

# **EXHIBIT 5**

1300 Pennsylvania Avenue, NW  
Washington, DC 20229



**U.S. Customs and  
Border Protection**

**OT:RR:RDL:DLJA  
CBP-AP-2022-061230 SS**

April 12, 2022

Mike Howell  
The Heritage Foundation  
214 Massachusetts Avenue NE  
Washington, DC 20002

**Re: Freedom of Information Act Request CBP-2022-056936**

Dear Mr. Howell:

This letter responds to the administrative appeal you filed with this office challenging the withholding of all records responsive to the Freedom of Information Act (FOIA) request you submitted to U.S. Customs and Border Protection (CBP) related to “the September 19, 2021, incident.” By this letter, we remand your case file to FOIA Division for further processing of your request.

On March 23, 2022, you requested via FOIAonline eleven (11) “sections” of information related to “the September 19, 2021, incident” which you stated means “[a]llegations made against or about United States Customs and Border Protection (CBP) agents ‘whipping’ or otherwise engaging migrants attempting to cross into the United States in or near the Rio Grande River near Del Rio, Texas during the migrants’ encounter with CBP agents on September 19, 2021.” You asked to limit the search from September 18, 2021, through March 22, 2022.

On March 31, 2022, CBP’s FOIA Division reported that “the responsive records are denied in full” pursuant to DHS Instruction 262-11-004 and FOIA Exemption 6 in order to protect personally identifiable information of CBP personnel. You appealed that determination the next day stating the determination violated DHS FOIA regulations and questioning the adequacy of the search.

In response to your appeal, this office contacted FOIA Division to obtain and review your request’s case file. Upon review, we determined that FOIA Division intended to withhold those records pursuant to both Exemption 6 and Exemption 7A, which protects “records or information compiled for law enforcement purposes” which “could reasonably be expected to interfere with enforcement proceedings.”

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Our review additionally indicated that FOIA Division did not conduct a segregability review. Indeed, although FOIA Division contacted the Office of Professional Responsibility (OPR) to obtain records responsive to your request, it relied on OPR's assertion that the responsive records are part of "open/pending investigations" to conclude that the records should be withheld in full pursuant to the above referenced exemptions. FOIA Division did not collect the records or review them to ensure that the entirety of each record fit within the bounds of the exemptions or determine that "the agency reasonably foresees that disclosure would harm an interest protected by an exemption," 5 U.S.C. §552(a)(8)(A)(i).

To resolve the error, we are remanding your request to FOIA Division to collect and meaningfully review the records responsive to your request. In doing so, we preserve your administrative appeal rights. The administrative appeal process is important to agencies and requesters because the appeal process provides an agency with an opportunity to review its initial action taken in response to a request to determine whether corrective steps are necessary. The appeals process allows CBP to correct mistakes made at lower levels and thereby obviates unnecessary judicial review.

Because there were no substantive determinations made related to the records responsive to your request, we have determined that a remand is the most appropriate recourse. FOIA Division is aware of this remand and we note your initial request case file is open.

If you interpret this determination to be a denial of your request, you may challenge it in court. Pursuant to 5 U.S.C. §552(a)(4)(B), you may do so in the U.S. District Court in the district in which you reside or have a principle place of business, or in which the agency records are situated, or in the U.S. District Court for the District of Columbia.

Alternatively, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you wish to contact OGIS, you may email them at [ogis@nara.gov](mailto:ogis@nara.gov) or call 1-877-684-6448.

Sincerely,



Shari Suzuki, Chief  
FOIA Appeals & Policy Branch  
Regulations and Rulings Directorate  
Office of Trade  
U.S. Customs and Border Protection