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United States Government Accountability Office
Washington, DC 20548

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August 28, 2007

The Honorable Patrick J. Kennedy
House of Representatives

Subject: *Bureau of Alcohol, Tobacco, Firearms, and Explosives—Words of Futurity
in Fiscal Year 2006 Appropriations Act*

Dear Mr. Kennedy:

In a letter dated June 20, 2007, you requested our opinion regarding whether a proviso appearing in the fiscal year 2006 Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Salaries and Expenses appropriation regarding the Firearms Trace System constitutes permanent legislation. The proviso prohibits ATF from using appropriated funds to disclose contents of the Firearms Trace System database except to certain parties. For the reasons stated below, we conclude that this provision is permanent law.

BACKGROUND

To execute its mission of enforcing federal firearms laws, ATF conducts firearms traces for federal, state, local, and tribal law enforcement agencies. 18 U.S.C. § 923. *See also* Library of Congress, Congressional Research Service, *Gun Control: Statutory Disclosure Limitations on ATF Firearms Trace Data and Multiple Handgun Sales Reports*, No. RS22458 (July 20, 2007), at 2. ATF maintains a Firearms Trace System database that contains information related to guns recovered in connection with a crime. *See* 18 U.S.C. § 923(g).

In the fiscal year 2003 Department of Justice Appropriations Act, Congress directed that no funds appropriated in that act “or any other Act with respect to any fiscal year” were available “to take any action” under the Freedom of Information Act with respect to information in the Firearms Trace System database. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 644, 117 Stat. 11, 473 (Feb. 20, 2003). Congress included similar language in fiscal years 2004 and 2005. Department of Justice Appropriations Act, 2004, Pub. L. No. 108-199, div. B, title I, 118 Stat. 3, 52–3 (Jan. 23, 2004); Department of Justice Appropriations Act, 2005, Pub. L. No. 108-447, div. B, title I, 118 Stat. 2809, 2859 (Dec. 8, 2004).

In the 2006 Department of Justice Appropriations Act, as part of the language of ATF's Salaries and Expenses appropriation, Congress included a similar proviso stating that "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" to anyone other than a law enforcement agency or a prosecutor in connection with a criminal investigation or prosecution.¹ Department of Justice Appropriations Act, 2006, Pub. L. No. 109-108, title I, 119 Stat. 2290, 2295 (Nov. 22, 2005) (ATF proviso). It is the 2006 proviso that we address in this opinion.²

DISCUSSION

Appropriations acts are by their nature nonpermanent legislation. *See, e.g.*, B-288511, Aug. 22, 2001; B-271412, June 13, 1996. Provisions in appropriations acts are presumed effective only for the covered fiscal year. B-288511. Accordingly, unless otherwise specified, the provisions of an appropriations act for a given fiscal year expire at the end of that fiscal year. *Id.*

Congress, of course, has the power to enact permanent legislation in an appropriations act. *See Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). When the language or nature of an appropriations act provision makes it clear that such was the intent of Congress, we will construe the provision as permanent legislation. B-288511, Aug. 22, 2001.

The most important factor in ascertaining Congress's intent is the language of the statute itself. *See, e.g., Mallard v. United States District Court*, 490 U.S. 296, 300 (1989). In this regard, the clearest indication that Congress intended a provision to be permanent is the presence in the provision of "words of futurity" clearly indicating such intent. B-288511, Aug. 22, 2001; 65 Comp. Gen. 588 (1986). For example, in some circumstances, Congress has indicated permanence in the language of an appropriations act provision when it included the operative term "henceforth" to denote futurity. B-209583, Jan. 18, 1983. The United States Court of Appeals for the

¹ The fiscal year 2005 and fiscal year 2006 provisions were each the subject of litigation in which parties attempted to obtain information in the Firearm Trace System database from ATF. The litigation did not address whether the provisions were to be read as temporary or permanent provisions of law. *City of Chicago v. United States Department of the Treasury*, 423 F.3d 777 (7th Cir. 2005) (2005 provision); *City of New York v. Beretta U.S.A. Corp.*, 429 F. Supp. 2d 517 (E.D.N.Y. 2006) (2006 provision).

² The ATF proviso remains in effect for fiscal year 2007 by virtue of the continuing resolution enacted for the entire fiscal year. Continuing Appropriations Resolution, 2007, Pub. L. No. 109-289, § 104, 120 Stat. 1257, 1313 (Sept. 29, 2006) *as amended by* Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, § 2, 121 Stat. 8-60 (Feb. 15, 2007) ("[T]he requirements, authorities, conditions, limitations, and other provisions of" the fiscal year 2006 Department of Justice Appropriations Act "shall continue in effect" through the end of fiscal year 2007.).

Second Circuit found words of futurity in the phrase “this subsection shall apply to fiscal year 1999 and each fiscal year thereafter.” *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 146 (2nd Cir. 2002). The court concluded that such language constituted permanent legislation because it contained “unambiguous language of permanence . . . [that] clearly and expressly indicates that it is intended to be permanent.”³ *Id.* at 143.

The ATF proviso applies to “funds appropriated under this or any other Act with respect to any fiscal year.” We have previously found that when a provision in an appropriations act applies to “funds appropriated under this or any other act,” without further indication of permanence, the provision is temporary. 65 Comp. Gen. at 589 (the phrase “this act or any other act,” standing alone, is insufficient to indicate futurity); B-145492, Sept. 21, 1976. In such instances, we understand the phrase to refer only to other appropriations acts enacted in the same fiscal year as the act in which the phrase appears. 65 Comp. Gen. at 589. However, we have found that when, as here, the phrase “this or any other act” is coupled with the phrase “with respect to any fiscal year,” Congress intended the provision in question to be permanent because of the forward-looking effect of the phrase. B-230110, Apr. 11, 1988. Thus, when Congress states that a provision in an appropriations act shall apply to “this or any other act with respect to any fiscal year,” as Congress has done in the ATF proviso, it strongly indicates that Congress intended the provision to be permanent law.⁴

We note the repeated appearance of some version of the ATF proviso in ATF’s appropriations acts since fiscal year 2003. In our view the repetition of this proviso merely underscores the importance Congress places on the provision. *See, e.g.*, 36 Comp. Gen. 434, 436 (1956) (repetition of permanent legislation in an appropriations act “is consistent with an excess of caution” on the part of Congress).

³ Both the Senate and House bills for ATF’s fiscal year 2008 appropriation contain the same prohibition on the use of funds that appears in the 2006 ATF proviso, using language similar to that in *Auburn Housing Authority*. S. 1745, 110th Cong., at 40 (2007) (restriction applies to “funds appropriated under this or any other Act with respect to any previous fiscal year, fiscal year 2008, and any fiscal year thereafter”); H.R. 3093, 110th Cong., at 32 (2007) (restriction applies “beginning in fiscal year 2008 and thereafter”).

⁴ Our practice when rendering opinions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency’s legal position in the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/congress.htm. In this regard, ATF responded to questions from our office regarding this matter, advising that ATF agrees that the proviso is permanent law and applies the restriction “regardless of fiscal year.” Letter from Stephen R. Rubenstein, Chief Counsel, ATF, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Aug. 3, 2007, at 2.

In this regard, the legislative history of the provisos in previous years clearly underscores the importance Congress placed on it:

“In the last two fiscal years the Committee has expressed serious concern that, contrary to . . . Congress’ intent, certain sensitive law enforcement information contained in databases maintained by the ATF have been subject to release . . . to the public The Committee therefore includes language to make clear that ATF shall not make these law enforcement records available to anyone other than to law enforcement agencies for a bona fide criminal investigation.”

H.R. Rep. No. 108-576, at 30 (language adopted by conference committee, H.R. Conf. Rep. No. 108-792, at 734 (2004)).

CONCLUSION

While doubtless Congress may on occasion express its desire for future application of an appropriation restriction with ideal precision and clarity, that, however, is not the test. Here, we believe that the use of the phrase “with respect to any fiscal year” looks with reasonable clarity forward to future appropriations. Hence in our opinion, the proviso appearing in ATF’s fiscal year 2006 appropriation directing that “no funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose” data from the Firearms Trace System to unauthorized parties is permanent law.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Gary L. Keplinger". The signature is written in black ink and includes a long horizontal flourish extending to the right.

Gary L. Keplinger
General Counsel

DIGEST

A proviso appearing in the Bureau of Alcohol, Tobacco, Firearms, and Explosives' fiscal year 2006 appropriation directing that "no funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose" data from the Firearms Trace System to unauthorized parties is permanent law. Provisions in appropriations acts are presumed effective only for the covered fiscal year, unless Congress makes clear that they are permanent. Here, the provision contains words of futurity that indicate Congress intended it to be permanent.