order to ensure the proper use of data that has been so disclosed. The rider has no application to data that is not to be disclosed through the use of federally appropriated funds.<sup>105</sup>

The court went on to provide further support for this reading of the phrase “such data” by reviewing the grammatical structure of the rider.<sup>106</sup> In this effort, the *City of New York* court focused on the portion of the rider which states:

No funds appropriated under this or any other Act . . . may be used to disclose part or all of the contents of [the Trace Data] to anyone other than a Federal, State, or local law enforcement agency . . . *and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure.*<sup>107</sup>

Unquestionably, the phrase “such information” can only refer to data that is to be revealed to law enforcement agencies, as indicated by the phrase “the law enforcement agency requesting the disclosure.”<sup>108</sup> Therefore, if the phrase “such data” also referred to the data to be disclosed to law enforcement agencies, then the term “such” would have the same meaning throughout the rider.<sup>109</sup> Interpreting identical

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 119 Stat. at 2295-96. The 2006 rider is identical in language and structure to the 2005 rider, with the exception of the evidentiary restriction language inserted after the phrase “such data shall be immune from the legal process.” *See supra* note 97.

<sup>108</sup> *City of New York*, 429 F.Supp.2d at 526.

<sup>109</sup> *Id.*

words used in different parts of the same act to have the same meaning is the favored practice and the more logical interpretation.<sup>110</sup>

Moreover, the court highlighted Congress' use of the phrase "and then only," which directly precedes "such information" in the passage above, as an indication that Congress intended to impose one restriction, then apply further restrictions to the originally limited subject.<sup>111</sup> Under this view, the rider would effectively read as follows: "ATF may only use the funds being appropriated to release data to law enforcement recipients 'and then only' subject to the restrictions which follow."<sup>112</sup> Such a reading of the phrase "and then only" is in line with the common use of the phrase in other statutes.<sup>113</sup>

Finally, aware of the recent Seventh Circuit decision interpreting the same language in the 2005 rider, the court noted that it "read the decision with interest" and "most respectfully disagree[d] with the conclusion of [the Seventh Circuit] in that case."<sup>114</sup> While the court acknowledged that the facts in *Chicago III* differed from the facts in *City of New York*,<sup>115</sup> the court believed that the Seventh Circuit's interpretation of "such data" was nonetheless erroneous.<sup>116</sup> The court stated:

Contrary to the Seventh Circuit's reading, there are in fact two grammatically possible antecedents to the phrase "such data" in both the 2005 and the 2006 riders. "Such data" could, as [*Chicago III*] concluded,

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<sup>110</sup> *Id.* (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *Sorensen v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986)).

<sup>111</sup> *City of New York*, 429 F.Supp.2d at 526.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 528.

<sup>115</sup> *Id.* at 528-29 (noting that ATF had already disclosed the data in question to the City of New York pursuant to a court order, whereas in *Chicago III*, a significant portion of the data was never disclosed); see *City of Chicago v. ATF* ("*Chicago III*"), 423 F.3d 777, 778-79 (7th Cir. 2005).

<sup>116</sup> *City of New York*, 429 F.Supp.2d at 528-29.

refer to the more general description of the ATF data in the first few lines of the riders, but, as already noted above, it could also refer to the data to be revealed in future disclosures to law enforcement officials. For the contextual and grammatical reasons already explained, the latter is the more appropriate antecedent to “such data.”<sup>117</sup>

However, in its concluding statements, the court still urged an immediate appeal of the case, noting that there was “substantial ground for disagreement about a controlling issue of law -- the applicability of the 2006 rider to the present litigation.”<sup>118</sup> Whether the termination of this case will continue to turn on the proper reading of the phrase “such data” or on the other congressional policy and evidentiary concerns addressed by this case has yet to be determined.

#### IV. WHY THE SEVENTH CIRCUIT’S INTERPRETATION MISSED THE MARK

##### *A. Which Interpretation is Correct?*

In stark contrast to the Seventh Circuit’s analysis in *Chicago III*, the *City of New York* court made no mention of congressional intent in its analysis of the 2006 rider.<sup>119</sup> Instead, the district court focused only on established statutory interpretation and construction principles.<sup>120</sup> Why was there such a drastic disparity in the two interpretations? Surely, no court can deny that with the language “immune from legal process” Congress intended to exempt certain information from disclosure. However, that was not the controlling issue in either case.<sup>121</sup> Rather, the controlling issue was, or should

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<sup>117</sup> *Id.* at 529.

<sup>118</sup> *Id.*

<sup>119</sup> Compare *Chicago III*, 423 F.3d at 780-82, with *City of New York*, 429 F. Supp. 2d at 523-26.

<sup>120</sup> See *City of New York*, 429 F. Supp. 2d at 523-26.

<sup>121</sup> See *Chicago III*, 423 F.3d at 780; *City of New York*, 429 F. Supp. 2d at 523.

have been, which category of information Congress intended to exempt or restrict through its use of the phrase “such data.”<sup>122</sup> The Seventh Circuit’s unwavering focus on the former clouded its judgment and interpretation of the latter.<sup>123</sup> The *City of New York* court, not tied to the “immune from legal process” language, was able to engage in a more logical and correct interpretation of “such data.”<sup>124</sup>

When evaluating issues of statutory interpretation, courts are to “give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”<sup>125</sup> Undoubtedly, the Seventh Circuit considered this rule of statutory interpretation during its analysis, even though it did not explicitly state it.<sup>126</sup> However, it is less clear from the opinion whether the court was guided by other established principles of statutory interpretation.<sup>127</sup>

The Seventh Circuit has previously noted that the statute’s text is regarded as the “best evidence of the statute’s purpose.”<sup>128</sup> Therefore, courts must strive to “give effect . . . to every clause and word of a statute.”<sup>129</sup> At the bare minimum, a court interpreting a provision of a statute is to “account for a statute’s full text, language, as well as punctuation, structure, and subject matter.”<sup>130</sup> In a case decided by the Seventh Circuit just months before *Chicago III*, the court applied such principles to a particular statute and began its

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<sup>122</sup> *Id.*

<sup>123</sup> See *Chicago III*, 423 F.3d at 780-82.

<sup>124</sup> See *City of New York*, 429 F.Supp.2d at 523-26. Although the court in *City of New York* interpreted the language “such data,” the same language interpreted by the Seventh Circuit, the language “immune from legal process” was not part of or relevant to the district court’s analysis. *Id.*

<sup>125</sup> *Lifschultz Fast Freight Corp. v. Medici*, 63 F.3d 621, 628 (7th Cir. 1995) (citing *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993)).

<sup>126</sup> See *Chicago III*, 423 F.3d at 780-82 (focusing much of the analysis on congressional intent).

<sup>127</sup> *Id.*

<sup>128</sup> *Lifschultz*, 63 F.3d at 628.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

inquiry with the following question: “whether the language at issue had a plain and unambiguous meaning with regard to the particular dispute in the case.”<sup>131</sup> The court noted that the “plainness or ambiguity of the statutory language is determined by reference to the language itself, the context in which the language is used, and the broader context of the statute as a whole.”<sup>132</sup> If the court determined that the statutory language was unambiguous and the statutory scheme was coherent and consistent, its inquiry would end.<sup>133</sup>

In *Chicago III*, the Seventh Circuit appears to have ended its inquiry as soon as it determined what it perceived to be the congressional intent, and the actual text and structure of the 2005 rider was merely a backdrop to its analysis.<sup>134</sup> This is particularly evident during the court’s interpretation of the phrase “such data.”<sup>135</sup> In response to the City’s argument that the phrase “such data” only referred to the data requested by law enforcement agencies, the Seventh Circuit stated:

Under the City’s strained construction of the statute, the portion of the databases in law enforcement’s hands would be ‘immune from legal process,’ but the remaining portion of the databases, the extensive data not produced to law enforcement, would be accessible to anyone willing to pay for it. Such a reading would thwart Congress’ intention to bar access to the databases, and we accordingly reject it.<sup>136</sup>

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<sup>131</sup> *Ioffe v. Skokie Motor Sales, Inc.*, 414 F.3d 708, 710-11 (7th Cir. 2005) (citing *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997)).

<sup>132</sup> *Ioffe*, 414 F.3d at 711.

<sup>133</sup> *Id.*

<sup>134</sup> See *City of Chicago v. ATF (“Chicago III”)*, 423 F.3d 777, 780-82 (7th Cir. 2005).

<sup>135</sup> *Id.* at 780-81.

<sup>136</sup> *Id.* at 781.

Clearly, rather than using the rider's text to interpret congressional intent, the court is using its already preconceived notion of congressional intent to interpret the text.<sup>137</sup> In much the same way, the court overlooked the significant limiting language included between the reference to the Trace Data and the language "such data" in the rider.<sup>138</sup> As the *City of New York* court so distinctly pointed out, the use of the phrases "such information" and "and then only," which were a part of that limiting language, were vital to the interpretation of both the meaning of the language "such data" and the rider as a whole.<sup>139</sup>

More significantly, the Seventh Circuit ignored FOIA's policy considerations, failing to even mention, as it had in its prior two opinions, that there is a strong presumption in favor of disclosure under FOIA and that its exemptions are to be narrowly construed.<sup>140</sup> Instead, the Seventh Circuit adopted the broadest reading of the 2005 rider possible.<sup>141</sup> Although there was no FOIA issue in *City of New York*, as the information had already been disclosed, the 2006 rider also contained an evidentiary restriction, which, like a FOIA exemption, was to be narrowly construed by the court.<sup>142</sup> Relying on this principle, the *City of New York* court noted that "there [was] no need to construe this budgetary provision more broadly than necessary – a construction requiring the assumption that Congress was acting irrationally and in opposition to its long-standing policy regarding the administration of justice."<sup>143</sup> In light of FOIA's long-standing goals

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 780-81

<sup>139</sup> See *City of New York v. Beretta U.S.A. Corp.*, 429 F.Supp.2d 517, 526 (E.D.N.Y. 2006).

<sup>140</sup> See *Chicago III*, 423 F.3d at 780-82; *City of Chicago v. ATF* ("*Chicago II*"), 384 F.3d 429, 432 (7th Cir. 2004); *City of Chicago v. ATF* ("*Chicago I*"), 287 F.3d 628, 633 (7th Cir. 2002).

<sup>141</sup> See *Chicago III*, 423 F.3d at 781 (holding that the rider refers "generally to the multiple sales and tracing data, rather than to some subset of the data.").

<sup>142</sup> See *City of New York*, 429 F.Supp.2d at 528.

<sup>143</sup> *Id.*

and policies,<sup>144</sup> the same principle should have guided the court's interpretation of the 2005 rider in *Chicago III*.<sup>145</sup>

*B. FOIA is Wounded by the Seventh Circuit's Decision*

The Seventh Circuit's decision in *Chicago III* essentially gave a green light to those who wish to exploit Exemption 3 of FOIA and restrict the public's access to information without debate or question. Exemption 3, which provides that information specifically exempted from disclosure by statute may be withheld, combined with Congress' increasing use of appropriations riders to change substantive law, widens the potential for government agencies to bypass FOIA's disclosure requirements.<sup>146</sup> In effect, as the *Chicago III* decision demonstrated, a simple rider inserted in a large federal spending bill may create a new exemption and substantively change FOIA law without being subject to the formal legislative procedures typically required for such changes.<sup>147</sup> While this problematic use of appropriations riders is not specific to FOIA,<sup>148</sup> the importance of addressing it in this context has only escalated under the Bush Administration and its more secretive policies.<sup>149</sup> Members of

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<sup>144</sup> See S. 394 § 2.

<sup>145</sup> See 423 F.3d at 781-82.

<sup>146</sup> See generally Geoffrey Christopher Rapp, *Low Riding*, 110 YALE L. J. 1089, 1093-95 (2001) (stating that there has been a significant rise in the number of substantive laws passed through appropriations legislation in the last half-century, and calling for modification of this practice and a return to the full and formal legislative process).

<sup>147</sup> *Id.*; 423 F.3d at 782.

<sup>148</sup> See Rapp, *supra* note 146, at 1093-95.

<sup>149</sup> See Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 482-84 (2006) (stating that the Bush Administration's actions have amounted to an unprecedented "organized assault on freedom of information."); see also Joshua Apfelroth, *The Open Government Act: A proposed Bill to Ensure the Efficient Implementation of the Freedom of Information Act*, 58 ADMIN. L. REV. 219, 225 (2006) (describing the Bush Administration's approach to FOIA as

Congress have also expressed their concern on this issue, stating that “new exemptions should not be created lightly,” and that “individual statutory exemptions should be vigorously debated before lawmakers vote in favor of them.”<sup>150</sup>

Notably, the fear of Exemption 3 becoming overly broad and inclusive has been addressed by Congress in the past.<sup>151</sup> In 1976, Congress amended Exemption 3 in direct response to the Supreme Court’s decision in *FAA v. Robertson*,<sup>152</sup> in which the Court held that general statutory language, without further specification of documents to be withheld, was sufficient to qualify as an Exemption 3 statute.<sup>153</sup> In that amendment, Congress set the specific qualifications criteria in effect today in order to narrow the number of statutes which could qualify under the exemption.<sup>154</sup> Federal courts were then left with the task of policing the new standard.<sup>155</sup> Considering the Seventh Circuit’s recent Exemption 3 analysis, and all of the above concerns, the time may again be ripe for a FOIA amendment.<sup>156</sup>

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“discouraging agencies from disclosing records if the agency can invoke any technical grounds for withholding them under FOIA.”).

<sup>150</sup> See Kirtley, *supra* note 149, at 507-08 (citing Representative Henry Waxman and Senator Patrick Leahy’s comments, respectively, in response to two proposed bills which impact FOIA. One proposed bill provides that “any future legislation to establish a new exemption to [FOIA] be stated explicitly within the text of the bill.”).

<sup>151</sup> See Charles H. Koch, Jr., *Administrative Law and Practice*, 1 ADMIN. L. & PRAC. § 3.38 (2d ed. 2006).

<sup>152</sup> 422 U.S. 255, 265 (1975).

<sup>153</sup> See Koch, *supra* note 151.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See *City of Chicago v. ATF (“Chicago III”)*, 423 F.3d 777, 782 (7th Cir. 2005); see also Kirtley, *supra* note 149, at 507-08 (provides a brief description of two proposed bills to reform FOIA, both by promoting public disclosure and an open government, and both of which may resolve the problems addressed in this Note. Both bills are still awaiting committee review).

## CONCLUSION

The Seventh Circuit's faulty interpretation of the 2005 rider in *Chicago III* not only resulted in an unwarranted substantive change in FOIA, at least as perceived by the Seventh Circuit,<sup>157</sup> but also exposed a dangerous new loophole in FOIA legislation which could potentially allow government agencies to unquestionably withhold information from the public.<sup>158</sup> FOIA provides a powerful tool for the American people, and is a hallmark of our system of democracy.<sup>159</sup> Until the Seventh Circuit's decision in 2005, FOIA could have provided the means for the City of Chicago to obtain information with which to combat gun trafficking and shed light on the activities of ATF. However, without proper debate or questioning in Congress, the City of Chicago's right to this information under FOIA was stripped away.

Congress provided for judicial review of FOIA denials in order to monitor federal agencies' claims of secrecy and entitlement to exemptions.<sup>160</sup> It did so with the hope that the judicial review, a vital part of our constitutional system of checks and balances, would be more than a mere "judicial sanctioning of agency discretion."<sup>161</sup> Thus, it is imperative that federal courts continue to thoroughly scrutinize and narrowly construe both new and existing exemptions to FOIA which might further restrict FOIA's purpose and effectiveness.

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<sup>157</sup> See *Chicago III*, 423 F.3d at 782; *City of New York v. Beretta U.S.A. Corp.*, 429 F.Supp.2d 517, 529 (E.D.N.Y. 2006).

<sup>158</sup> See Beermann, *supra* note 50, at 88-89.

<sup>159</sup> Meredith Fuchs, *supra* note 5, at 144 (noting that "Congress designed FOIA to make democratic participation and citizen oversight a reality.").

<sup>160</sup> *Id.* at 159.

<sup>161</sup> *Id.*