

Eric M. Larson

From: "Melson, Kenneth E." <Ken.Melson@usdoj.gov>
To: <larsone@starpower.net>
Cc: "Rubenstein, Steve R." <Stephen.R.Rubenstein@usdoj.gov>; "Herbert, Arthur W." <Arthur.W.Herbert@usdoj.gov>
Sent: Wednesday, June 09, 2010 10:02 AM
Subject: Re: Letter to ATF Deputy Director Kenneth Melson re: NFRTR
 Thank you for your email. I will make sure we look into this. Ken Melson

NOTICE: This electronic transmission is confidential and intended only for the person(s) to whom it is addressed. If you have received this transmission in error, please notify the sender by return e-mail and destroy this message in its entirety (including all attachments).

From: Eric M. Larson
To: Melson, Kenneth E.; Melson, Kenneth E.
Sent: Tue Jun 08 22:52:54 2010
Subject: Letter to ATF Deputy Director Kenneth Melson re: NFRTR

June 8, 2010

Kenneth Melson
 Deputy Director
 Bureau of Alcohol, Tobacco, Firearms
 and Explosives
 99 New York Avenue, N.E.
 Washington, D.C. 20226

Via e-mail; hard copy via U.S. Postal Service

Dear Deputy Director Melson:

In 2009, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) began releasing documents which disclose that there are no records of hundreds of registrations or transfers of firearms in ATF's version of the National Firearms Registration and Transfer Record (NFRTR). Because no firearm regulated under the National Firearms Act (NFA) can be registered or transferred unless ATF approves the application in duplicate original (one copy for the registrant or transferee, the other for ATF), these missing records indicate the NFRTR is inaccurate and incomplete, and therefore not reliable.

An example of such missing records, included under FOIA release 08-726, is on the Internet at <http://www.nfaoa.org/documents/FOIA2010NFRTR.pdf>. In 1979, the Criminal Division of the Department of Justice advised the Congress that even one such missing record would require establishing a new amnesty period (see <http://www.nfaoa.org/documents/DOJAmnestyMemo1979.pdf>, page 4). Inspection of the FOIA records released so far indicate more than 800 instances of an NFA firearm or device in a licensee's inventory, for which the licensee had his copy of an ATF-approved Form 2 or Form 3 (or other document issued by ATF), and for which there was no corresponding record in the NFRTR.

In a criminal case in which an NFRTR firearm description was invoked in prosecution (*United States v. Friesen*, 2009), technical examination of 25 firearms disclosed that nothing was uniform with respect to firearm type, serial number placement, and serial number font or size as listed on the Form 2 filed by the manufacturer and approved by ATF. A nationally recognized expert on statistics and administrative records, Dr. Fritz J. Scheuren, testified that NFRTR data were useful for exploratory purposes, but could not be used for prosecution unless the data could be independently verified. The Friesen case was plea bargained down from 5 felonies to a \$25 misdemeanor for which the statute of limitations had to be waived.

The NFRTR records from the FOIA originated from ATF compliance inspections of federally licensed firearms (FFL) dealers who are Special Occupational Taxpayers (SOTs). But as Stephen Halbrook, Esq. points out in *Firearms Law Deskbook*: "Such access does not exist for BATF-approved transfers between unlicensed persons in the same state, in regard to which the transferor is not subject to BATF inspection and is not required to keep [FFL/SOT dealer] records." (2009-2010 edition, Vol. 2, page 16). How many people who have only tried their best to comply with the NFA, have had their registration or transfer documents destroyed through no fault of their own (e.g., a Katrina, housefire, or other such event)? Such people have been unjustly victimized by ATF when an NFRTR lookup fails to disclose a record, and forced to "voluntarily abandon" a valuable firearm, perhaps an heirloom, rather than face up to 10 years in prison and a \$250,000 fine.

In *Herring v. United States* (2009), the Supreme Court decided: "We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. . . . If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation." Reliance on "systemic error or reckless disregard of constitutional requirements" would trigger the exclusionary rule.

How would you feel if a laboratory that you certified had lost track of data? What would happen if its personnel were routinely asked to testify in criminal trials as to the accuracy of NFRTR data when its records are missing?

NFRTR lookups are routinely used to justify issuing search warrants, filing criminal charges, and other law enforcement activities. As Deputy Director of ATF, you have the responsibility to ensure these data are accurate and complete. Please consider taking the steps necessary to make it so.

Sincerely,

[signed] Eric M. Larson

cc: Stephen Rubenstein, Esq.
ATF Chief Counsel