

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HERITAGE FOUNDATION., 214 Massachusetts Ave. N.E. Washington, D.C. 20002)	
)	
)	
)	
)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Case No. 23-cv-342
)	
U.S. DEPARTMENT OF JUSTICE 950 Pennsylvania Ave., N.W. Washington, D.C. 20408)	
)	
<i>Defendant.</i>)	

COMPLAINT AND PRAYER FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs THE HERITAGE FOUNDATION and MIKE HOWELL (collectively “Plaintiffs”) for their complaint against Defendant DEPARTMENT OF JUSTICE (“DOJ” or “Department”) allege on knowledge as to Plaintiffs, and on information and belief as to all other matters, as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the production of information from DOJ component the Federal Bureau of Investigation (“FBI”) relating to how certain FBI offices responded to the Black Lives Matter (“BLM”) protests in the Summer of 2020.

PARTIES

2. Plaintiff, The Heritage Foundation is a Washington, D.C.-based nonpartisan public policy organization with a national and international reputation whose mission is to “formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.” Heritage Foundation, *About Heritage*, found at <https://www.heritage.org/about-heritage/mission> (last visited Feb. 5, 2023). Heritage is a not-for-profit section 501(c)(3) organization which engages in substantial dissemination of information to the public. Heritage operates a national news outlet, *The Daily Signal*.

3. Plaintiff Mike Howell leads the Heritage Foundation’s Oversight Project and is an author for *The Daily Signal*. The Oversight Project is an initiative aimed at obtaining information via Freedom of Information Act requests and other means in order to best inform the public and Congress for the purposes of Congressional oversight. The requests and analysis of information is informed by Heritage’s deep policy expertise.

4. Defendant DOJ is a federal agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) whose mission is to “uphold the rule of law, to keep our country safe, and to protect civil rights.” About DOJ; Our Mission, found at <https://www.justice.gov/about#:~:text=Mission,and%20to%20protect%20civil%20rights>. (last visited Feb. 5, 2022).

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

6. Venue is proper in this Court under 28 U.S.C. § 1391(b) because Defendant DOJ's principal place of business is in the District of Columbia.

PLAINTIFFS' FOIA REQUEST

7. Plaintiffs submitted their FOIA Request on September 12, 2022. FOIA Request No. 1561629 (Sept. 23, 2022) ("Request" or "Plaintiffs' FOIA Request") (Ex. 1).

8. The Request explained that it sought to learn more about a particular occurrence during the BLM protests in the Summer of 2020 in Washington, D.C.:

During a June 2020 Black Lives Matter (BLM) protest, a group of smiling Federal Bureau of Investigation (FBI) special agents wearing FBI insignia demonstrated political solidarity with the BLM protestors by kneeling, clapping, and making other gestures affirming sympathy with the BLM cause. These agents were under no coercion or compulsion as evidenced by countless Twitter photos that memorialize this event but more so by a TikTok video that documented the entirety of the event. The user of TikTok account @sonnywithnochances noted when uploading the video that "THE FBI KNEELED WITH US IN DC!!!!" In the week that followed, the TikTok video of the FBI special agents kneeling went viral. Curiously, this video is no longer available on the Internet. At some point, the video (<https://www.tiktok.com/@sonnywithnochances/video/6834598911697620229>) and the TikTok account used to originally upload it (@sonnywithnochances) were removed from TikTok.

Id. at 1.

9. The Request sought records from a limited set of custodians—The FBI Director's Office and the Washington Field Office—for a limited period of time—June 1, 2020, to September 1, 2020. *Id.* at 1–2. Within that narrow set of records, the Request sought any record containing one of the following terms:

1. @sonnywithnochances
2. <https://www.tiktok.com/@sonnywithnochances/video/6834598911697620229>
3. "kneel" AND "hatch"
4. "patrol" AND "knee" AND "crowd"
5. "patrol" AND "kneel" AND "crowd"
6. "BLM" AND "Hatch Act"
7. "Tik Tok" AND "kneel"

8. “TikTok” AND “kneel”
9. “Take a knee”
10. “Taking a knee”
11. “Kneel Team Six”
12. “FBI” AND “Expectations VS Reality”

Id. at 1. The Request sought a fee waiver because of the public interest in the interactions between federal agencies and the BLM movement. *Id.* at 3–4.

DOJ’S INITIAL DENIAL

10. On September 30, 2022, the FBI denied the Request. Letter from Michael G. Seidel to Mike Howell (Sept. 30, 2022) (“Initial Denial”) (Ex. 2). The Initial Denial appears to be a “form” document. It first denied the Request in full because:

Based on the information you provided, we conducted a main and reference entity record search of the Central Records System (CRS) per our standard search policy. However, we were unable to identify records subject to the FOIP that are responsive to your request. Therefore, your request is being closed.

Id. at 1.

11. Despite the foregoing language being written as a full denial, the Initial Denial also appears to have denied at least part of the Request on the separate ground that:

You have requested records on one or more third party individuals. Please be advised the FBI will neither confirm nor deny the existence of such records pursuant to FOIA exemptions (b)(6) and (b)(7)(C), 5 U.S.C. §§ 552 (b)(6) and (b)(7)(C). The mere acknowledgement of the existence of FBI records on third party individuals could reasonably be expected to constitute an unwarranted invasion of personal privacy. This is our standard response to such requests and should not be taken to mean that records do, or do not, exist.

Id. The Initial Denial did not pass on the Plaintiffs’ application for a fee waiver.

PLAINTIFFS’ ADMINISTRATIVE APPEAL

12. Plaintiffs administratively appealed the Initial Denial on November 18, 2022. Administrative Appeal FOIA No. 1561629 (Nov. 18, 2022) (“Administrative Appeal”) (Ex. 3).

13. The Administrative Appeal began by explaining that the FBI's search was inadequate:

Legally "adequate" FBI FOIA queries must include searches of FBI employees' email and all other communications on FBI systems reasonably likely to contain responsive records. Media reports have demonstrated that the subject matter of FOIA Request 1561629-000 was of controversy within the FBI and that some FBI personnel believed the agents who knelt in solidarity with the Black Lives Matter movement did so in violation of the Hatch Act. Due to these facts, the FOIA Request 1561629-000's requested search terms, to include "'kneel' AND 'hatch'", would invariably have been used in FBI communications. As such, had an adequate query been run, records would have been identified.

Id. at 1.

14. The Administrative Appeal then turned to the Initial Denial's discussion of "third party individuals." *Id.* at 2. It explained that the only non-governmental party possibly implicated by the Request was the anonymous TikTok account "@sonnywithnochances." *Id.* As a threshold matter, the Administrative Appeal noted that there is no third-party privacy interest in an anonymous TikTok account. *Id.* It continued by noting that even if there was some underlying privacy interest, that interest was outweighed by the interests favoring disclosure. *Id.*

15. The Department has not responded to the Administrative Appeal.

16. Twenty business days from November 18, 2022 is December 19, 2022.

FIRST CLAIM FOR RELIEF

Violation FOIA, 5 U.S.C. § 552

Failure to Conduct Adequate Searches for Responsive Records.

17. Plaintiffs re-allege paragraphs 1–16 as if fully set out herein.

18. FOIA requires all doubts to be resolved in favor of disclosure. "Transparency in government operations is a priority of th[e Biden] . . . Administration." Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022).

19. Plaintiffs properly requested records within the possession, custody, and control of Defendant.

20. Defendant is subject to FOIA and therefore must make reasonable efforts to search for requested records.

21. Defendant has failed to promptly review agency records for the purpose of locating and collecting those records that are responsive to Plaintiffs' FOIA Request.

22. Defendant's failure to conduct searches for responsive records violates FOIA and DOJ regulations.

23. Plaintiffs have a statutory right to the information they seek.

24. Defendant is in violation of FOIA.

25. Plaintiffs are being irreparably harmed by reason of Defendant's violation of FOIA. Plaintiffs are being denied information to which they are statutorily entitled and that is important to carrying out Plaintiffs' functions as a non-partisan research and educational institution and publisher of news. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

26. Plaintiffs have no adequate remedy at law.

27. Plaintiffs have constructively exhausted their administrative remedies.

SECOND CLAIM FOR RELIEF
Violation of FOIA, 5 U.S.C. § 552

Wrongful Withholding of Non-Exempt Responsive Records

28. Plaintiffs re-allege paragraphs 1–27 as if fully set out herein.

29. FOIA requires all doubts to be resolved in favor of disclosure. "Transparency in government operations is a priority of th[e Biden] . . . Administration." Attorney General,

Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines, at 4 (Mar. 15, 2022).

30. Plaintiffs properly requested records within the possession, custody, or control of Defendant.

31. Defendant is subject to FOIA, and therefore must release to a FOIA requester any non-exempt records and provide a lawful reason for withholding any records.

32. Defendant is wrongfully withholding non-exempt records requested by Heritage by failing to produce any records responsive to Plaintiffs' FOIA Request.

33. Defendant is wrongfully withholding non-exempt-agency records requested by Plaintiffs by failing to segregate exempt information in otherwise non-exempt records responsive to Plaintiffs' FOIA Request.

34. Defendant's failure to provide all non-exempt responsive records violates FOIA and DOJ regulations.

35. Plaintiffs have a statutory right to the information they seek.

36. Defendant is in violation of FOIA.

37. Plaintiffs are being irreparably harmed by reason of Defendant's violation of FOIA. Plaintiffs are being denied information to which they are statutorily entitled and that is important to carrying out Plaintiffs' functions as a non-partisan research and educational institution and publisher of news. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

38. Plaintiffs have no adequate remedy at law.

39. Plaintiffs have constructively exhausted their administrative remedies.

THIRD CLAIM FOR RELIEF
Violation of FOIA, 5 U.S.C. § 552
Wrongful Denial of Fee Waiver

40. Plaintiffs re-allege paragraphs 1–39 as if fully set out herein.

41. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” *Attorney General, Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022).

42. Plaintiffs properly requested records within the possession, custody, or control of Defendant.

43. Defendant has constructively denied Plaintiffs’ application for a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) & (iii) and 28 C.F.R. §16.10(k).

44. The Request does not have a commercial purpose because Heritage is a 501(c)(3) nonprofit, Howell acts in his capacity as a Heritage employee, and release of the information sought does not further Plaintiffs’ commercial interest.

45. Plaintiffs are members of the news media as they “gather[] information of potential interest to a segment of the public, use[] . . . [their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience” via Heritage’s major news outlet, *The Daily Signal*. 5 U.S.C. § 552(a)(4)(a)(ii).

46. Disclosure of the information sought by the Request also “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii).

47. Defendant has “failed to comply with a[]time limit under paragraph (6)” as to the Request. 5 U.S.C. § 552(a)(4)(A)(viii)(I).

48. Plaintiffs have a statutory right to a fee waiver.

49. Defendant is in violation of FOIA by denying a fee waiver.

50. Plaintiffs are being irreparably harmed by reason of Defendant's violation of FOIA. Plaintiffs are being denied a fee waiver to which they are statutorily entitled and that is important to carrying out Plaintiffs' functions as a non-partisan research and educational institution and publisher of news. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

51. Plaintiffs have no adequate remedy at law.

52. Plaintiffs have constructively exhausted their administrative remedies.

FOURTH CLAIM FOR RELIEF
Violation of FOIA, 5 U.S.C. § 552
Statutory Bar Against Charging Fees

53. Plaintiffs re-allege paragraphs 1–52 as if fully set out herein.

54. FOIA requires all doubts to be resolved in favor of disclosure. “Transparency in government operations is a priority of th[e Biden] . . . Administration.” Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines*, at 4 (Mar. 15, 2022).

55. Plaintiffs properly requested records within the possession, custody, or control of Defendant.

56. The Request does not have a commercial purpose because Heritage is a 501(c)(3) nonprofit, Howell acts in his capacity as a Heritage employee, and release of the information sought does not further Plaintiffs' commercial interest.

57. Plaintiffs are members of the news media as they “gather[] information of potential interest to a segment of the public, use[] . . . [their] editorial skills to turn the raw

materials into a distinct work, and distribute[] that work to an audience” via Heritage’s major news outlet, *The Daily Signal*. 5 U.S.C. § 552(a)(4)(a)(ii).

58. Disclosure of the information sought by the Request also “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii).

59. Defendant has “failed to comply with a[]time limit under paragraph (6)” as to the Request. 5 U.S.C. § 552(a)(4)(A)(viii)(I).

60. Defendant has not determined “more than 5,000 pages are necessary to respond to this request,” or discussed with Plaintiffs how Plaintiffs “could effectively limit the scope of the request.” 5 U.S.C. § 552(a)(4)(A)(viii)(II)(cc).

61. Defendant is currently statutorily barred from charging fees related to Plaintiffs’ FOIA Request. Therefore, Plaintiffs have a statutory right to have their request processed without being charged any fees.

62. Plaintiffs are being irreparably harmed by reason of Defendant’s violation of FOIA. Plaintiffs will continue to be irreparably harmed unless Defendant is compelled to comply with the law.

63. Plaintiffs have no adequate remedy at law.

64. Plaintiffs have constructively exhausted their administrative remedies.

WHEREFORE as a result of the foregoing, Plaintiffs pray that this Court:

- A. Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to Plaintiffs' FOIA Request;
- B. Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Plaintiffs' FOIA Request and indexes justifying the withholding of any responsive records withheld in whole or in part under claim of exemption;
- C. Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiffs' FOIA Request;
- D. Enjoin Defendant from assessing fees or costs for Plaintiffs' FOIA Request;
- E. Retain jurisdiction over this matter as appropriate;
- F. Award Plaintiffs their costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 522(a)(4)(E); and
- G. Grant such other and further relief as this Court may deem just and proper.

Dated: February 7, 2023

Respectfully submitted,

/s/ Samuel Everett Dewey
SAMUEL EVERETT DEWEY
(No. 999979)
Chambers of Samuel Everett Dewey, LLC
Telephone: (703) 261-4194
Email: samueledewey@sedchambers.com

ROMAN JANKOWSKI
(No. 975348)
The Heritage Foundation
Telephone: (202) 489-2969
Email: Roman.Jankowski@heritage.org

Counsel for Plaintiffs

<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input checked="" type="radio"/> I. FOIA/Privacy Act <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran’s Benefits <input type="checkbox"/> 160 Stockholder’s Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multi-district Litigation
 7 Appeal to District Judge from Mag. Judge
 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

VII. REQUESTED IN COMPLAINT	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$ JURY DEMAND:	Check YES only if demanded in complaint YES <input type="checkbox"/> NO <input type="checkbox"/>
VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: <u>February 7, 2023</u>	SIGNATURE OF ATTORNEY OF RECORD <u>/s/ Samuel Everett Dewey</u>
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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil coversheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk’s Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CLEAR FORM

Heritage Foundation & Mike Howell

Plaintiff

v.

Department of Justice

Defendant

Civil Action No. 23-cv-342

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Samuel Everett Dewey
Chambers of Samuel Everett Dewey, LLC
2200 12th Court North No. 609
Arlington, VA 22201

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 23-cv-342

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print

Save As...

Reset

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CLEAR FORM

Heritage Foundation & Mike Howell

Plaintiff

v.

Department of Justice

Defendant

Civil Action No. 23-cv-342

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Hon. Merrick Garland
Attorney General of the United States
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Samuel Everett Dewey
Chambers of Samuel Everett Dewey, LLC
2200 12th Court North No. 609
Arlington, VA 22201

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 23-cv-342

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I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print

Save As...

Reset

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CLEAR FORM

Heritage Foundation & Mike Howell

Plaintiff

v.

Department of Justice

Defendant

Civil Action No. 23-cv-342

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Civil Process Clerk
U.S. Attorney's Office for D.C.
601 D Street, N.W.
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Samuel Everett Dewey
Chambers of Samuel Everett Dewey, LLC
2200 12th Court North No. 609
Arlington, VA 22201

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 23-cv-342

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

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was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print

Save As...

Reset

EXHIBIT 1



214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400
heritage.org

SENT VIA: <https://efoia.fbi.gov>

September 23, 2022

Michael G. Seidel, Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Department of Justice
200 Constitution Drive
Winchester, VA 22602

Dear FOIA Officer,

During a June 2020 Black Lives Matter (BLM) protest, a group of smiling Federal Bureau of Investigation (FBI) special agents wearing FBI insignia demonstrated political solidarity with the BLM protestors by kneeling, clapping, and making other gestures affirming sympathy with the BLM cause. These agents were under no coercion or compulsion as evidenced by countless Twitter photos that memorialize this event but more so by a TikTok video that documented the entirety of the event. The user of TikTok account @sonnywithnochances noted when uploading the video that “THE FBI KNEELED WITH US IN DC!!!!” In the week that followed, the TikTok video of the FBI special agents kneeling went viral. Curiously, this video is no longer available on the Internet. At some point, the video (<https://www.tiktok.com/@sonnywithnochances/video/6834598911697620229>) and the TikTok account used to originally upload it (@sonnywithnochances) were removed from TikTok.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and the implementing FOIA regulations of the Department of Justice (“DOJ”), 28 CFR Part 16, I respectfully request, specifically from the FBI Director’s Office and from the Washington Field Office, the following records regarding any and all documents as well as internal and external communications that use any of the below words and/or terms:

1. @sonnywithnochances
2. <https://www.tiktok.com/@sonnywithnochances/video/6834598911697620229>
3. “kneel” AND “hatch”
4. “patrol” AND “knee” AND “crowd”
5. “patrol” AND “kneel” AND “crowd”
6. “BLM” AND “Hatch Act”
7. “Tik Tok” AND “kneel”
8. “TikTok” AND “kneel”
9. “Take a knee”



214 Massachusetts Avenue, NE
Washington, DC 20002

(202) 546-4400
heritage.org

10. "Taking a knee"
11. "Kneel Team Six"
12. "FBI" AND "Expectations VS Reality"

Please limit the search from June 1, 2020 to September 1, 2020.

The terms "pertaining to," "referring," "relating," or "concerning" with respect to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

The term "record" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (emails), MMS or SMS text messages, instant messages, messaging systems (such as iMessage, Microsoft Teams, WhatsApp, Telegram, Signal, Google Chat, Twitter direct messages, Lync, Slack, and Facebook Messenger), contracts, cables, telexes, notations of any type of conversation, telephone call, voicemail, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electronic records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise.

The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The terms "all," "any," and "each" should each be construed as encompassing any and all. The singular includes the plural number, and vice versa. The present tense includes the past and vice versa. The masculine includes the feminine and neuter genders.

The term "communication" means each manner or means of disclosure or exchange of information (in the form of facts, ideas, inquiries, or otherwise), regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in an in-person meeting, by telephone, facsimile, e-mail (desktop or mobile device), text message, MMS or SMS message,



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messaging systems (such as iMessage, Microsoft Teams, WhatsApp, Telegram, Signal, Google Chat, Twitter direct messages, Lync, Slack, and Facebook Messenger), regular mail, telexes, releases, or otherwise.

“Communications with,” “communications from,” and “communications between” means any communication involving the related parties, regardless of whether other persons were involved in the communication, and includes, but is not limited to, communications where one party is cc’d or bcc’d, both parties are cc’d or bcc’d, or some combination thereof.

Please consider all members of a document “family” to be responsive to the request if any single “member” of that “family” is responsive, regardless of whether the “family member” in question is “parent” or “child.”

In the interest of expediency and to minimize the research and/or duplication burden on your staff, please send records electronically if possible. If this is not possible, please notify me before sending to the mailing address listed below. If access to this request will take longer than twenty business days, please let me know when I might receive records or be able to inspect the requested records. Please produce responsive documents as soon as they become available. In all cases, please communicate with me at the below email address.

Please comply fully with 5 U.S.C. § 552(b). Accordingly, without limitation to the foregoing, if any portion of this request is denied for any reason, please provide written notice of the records or portions of records that are being withheld and cite each specific exemption of the Freedom of Information Act on which the agency relies. Moreover, to the extent that responsive records may be withheld in part produce all reasonably segregable portions of those records. Additionally, please provide all responsive documents even if they are redacted in full.

Fee Waiver Request

This request is primarily and fundamentally for non-commercial purposes. As a 501(c)(3) nonprofit, Heritage Foundation does not have a commercial purpose and the release of the information requested is not in Heritage Foundation’s commercial interest. Heritage Foundation’s mission is to formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. Heritage Foundation uses the information requested and analyzes it in order to educate the public through social media,¹ broadcast media² (traditional and nontraditional) and press

¹ Heritage Foundation. [@ Heritage] (Accessed: 2022, February 18). 626.8K Followers Twitter. <https://twitter.com/Heritage>

² Fox News. (Accessed: 2022, February 18). Heritage Foundation launches Conservative Oversight Project aimed at 'exposing' Biden admin, leftist policies. <https://www.foxnews.com/politics/heritage-conservative-oversight-project-biden-admin-leftist-policies>



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releases.³ This request is in the public interest because its in regards to Black Lives Matter and federal agencies which is very newsworthy.⁴

Because this is a request by a member of the news media for information of public interest, made in my capacity as an author for the Daily Signal⁵ (a major news outlet⁶), I actively gather information of potential interest to our Daily Signal audience, and I use my editorial skills to turn raw materials into a distinct work, and I distribute that work to our Daily Signal audience through podcasts⁷ or articles. I request that you waive all applicable fees associated with this request.

If you deny this request for a fee waiver, please advise me in advance of the estimated charges if they are to exceed \$50. Please send me a detailed and itemized explanation of those charges.

Thank you in advance for considering my request. If you have any questions, or feel you need clarification of this request please contact me at oversightproject@heritage.org.

Sincerely,

Mike Howell
Senior Advisor and Author at The Daily Signal
The Heritage Foundation
214 Massachusetts Ave, NE
Washington, D.C. 20002

³ Heritage Foundation. (Accessed: 2022, February 18). Press. <https://www.heritage.org/press> .

⁴ Axios. . (Accessed: 2022, September 23). Anonymous DHS employees call on Biden to fire inspector general. <https://www.axios.com/2022/09/23/dhs-biden-fire-inspector-general>

⁵Daily Signal. (Accessed: 2022, February 18). Mike Howell. <https://www.dailysignal.com/author/mike-howell/>

⁶Daily Signal. [@DailySignal] (Accessed: 2022, February 18). 73.7K Followers Twitter. <https://twitter.com/DailySignal>

⁷Apple. (Accessed: 2022, March 4). The Daily Signal Podcast. <https://podcasts.apple.com/us/podcast/the-daily-signal-podcast/id1313611947>

EXHIBIT 2

U.S. Department of Justice



Federal Bureau of Investigation
Washington, D.C. 20535

September 30, 2022

MIKE HOWELL
THE HERITAGE FOUNDATION
214 MASSACHUSETTS AVENUE, NORTHEAST
WASHINGTON, DC 20002

Request No.: 1561629-000
Subject: Keywords relating to Black Lives
Matter
(On June 1, 2020 until September 1, 2020)

Dear Mike Howell:

This is in response to your Freedom of Information/Privacy Acts (FOIPA) request. Based on the information you provided, we conducted a main and reference entity record search of the Central Records System (CRS) per our standard search policy. However, we were unable to identify records subject to the FOIPA that are responsive to your request. Therefore, your request is being closed. If you have additional information pertaining to the subject of your request, please submit a new request providing the details, and we will conduct an additional search. For more information about records searches and the standard search policy, see the enclosed FBI FOIPA Addendum General Information Section.

You have requested records on one or more third party individuals. Please be advised the FBI will neither confirm nor deny the existence of such records pursuant to FOIA exemptions (b)(6) and (b)(7)(C), 5 U.S.C. §§ 552 (b)(6) and (b)(7)(C). The mere acknowledgement of the existence of FBI records on third party individuals could reasonably be expected to constitute an unwarranted invasion of personal privacy. This is our standard response to such requests and should not be taken to mean that records do, or do not, exist. Please visit www.fbi.gov, select "Services," "Information Management," and "Freedom of Information/Privacy Act" for more information about making requests for records on third party individuals (living or deceased).

Please see the paragraphs below for relevant information that may be specific to your request. Only checked boxes contain corresponding paragraphs relevant to your request. If no boxes are checked, the corresponding information does not apply.

- Please be advised that your request was reopened based on the additional information you provided. A new search was conducted, and we were unable to identify responsive records subject to the FOIPA that are responsive to your request.
- Records potentially responsive to your request were destroyed. Since this material could not be reviewed, it is not known if it was responsive to your request. Record retention and disposal is carried out under supervision of the National Archives and Records Administration (NARA) according to Title 44 United States Code Section 3301, Title 36 Code of Federal Regulations (CFR) Chapter 12 Sub-chapter B Part 1228, and 36 CFR 1229.10. Please be advised that the General Records Schedule (GRS) disposition authority for FOIPA records is DAA-GRS-2016-0002-0001 (GRS 4.2, Item 020).
- Records potentially responsive to your request were transferred to the National Archives and Records Administration (NARA). If you wish to review these records, file a FOIPA request with NARA at the following address:
- National Archives and Records Administration
Special Access and FOIA
8601 Adelphi Road, Room 5500
College Park, MD 20740-6001
- Potentially responsive records were identified during the search. However, we were advised that they were not in their expected locations. An additional search for the missing records also met with unsuccessful results. Since we were unable to review the records, we were unable to determine if they were responsive to your request.

- The identification records requested are maintained by the FBI's Criminal Justice Information Services (CJIS) Division; therefore, we have forwarded a portion of your request to CJIS for processing. To check the status of this request, please contact CJIS directly at (304) 625-5590. For additional information, see the enclosed FBI FOIPA Addendum General Information Section.
- Requests for expedited processing are not applicable when a final response is issued within ten calendar days.
- Police departments should be aware that the search conducted was limited to FBI records. Requests for criminal history records or rap sheets should be directed to Criminal Justice Information Services (CJIS). Information regarding CJIS is listed in the enclosed FBI FOIPA Addendum General Information Section.
- Records potentially responsive to your request were transferred to the National Personnel Records Center - Civilian Personnel Records (NPRC-CPR). In order to obtain information on a file located at the NPRC, your request must be mailed to the following address:

National Archives and Records Administration
ATTN: Archival Programs
P.O. Box 38757
St. Louis, MO 63138

Please refer to the enclosed FBI FOIPA Addendum for additional standard responses applicable to your request. "Part 1" of the Addendum includes standard responses that apply to all requests. "Part 2" includes additional standard responses that apply to all requests for records about yourself or any third party individuals. "Part 3" includes general information about FBI records that you may find useful. Also enclosed is our Explanation of Exemptions.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request.

If you are not satisfied with the Federal Bureau of Investigation's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so it may be easily identified.

You may seek dispute resolution services by emailing the FBI's FOIA Public Liaison at foipaquestions@fbi.gov. The subject heading should clearly state "Dispute Resolution Services." Please also cite the FOIPA Request Number assigned to your request so it may be easily identified. You may also contact the Office of Government Information Services (OGIS). The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,



Michael G. Seidel
Section Chief
Record/Information
Dissemination Section
Information Management Division

Enclosures

As referenced in our letter responding to your Freedom of Information/Privacy Acts (FOIPA) request, the FBI FOIPA Addendum provides information applicable to your request. Part 1 of the Addendum includes standard responses that apply to all requests. Part 2 includes standard responses that apply to requests for records about individuals to the extent your request seeks the listed information. Part 3 includes general information about FBI records, searches, and programs.

Part 1: The standard responses below apply to all requests:

- (i) **5 U.S.C. § 552(c).** Congress excluded three categories of law enforcement and national security records from the requirements of the FOIPA [5 U.S.C. § 552(c)]. FBI responses are limited to those records subject to the requirements of the FOIPA. Additional information about the FBI and the FOIPA can be found on the www.fbi.gov/foia website.
- (ii) **Intelligence Records.** To the extent your request seeks records of intelligence sources, methods, or activities, the FBI can neither confirm nor deny the existence of records pursuant to FOIA exemptions (b)(1), (b)(3), and as applicable to requests for records about individuals, PA exemption (j)(2) [5 U.S.C. §§ 552/552a (b)(1), (b)(3), and (j)(2)]. The mere acknowledgment of the existence or nonexistence of such records is itself a classified fact protected by FOIA exemption (b)(1) and/or would reveal intelligence sources, methods, or activities protected by exemption (b)(3) [50 USC § 3024(i)(1)]. This is a standard response and should not be read to indicate that any such records do or do not exist.

Part 2: The standard responses below apply to all requests for records on individuals:

- (i) **Requests for Records about any Individual—Watch Lists.** The FBI can neither confirm nor deny the existence of any individual's name on a watch list pursuant to FOIA exemption (b)(7)(E) and PA exemption (j)(2) [5 U.S.C. §§ 552/552a (b)(7)(E), (j)(2)]. This is a standard response and should not be read to indicate that watch list records do or do not exist.
- (ii) **Requests for Records about any Individual—Witness Security Program Records.** The FBI can neither confirm nor deny the existence of records which could identify any participant in the Witness Security Program pursuant to FOIA exemption (b)(3) and PA exemption (j)(2) [5 U.S.C. §§ 552/552a (b)(3), 18 U.S.C. 3521, and (j)(2)]. This is a standard response and should not be read to indicate that such records do or do not exist.
- (iii) **Requests for Confidential Informant Records.** The FBI can neither confirm nor deny the existence of confidential informant records pursuant to FOIA exemptions (b)(7)(D), (b)(7)(E), and (b)(7)(F) [5 U.S.C. §§ 552 (b)(7)(D), (b)(7)(E), and (b)(7)(F)] and Privacy Act exemption (j)(2) [5 U.S.C. § 552a (j)(2)]. The mere acknowledgment of the existence or nonexistence of such records would reveal confidential informant identities and information, expose law enforcement techniques, and endanger the life or physical safety of individuals. This is a standard response and should not be read to indicate that such records do or do not exist.

Part 3: General Information:

- (i) **Record Searches and Standard Search Policy.** The Record/Information Dissemination Section (RIDS) searches for reasonably described records by searching systems, such as the Central Records System (CRS), or locations where responsive records would reasonably be found. The CRS is an extensive system of records consisting of applicant, investigative, intelligence, personnel, administrative, and general files compiled by the FBI per its law enforcement, intelligence, and administrative functions. The CRS spans the entire FBI organization, comprising records of FBI Headquarters, FBI Field Offices, and FBI Legal Attaché Offices (Legats) worldwide; Electronic Surveillance (ELSUR) records are included in the CRS. The standard search policy is a search for main entity records in the CRS. Unless specifically requested, a standard search does not include a search for reference entity records, administrative records of previous FOIPA requests, or civil litigation files.
 - a. *Main Entity Records* – created for individuals or non-individuals who are the subjects or the focus of an investigation
 - b. *Reference Entity Records*- created for individuals or non-individuals who are associated with a case but are not known subjects or the focus of an investigation
- (ii) **FBI Records.** Founded in 1908, the FBI carries out a dual law enforcement and national security mission. As part of this dual mission, the FBI creates and maintains records on various subjects; however, the FBI does not maintain records on every person, subject, or entity.
- (iii) **Foreseeable Harm Standard.** As amended in 2016, the Freedom of Information Act provides that a federal agency may withhold responsive records only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the nine exemptions that FOIA enumerates, or (2) disclosure is prohibited by law (5 United States Code, Section 552(a)(8)(A)(i)). The FBI considers this foreseeable harm standard in the processing of its requests.
- (iv) **Requests for Criminal History Records or Rap Sheets.** The Criminal Justice Information Services (CJIS) Division provides Identity History Summary Checks – often referred to as a criminal history record or rap sheet. These criminal history records are not the same as material in an investigative “FBI file.” An Identity History Summary Check is a listing of information taken from fingerprint cards and documents submitted to the FBI in connection with arrests, federal employment, naturalization, or military service. For a fee, individuals can request a copy of their Identity History Summary Check. Forms and directions can be accessed at www.fbi.gov/about-us/cjis/identity-history-summary-checks. Additionally, requests can be submitted electronically at www.edo.cjis.gov. For additional information, please contact CJIS directly at (304) 625-5590.

EXPLANATION OF EXEMPTIONS**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

EXHIBIT 3



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SENT VIA: OIP's FOIA online portal <https://doj-foia.entellitrak.com/etk-doj-foia-prod/login.request.do>

November 18, 2022

Director of the Office of Information Policy
U.S. Department of Justice
Office of Information Policy
441 G Street NW, Sixth Floor
Washington, D.C. 20001

RE: Freedom of Information Act Appeal

Dear FOIA Appeals Officer,

The Heritage Foundation is appealing the full denial of attached Federal Bureau of Investigation Freedom of Information Act (FOIA) Request 1561629-000, dated September 23, 2022, pursuant to 28 C.F.R. § 5.8(a)(1) because the search in question was inadequate. Because the FBI possesses records relevant to The Heritage Foundation's FOIA Request, the FBI's failure to disclose any relevant records is evidence of an insufficient search.

- **Objection 1. The FBI search was inadequate because the requested terms are found in FBI records.**

In attached letter dated September 30, 2022, the FBI advised that the FBI had conducted a main entry and reference entity record search of the Central Records System and noted "we were unable to identify records subject to the FOIPA that were responsive to your request."

Legally "adequate" FBI FOIA queries must include searches of FBI employees' email and all other communications on FBI systems reasonably likely to contain responsive records. Media reports have demonstrated that the subject matter of FOIA Request 1561629-000 was of controversy within the FBI and that some FBI personnel believed the agents who knelt in solidarity with the Black Lives Matter movement did so in violation of the Hatch Act.¹ Due to these facts, the FOIA Request 1561629-000's requested search terms, to include "'kneel' AND 'hatch'", would invariably have been used in FBI communications. As such, had an adequate query been run, records would have been identified.

¹ The Washington Times. (Accessed 2022, November 1). FBI insiders say agents who took a knee during BLM protests were rewarded. <https://www.washingtontimes.com/news/2022/sep/29/fbi-insiders-say-agents-who-took-knee-during-blm-p/>



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- **Objection 2. The FBI search was inadequate because the FBI did not query particular search terms based upon inapplicable FOIA exemptions related to privacy and third-party individuals.**

In a separate paragraph of its September 30, 2022 letter, the FBI stated “*You have requested records on one or more third party individuals. Please be advised the FBI will neither confirm nor deny the existence of such records pursuant to FOIA exemptions (b)(6) and (b)(7)(C), 5 U.S.C. §§ 552 (b)(6) and (b)(7)(C). The mere acknowledgement of the existence of FBI records on third party individuals could reasonably be expected to constitute an unwarranted invasion of personal privacy.*”

The FBI characterized as “third party” FOIA Request 1561629-000 search term “@sonnywithnochances”. This search term relates to a defunct and anonymous TikTok account. Because disclosure of FBI communications containing the term “@sonnywithnochances” would not reveal the identity of the anonymous user of the account, no privacy right is in question.

According to Department of Justice’s Office of Information Policy (OIP):

When a requester asks an agency for records about someone else, the agency must balance an individual’s right to privacy with the public’s right to know about the operations of the Federal government. While it is a balancing act, it’s a necessary one; if the government identifies an individual’s right to privacy in the requested records then it shouldn’t release those records unless the release is “warranted” due to a countervailing public interest in the disclosure. Of course, the starting point – even before the balancing – is whether there is a privacy interest at all.²

While there is no privacy interest in a defunct and anonymous Twitter account, the countervailing public interest in release of these records is potentially significant. It would be of great public interest and of relevance to governmental oversight officials if it were revealed that a governmental official was involved in having the anonymous TikTok account @sonnywithnochances shut down at a time where the TikTok account was the sole source of a video showing kneeling FBI agents smiling and not showing signs of duress.

I respectfully request that the FBI and/or DOJ reassess its response, search for records, and provide responsive records. If any portion of this request is denied for any reason, please provide copies of the records or portions of records that are being withheld and cite each specific exemption of the Freedom of Information Act on which the agency relies.

² The FOIA Ombudsman. (Accessed 2022, November 1). Striking the Balance with Third-party Requests. <https://foia.blogs.archives.gov/2012/01/27/striking-the-balance-with-third-party-requests/>



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Please provide partial responses when they are ready. Thank you in advance for considering my Appeal. If you have any questions, or feel you need clarification of this request please contact me at oversightproject@heritage.org.

Sincerely,

Mike Howell
Senior Advisor and Author at The Daily Signal
The Heritage Foundation
214 Massachusetts Ave, NE
Washington, D.C. 20002