

DAVIS WRIGHT TREMAINE LLP

1 THOMAS R. BURKE (State Bar No. 141930)
DAVIS WRIGHT TREMAINE LLP
2 50 California Street, 23rd Floor
San Francisco, California 94111
3 Telephone: (415) 276-6500
Facsimile: (415) 276-6599
4 Email: thomasburke@dwt.com

5 SARAH E. BURNS (State Bar No. 324466)
DAVIS WRIGHT TREMAINE LLP
6 865 South Figueroa Street, Suite 2400
Los Angeles, California 90017
7 Telephone: (213) 633-6800
Facsimile: (213) 633-6899
8 Email: sarahburns@dwt.com

9 LEENA M. CHARLTON (*pro hac vice forthcoming*)
DAVIS WRIGHT TREMAINE LLP
10 1251 Avenue of the Americas, 21st Floor
New York, New York 10020
11 Telephone: (212) 489-8230
Facsimile: (212) 489-8340
12 Email: leenacharlton@dwt.com

13 Attorneys for Plaintiffs
THE APPEAL, INC., and ETHAN COREY

14
15 IN THE UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 EASTERN DIVISION

18
19 THE APPEAL, INC., and ETHAN COREY,
20 Plaintiffs,

21 v.

22 UNITED STATES DEPARTMENT OF
23 JUSTICE'S OFFICE OF JUSTICE
PROGRAMS,

24 Defendant.
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Case No. 5:22-cv-02111

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF FOR
VIOLATION OF THE FREEDOM OF
INFORMATION ACT, 5 U.S.C. § 552 *et*
*seq.***

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1 Plaintiffs The Appeal, Inc., and Ethan Corey (“Plaintiffs” or “The Appeal”), by its
2 undersigned attorneys, allege as follows:

3 **INTRODUCTION**

4 1. The Office of Justice Programs (a division of the U.S. Department of Justice) is a
5 federal agency that provides resources for improving the nation’s criminal justice systems. The
6 Office of Justice Programs (“OJP”) is comprised of six program offices, two of which are
7 responsible for the collection of in-custody death data: the Bureau of Justice Assistance¹ (“BJA”) and the Bureau of Justice Statistics² (“BJS”).

9 2. In 2000, Congress passed the Death in Custody Reporting Act (“DCRA-2000”) which requires states to report to the Attorney General information regarding the death of any
10 person who is either detained, under arrest, in the process of being arrested, en route to be
11 incarcerated, or is incarcerated at a municipal or county jail, state prison, state-run boot camp
12 prison, boot camp prison that is contracted out by the state, or any state or local contract facility,
13 or other local or state correctional facility (including any juvenile facility). The purpose of the
14 DCRA-2000 was to increase transparency about in-custody deaths at the state and local levels
15 and to have a repository of national statistics that could highlight systemic issues in need of
16 reform.³ The BJS was responsible for capturing this data via its Mortality in Correctional
17 Institutions reporting program (“MCI”).

19 3. Between 2001 and 2016, the BJS found that at least 16,058 people died in local
20 jails, nearly half by nonnatural causes like suicide or drug overdose, and nearly 60,000 people
21 died in state and federal prisons. The agency also reported nearly 5,000 arrest-related deaths, the
22 majority of which were police homicides from 2003 to 2009.⁴

23 4. The DCRA-2000 expired in 2006; however, the BJS continued to collect in-
24 custody death reports until the end of 2019. In 2014, Congress reauthorized the DCRA (“DCRA-
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26 ¹ See *Death in Custody Reporting Act (DCRA) Data Collection: Overview* (Nov. 23, 2022),
27 <https://www.bja.ojp.gov/program/dkra/overview>.

² See *Death in Custody Reporting Act* (Nov. 23, 2022), <https://bjs.ojp.gov/programs/dicra>.

³ See Ethan Corey, *How the Federal Government Lost Track of Deaths in Custody* (Jun. 24, 2020),
28 <https://theappeal.org/police-prison-deaths-data/>.

⁴ See *id.*

1 2013”) and expanded its requirements in response to the high-profile police killings of Eric
 2 Garner and Michael Brown.⁵ Unlike the DCRA-2000, the DCRA-2013 now requires that *federal*
 3 law enforcement agencies report in-custody death data to the Attorney General and penalizes
 4 states that fail to report deaths.⁶

5 5. In 2019, the BJA took over the aggregation of state and local mortality data on
 6 behalf of the BJS. The transfer of responsibility of DCRA-2013 reporting from the BJS to the
 7 BJA, coupled with modifications to data collection by the Trump administration, caused the BJA
 8 to not begin collecting in-custody death data until October 2019. Since then, neither the BJA,
 9 BJS, nor any other component of the U.S. Department of Justice has published or made publicly
 10 available any in-custody death data. Furthermore, the BJS has yet to revive its arrest-related
 11 deaths reporting program, meaning that there is no publicly available, official data on deaths
 12 from police encounters.⁷ In short, the true scope of deaths in custody remains unknown to the
 13 public.

14 6. Starting on October 10, 2019, on behalf of The Appeal, Inc.,⁸ then-Senior Fact
 15 Checker and Researcher Ethan Corey made three FOIA requests to the OJP requesting
 16 information on pre-2019 jail death data, federal law enforcement agency death data, and post-
 17 2019 state and local jail death data. Nearly *three years* after Plaintiffs made their initial FOIA
 18 request, the OJP continues to wrongfully deny disclosure and withhold the responsive
 19 documents.

20 7. Plaintiffs bring this action under the Freedom of Information Act, 5 U.S.C. § 552
 21 *et seq.*, as amended (“FOIA”), to enjoin the OJP from continuing to improperly withhold agency
 22 records that are responsive to the FOIA requests Plaintiffs sent starting in October 2019 (the
 23 “FOIA Requests”). This FOIA action is necessary because Plaintiffs have exhausted their
 24 administrative remedies, and Defendant continues to wrongfully deny disclosure of responsive
 25

26 ⁵ *Id.*

27 ⁶ See Office of the Inspector General, *Review of the Department of Justice’s Implementation of the Death in Custody Reporting Act of 2013* (Dec. 2018), <https://www.oversight.gov/sites/default/files/oig-reports/e1901.pdf>.

28 ⁷ See *supra* note 3.

⁸ The Appeal is a highly regarded nonprofit news organization that focuses its reporting on the U.S. criminal legal system.

1 records under 5 U.S.C. § 552(b)(3). Furthermore, Plaintiffs made a 2020 FOIA Request over 27
 2 months ago and have yet to receive any responsive records, a constructive denial of that FOIA
 3 Request.

4 8. The Freedom of Information Act “focuses on the citizens’ right to be informed
 5 about ‘what their government is up to,’” by requiring the release of “[o]fficial information that
 6 sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for*
 7 *Freedom of the Press*, 489 U.S. 749, 750, 773 (1989) (citations omitted). “[D]isclosure, not
 8 secrecy, is the dominant objective” of FOIA. *Dep’t of Interior v. Klamath Water Users*
 9 *Protective Ass’n*, 532 U.S. 1, 8 (2001) (internal quotation marks and citations omitted).

10 9. The Appeal plays a critical role in providing information to citizens about what
 11 U.S. law enforcement agencies and correctional facilities “are up to.” Indeed, the First
 12 Amendment’s guarantee of freedom of the press is meant to enable journalists to play an
 13 “essential role in our democracy,” to “bare the secrets of government and inform the people.”
 14 *New York Times. Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring).

15 10. Through its FOIA Requests, Plaintiffs seek to fulfill their journalistic function and
 16 shine a public light on in-custody deaths in local jails, state prisons, and federal prisons in the
 17 United States.

18 PARTIES

19 11. Plaintiff The Appeal, Inc., is a national, nonprofit news agency that covers the
 20 impact of policy, politics, and the criminal-legal system on vulnerable communities.⁹ The
 21 Appeal’s expertise in fact-based reporting and analysis has led to countless articles detailing the
 22 human and economic costs of the United States’ mass incarceration system. The Appeal’s
 23 principal place of business is located in Landers, California.

24 12. Plaintiff Ethan Corey is the Research and Projects Editor for The Appeal. Mr.
 25 Corey’s work focuses on key issues in the criminal legal system, from bail reform to how the
 26 federal government lost track of deaths in custody.¹⁰

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28 ⁹ See The Appeal, *About Us* (Nov. 23, 2022), <https://theappeal.org/about/>.

¹⁰ See The Appeal, *Ethan Corey: Bio* (Nov. 23, 2022), <https://theappeal.org/authors/ethan-corey/>.

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1 13. Defendant Office of Justice Programs is a division of the U.S. Department of
2 Justice, which is a component of the Executive Branch of the United States Government.
3 Defendant is an “agency” within the meaning of 5 U.S.C. § 552(f). Plaintiffs are informed and
4 believe that Defendant has possession and control of records sought by the FOIA Requests.

5 **JURISDICTION**

6 14. This Court has subject-matter jurisdiction over this action and personal
7 jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 701-706, and 28 U.S.C. §
8 1331.

9 **VENUE**

10 15. Venue in the Central District of California – Eastern Division is proper under 5
11 U.S.C. § 552(a)(4)(B) as The Appeal has its principal place of business in San Bernardino
12 County. For the same reason, venue is also proper under 28 U.S.C. § 1391(e).

13 **FACTS**

14 **2019 FOIA Request**

15 16. Mr. Corey, while employed for The Appeal, sent a FOIA Request to the U.S.
16 Department of Justice’s Office of Justice Programs (“OJP”) on October 10, 2019. He requested
17 copies (including electronic records) of “[a]ll records concerning the number of jail deaths
18 reported (and/or unique CJ-9 forms submitted) by each jail facility participating in the Mortality
19 in Correctional Institutions reporting program (formerly known as the Death in Custody
20 Reporting Program) each year from 2000 to 2018, inclusive.” A true and correct copy of this
21 FOIA request is attached as **Exhibit A** (“2019 Request”).

22 17. Mr. Corey identified himself as a representative of a member of the news media.
23 *See Exhibit A.*

24 18. Mr. Corey specified that he sought only non-exempt information. *See Exhibit A.*

25 19. Mr. Corey asked the OJP to inform him of any fees in advance of fulfilling the
26 2019 Request. *See Exhibit A.*

27 20. On October 28, 2019, the OJP acknowledged receipt of the 2019 Request, and
28 assigned it the request number 20-FOIA-00016. Attached as **Exhibit B** is a true and correct copy

1 of this acknowledgment of receipt. The OJP stated that Mr. Corey’s request fell within “unusual
2 circumstances” pursuant to 5 U.S.C. § 552(a)(6)(B)(i)-(iii) and extended the time limit to
3 respond to the 2019 Request beyond the ten additional days provided by the statute.

4 21. In a letter dated March 31, 2020, DOJ stated that it had identified 182,611 pages
5 of responsive records in the Office of Justice Programs (OJP) and claimed that all 182,611 pages
6 were exempt from disclosure pursuant to “exemption (b)(3) of the [Freedom of Information Act]
7 . . . [authorizing] an agency to withhold information prohibited by disclosure by another statute.”
8 DOJ cited “34 U.S.C. §§ 10134 and 10231, which pertains to research or statistical information
9 collected by the Bureau of Justice Statistics and must remain confidential” as the applicable
10 statutes under FOIA (b)(3). The denial “complete[d] processing of” the 2019 FOIA Request.
11 Attached as **Exhibit C** is a true and correct copy of this letter.

12 22. On June 20, 2020, Mr. Corey appealed the OJP’s denial of the 2019 Request, on
13 the grounds that Exemption 3 was improperly applied, the OJP failed to undertake reasonable
14 efforts to segregate non-exempt material from responsive records, and the OJP failed to meet its
15 burden under the “foreseeable harm” standard. A true and correct copy of the appeal letter
16 (minus exhibits) is attached as **Exhibit D**.

17 23. In a letter dated July 7, 2020, the DOJ Office of Information Policy (“OIP”)
18 acknowledged receipt of the appeal on June 26, 2020 and assigned it No. A-2020-01346.
19 Attached as **Exhibit E** is a true and correct copy of this letter.

20 24. On November 30, 2020, the U.S. Department of Justice’s Office of Information
21 Policy (“OIP”) affirmed, on partly modified grounds, the OJP’s denial on the same basis as
22 before, again improperly applying Exemption 3 and stating that 34 U.S.C. § 10231 exempted the
23 responsive records from release in full. The OIP did not mention 34 U.S.C. § 10134, nor did they
24 respond to any other arguments raised by Mr. Corey’s appeal. A true and correct copy of the
25 OIP’s denial is attached as **Exhibit F**.

26 **2020 FOIA Request**

27 25. Mr. Corey, while employed for The Appeal, sent a FOIA Request to the OJP on
28 July 27, 2020. He requested copies (including electronic records) of:

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- a. All DCR-1 quarterly summary forms submitted by federal, state, and local agencies to the OJP, BJA, or any of its contractors or agents.
- b. All DCR-1A incident reports submitted by federal, state, and local agencies to OJP, BJA, or any of its contractors or agents.
- c. All Edward Byrne Memorial Justice Assistance Grant (“JAG”) Performance Management Tool reports submitted by state and local agencies using the online portal located at <https://bjapmt.ojp.gov/> that include reporting pursuant to the Death in Custody Act of 2013.

26. A true and correct copy of this FOIA Request to the OJP is attached as **Exhibit G** (the “2020 Request”).

27. Mr. Corey identified himself as a representative of a member of the news media and asked the OJP to waive all fees associated with this request pursuant to 5 U.S.C. § 552(a)(4)(A) because the information sought was for The Appeal’s “newsgathering process” and “disclosure of this information is in the public interest.”

28. Mr. Corey specified that he sought only non-exempt information. *See* Exhibit G.

29. On July 28, 2020, the OJP acknowledged receipt of the 2020 Request, and assigned it the request number 20-FOIA-00234. Attached as **Exhibit H** is a true and correct copy of this acknowledgment of receipt. The OJP stated that Mr. Corey’s request fell within “unusual circumstances” pursuant to 5 U.S.C. § 552(a)(6)(B)(i)-(iii) and extended the time limit to respond to the 2020 Request beyond the ten additional days provided by the statute.

30. On May 21, 2021, Mr. Corey requested a status update on his 2020 Request. On May 24, 2021, a contract FOIA Analyst on behalf of the OJP sent Mr. Corey an email response stating that his request had been resubmitted to include updated data and that he would be contacted as soon as the OJP received and processed the requested records. A true and correct copy of this email is attached as **Exhibit I**. Since receiving this email response Mr. Corey has not received any status updates or responsive records regarding his 2020 Request.

2021 FOIA Request

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1 31. Mr. Corey, while employed for The Appeal, sent a FOIA Request to the OJP on
2 February 5, 2021. He requested copies (including electronic records) of:

- 3 a. All Death in Custody Reporting Act (DCRA) reports submitted by federal law
4 enforcement agencies (including the Bureau of Prisons) in FY2016, FY2017,
5 FY2018, FY2019 and FY2020.
6 b. A true and correct copy of the FOIA Request to the OJP is attached as **Exhibit**
7 **J** (the “2021 Request”).

8 32. Mr. Corey identified himself as a representative of a member of the news media
9 and requested a fee waiver and expedited processing. *See* Exhibit J.

10 33. On February 9, 2021, the OJP acknowledged receipt of the 2021 Request, and
11 assigned it the request number 21-FOIA-00114. Attached as **Exhibit K** is a true and correct copy
12 of this acknowledgment of receipt. The OJP granted expedited processing and stated that Mr.
13 Corey’s request fell within “unusual circumstances” pursuant to 5 U.S.C. § 552(a)(6)(B)(i)-(iii)
14 and extended the time limit to respond to the 2021 Request beyond the ten additional days
15 provided by the statute.

16 34. In a letter dated February 24, 2021, DOJ stated that it had identified 3,348 pages
17 of responsive records in the OJP and claimed that all 3,348 pages were exempt from disclosure
18 pursuant to “exemption (b)(3) of the [Freedom of Information Act] . . . [authorizing] an agency
19 to withhold information prohibited by disclosure by another statute.” DOJ cited “34 U.S.C. S
20 10231, which pertains to research or statistical information collected by the Bureau of Justice
21 Statistics and must remain confidential” as the applicable statutes under FOIA (b)(3). The denial
22 “complete[d] processing of” the 2021 FOIA Request. Attached as **Exhibit L** is a true and
23 correct copy of this letter.

24 35. On May 8, 2021, Mr. Corey appealed the OJP’s denial of the 2021 Request, on
25 the grounds that Exemption 3 was improperly applied and that the OJP failed to meet its burden
26 under the “foreseeable harm” standard. A true and correct copy of the appeal letter (minus
27 exhibits) is attached as **Exhibit M**.

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1 36. In a letter dated January 5, 2022, the OIP affirmed the OJP’s denial, repeating
2 OJP’s justification without further elaboration. Attached as **Exhibit N** is a true and correct copy
3 of this letter.

4 **FIRST CAUSE OF ACTION**

5 **(Violation of FOIA)**

6 37. Plaintiffs reallege and incorporate the allegations contained in the preceding
7 paragraphs as if fully set forth herein.

8 38. Plaintiffs’ FOIA Requests seek “agency” records within the Defendant’s custody
9 and control.

10 39. Defendant U.S. Department of Justice’s Office of Justice Programs has failed to
11 produce any responsive records to Plaintiffs’ FOIA Requests. Plaintiffs have a legal right under
12 FOIA to obtain the agency records they requested in their FOIA Requests, and there exists no
13 “exceptional circumstances” or legal basis for Defendant’s failure to respond to Plaintiffs’ FOIA
14 Requests and to make these records available.

15 40. Defendant’s failure to make promptly available the records sought by Plaintiffs’
16 FOIA Requests violates FOIA, 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A)(ii), and applicable
17 regulations promulgated thereunder.

18 41. Plaintiffs are entitled to declaratory relief finding that Defendant has violated
19 FOIA and are immediately entitled to receive all records responsive to their requests.

20 42. Plaintiffs are further entitled to injunctive relief, ordering Defendant to
21 immediately produce copies of all records responsive to Plaintiffs’ FOIA Requests without
22 further delay.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiffs request the Court award them the following relief:

25 A. Declare that Defendant violated FOIA through their responses to Plaintiffs’ FOIA
26 Requests;

27 B. Order Defendant to immediately disclose the requested records to Plaintiffs and
28 enter an injunction prohibiting Defendant from continuing to withhold the requested records;

1 C. Order Defendant to immediately disclose any responsive records in their
2 possession or control to Plaintiffs;

3 D. Award Plaintiffs their reasonable costs and attorney’s fees;

4 E. Grant such further relief as the Court may deem just and proper.
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6 DATED: November 28, 2022

Respectfully submitted,

7 DAVIS WRIGHT TREMAINE LLP
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9 By: /s/ Thomas R. Burke
10 THOMAS R. BURKE

11 Attorneys for Plaintiffs THE APPEAL, INC.,
12 and ETHAN COREY
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