

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
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