

BEFORE THE UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF INFORMATION POLICY

STAR NEWS DIGITAL MEDIA, INC.,
MICHAEL PATRICK LEAHY,
and MATT KITTLE,

Appellants,

FOIPA Request No.:
1590230-000

v.

FEDERAL BUREAU OF INVESTIGATION,

Respondent.

FREEDOM OF INFORMATION ACT APPEAL

Star News Digital Media, Inc., Michael Patrick Leahy, and Matt Kittle (collectively “Star News”) hereby appeal the Federal Bureau of Investigation’s (FBI) denial of their expedited public-records request dated April 20, 2023, as clarified on April 24, 2023 (FOIPA Request No.: 1590230-000). FBI denied this expedited request on April 25, 2023.

Star News requests expedited processing of this appeal for all the reasons stated in the April 24, 2023, clarification request.

BACKGROUND

1. On March 27, 2023, a former student shot through the doors of The Covenant School in Nashville and tragically killed three nine-year-old students and three adults—an administrator, a substitute teacher, and a custodian. According to

news reports, the shooter elaborately planned the massacre with surveillance and a detailed map.

2. Yet, the killer's motives remain unknown to the public. Law enforcement officers bravely entered the building and immediately confronted the shooter. Later identified as Audrey Hale, the 28-year-old female shooter was shot and killed by responding officers.

3. During a press conference that same day, Metropolitan Nashville Police Chief John Drake did not give a specific motive for the attack, but said "we have a manifesto, we have some writings that we're going over that pertain to this date, the actual incident." See Jonathan Mattise, "Nashville shooter who drew maps, surveilled school," Associated Press, March 27, 2023, <https://archive.ph/RhF0o>. (For purposes of this appeal, the term "manifesto" will refer to journal entries, notes, plans, or other writings explaining Audrey Hale's motivations for the March 27 attack.)

4. Despite law enforcement's identification of the manifesto, it was not released to the public. Two days later, on March 29, *The New York Post* reported that the manifesto was in possession of the FBI's Behavioral Analysis Unit.

5. Days went by, and despite repeated promises by public officials that the manifesto would be released, it never was. The shooter is dead and no threat remains to the public related to the events of March 27. There is no criminal prosecution, investigation, or other legal proceeding. FBI is apparently attempting to interpret the manifesto, but at this point, interpreting or reviewing the manifesto is an academic exercise. In short, there is simply no reason why FBI cannot release the manifesto.

In fact, in the most recent mass shootings involving FBI, manifestos were released to the press sometimes within hours of the attack. It has been long enough, and the public has an urgent right to know why this tragedy happened, how future events may be prevented, and what policies should be in place to address this and other similar tragedies. The FBI has no right to retain a monopoly on this information.

RECORDS REQUEST

6. Star News Digital Media, Inc. is a media and news company that owns and operates The Star News Network family of digital newspapers and Star News Radio. The company's headquarters are in Nashville, Tennessee.

7. Michael Patrick Leahy is the CEO, Editor-in-Chief, and majority owner of Star News Digital Media, Inc., which owns and operates a family of state-focused conservative news sites, including *The Tennessee Star*, *The Ohio Star*, *The Michigan Star*, *The Minnesota Sun*, *The Virginia Star*, *The Georgia Star News*, *The Arizona Sun Times*, *The Florida Capital Star*, *The Wisconsin Daily Star*, *The Pennsylvania Daily Star*, *The Connecticut Star*, and The Star News Network. He is also the host of *The Tennessee Star Report with Michael Patrick Leahy*.

8. Matt Kittle is an award-winning investigative reporter and 30-year veteran of print, broadcast, and online journalism. Kittle is The Star News Network's National Political Editor and a reporter. He has written for *The Tennessee Star* about matters related to the March 27 shooting in Nashville and plans to report on the motivations of the shooting and the FBI's response and delay in releasing the manifesto.

9. On April 20, 2023, Star News requested a copy of the manifesto from the FBI. The request read as follows: “This is a request under the Freedom of Information Act. I am requesting a copy of the following document: Audrey Hale Manifesto related to the Nashville Covenant School Shooting on March 27, 2023. The record came into FBI’s possession on or about that date. Media reports indicate that the report is in the possession of the FBI, specifically the Behavioral Analysis Unit. The purpose of my request is not for commercial use, but as a member of the news media. I am a reporter employed by Star News Digital Media, Inc. I have been reporting on the events related to the shooting for The Tennessee Star. The Manifesto is alleged to reveal the motivations of Audrey Hale. These motivations are not only relevant to my reporting, but important for public safety and therefore of intense national media interest. The release of these documents could not possibly interfere with any pending law enforcement proceedings, especially since the killer is deceased and the threat to the public has abated. I am willing to pay the fees related to obtaining this document.” At this time, Star News also asked for expedited processing.

10. On April 24, 2023, FBI denied the request to expedite, stating that Star News had “not provided enough information concerning the statutory requirements permitting expedition.”

11. On that same day, Star News clarified its request in two ways. First, Star News re-stated its request as follows: “I am requesting a copy of the following records: the notes, journal entries, plans, letters, writings, or other documents making up what law enforcement officials have labeled as Audrey Hale’s ‘manifesto’

related to the Nashville Covenant School Shooting on March 27, 2023. During a press conference on that same day, Metropolitan Nashville Police Chief John Drake labeled these documents as a ‘manifesto,’ stating ‘we have a manifesto.’ On or about that same day, Nashville Police provided the FBI a copy of those documents for review, including review by the Behavioral Analysis Unit.” Second, Star News added facts proving that Star News satisfied the criteria to expedite FOIA requests found at 28 C.F.R. § 16.5(e)(1)(ii) & (iv). Star News also sent a copy of this request to the Office of Public Affairs, as required by those regulations.

12. On April 25, 2023, FBI denied the request. FBI’s response gave the following reason: “5 U.S.C. § 522(b)(7)(A) exempts from disclosure: records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.” FBI further stated, “The records responsive to your request are law enforcement records; there is a pending or prospective law enforcement proceeding relevant to these responsive records, and release of the information could reasonably be expected to interfere with enforcement proceedings. Therefore, your request is being administratively closed.”

13. FBI has never explained what “law enforcement proceeding” could possibly exist and how releasing the manifesto would “interfere” with such a proceeding.

14. Star News also requested a copy of the manifesto from the Nashville Police Department under Tennessee law, but that request was denied on April 25, 2023.

LEGAL BASIS OF APPEAL

15. Star News appeals FBI's denial under 5 U.S.C. § 552(a)(6)(A)(ii) and 28 C.F.R. § 16.8.

16. "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

17. The Freedom of Information Act (FOIA) requires federal agencies to provide access to all "records promptly available to any person," subject to certain exceptions. 5 U.S.C. § 552(a)(3)(A).

18. FOIA "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003). Under FOIA, federal agencies must release records to the public upon request, unless one of nine statutory exemptions apply. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); 5 U.S.C. § 552(b). To prevail in a FOIA case, a plaintiff must show that an agency has improperly withheld agency records. *See*

Odland v. FERC, 34 F.Supp.3d 1, 13 (D.D.C. 2014). The defending agency must demonstrate that its search for responsive records was adequate, that any invoked exemptions actually apply, and that any reasonably segregable non-exempt information has been disclosed after redaction of exempt information. *See id.*

19. In this case, FBI invokes a single exception: 5 U.S.C. § 522(b)(7)(A). This exception provides that law enforcement records may be withheld if they “could reasonably be expected to interfere with enforcement proceedings.”

20. “It is well recognized that, pursuant to this exemption, an agency may withhold documents stemming from an ongoing criminal investigation if disclosure would harm or interfere with a subsequent enforcement proceeding.” *Manna v. U.S. Dep't of Just.*, 815 F. Supp. 798, 805 (D.N.J. 1993), *aff'd*, 51 F.3d 1158 (3d Cir. 1995). The purpose of Exemption 7(A) is to protect FBI from being “hindered in their investigations or placed at a disadvantage when it came time to present their case.” *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). Foremost among the purposes of this exemption was to prevent “harm [to] the Government's case in court.” *Id.*

21. None of these factors apply here. Under the language of the statute, there are no “enforcement proceedings” contemplated. The shooter is dead. No crime is being investigated that would lead to a criminal prosecution. Therefore, disclosure would not “harm the Government’s case in court.” *Id.* But even if one interpreted “enforcement proceedings” to include FBI’s evaluation of a manifesto after the death of the assailant, it is hard to understand how allowing the public to see the manifesto

would “interfere” with that investigation. Whatever “interference” exists must be supported by the FBI with evidence.

22. FBI has identified no legitimate reason why the public should be prohibited from seeing the manifesto. And FBI’s own recent history demonstrates why there is no legitimate basis to withhold a manifesto from a deceased assailant.

23. On October 24, 2022, Orlando Harris killed two and injured seven people in St. Louis. FBI investigated the incident with other law enforcement authorities. The very next day, October 25, CNN obtained a copy of and reported on the details of his manifesto. *See* Holly Yan, St. Louis school shooter had an AR-15-style rifle, 600 rounds of ammo and a note saying ‘I don’t have any friends. I don’t have any family,’ police say, CNN.com, Oct. 25, 2022, <https://archive.ph/DDdqw>.

24. On November 22, 2022, Andre Marcus Bing killed seven people and injured four at a Walmart Supercenter in Chesapeake, Virginia. FBI investigated the incident with other law enforcement authorities. Within three days, the New York Times obtained the killer’s manifesto. *See* J. David Goodman, Walmart Gunman Bought Pistol Hours Before Killing and Left a “Death Note,” New York Times, Nov. 25, 2022, <https://archive.ph/MmfAx>.

25. On February 13, 2023, Anthony Dwayne McRae killed five and injured three on the campus of Michigan State University. FBI and Michigan law enforcement authorities jointly investigated the incident. Approximately three weeks after the shooting, the Detroit News received a two-page handwritten manifesto describing his motives through a FOIA request. *See* Kim Kozlowski, Note written by

MSU shooter asked ‘why,’ outlined other targets, The Detroit News, March 10, 2023, <https://archive.ph/0bMd6>.

26. FBI itself is proud of its history of releasing manifestos. In 1995, FBI famously released Ted Kaczynski’s manifesto to The Washington Post, The New York Times, and Penthouse magazine. FBI brags about this history on its website. *See* FBI, Unabomber Bomb Shrapnel, <https://www.fbi.gov/history/artifacts/unabomber-bomb-shrapnel>.

27. One could speculate as to why FBI has released so many other manifestos, but not this one. But such speculation is unnecessary for the purposes of this appeal. The simple fact is that FBI has not justified its refusal to release this manifesto under FOIA.

REQUEST FOR RELIEF

Star News therefore requests the following relief:

- A. Expedited consideration of this appeal for all the reasons stated in Star News’ April 24, 2023, request clarifying its FOIA request and requesting expedited processing under 28 C.F.R. § 16.5;
- B. Waiver of all costs; and
- C. Immediate release of the manifesto.

Dated: April 25, 2023

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