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December 6, 2021

VIA EFOIPA PORTAL

FBI
Attn: Initial Processing Operations Unit
Record/Information Dissemination Section
200 Constitution Drive
Winchester, VA 22602

Re: Freedom of Information Act Request
Expedited Processing Requested

To whom it may concern,

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute")[1] submits this request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records pertaining to the use by the Federal Bureau of Investigation ("FBI") of software platforms that gather and analyze information from social media platforms and other internet sources.

I. Background

Public participation in the "vast democratic forums of the Internet," *Reno v. ACLU*, 521 U.S. 844, 868 (1997), produces a massive amount of data that can reveal individuals' beliefs and associations, from the intimately personal to the overtly political. Government efforts to collect, aggregate, and analyze this data chill this First Amendment–protected activity. Discussions following the January 6, 2021 attack on the U.S. Capitol have highlighted the FBI's apparent authority to conduct extensive surveillance of social media, and reports on the nationwide protests following the murder of George Floyd described federal law enforcement's use of social media surveillance tools to

[1] The Knight First Amendment Institute is a New York not-for-profit corporation based at Columbia University that works to preserve and expand the freedoms of speech and the press through strategic litigation, research, and public education.

target protest groups. Still, very little is known about the nature and extent of these practices.

Internal Department of Justice documents show that FBI investigators may make use of information from social media at nearly all stages of the investigative process, despite the FBI Director's public suggestions to the contrary.[2] FBI agents may do so in the course of full investigations, but also as part of "assessments"—a type of investigative activity that requires no particular factual predicate, but merely an "authorized purpose" that falls within the broad law enforcement and intelligence functions of the FBI.[3]

Some of the FBI's most powerful tools for surveilling and searching social media are produced by private firms. As early as 2016, the FBI contracted with the firm Dataminr to fulfill a stated need for "real time access to a full range of social media exchanges in order to obtain the most current information available in furtherance of its law enforcement and intelligence missions."[4] In December 2020, the FBI awarded a new contract to another firm, ZeroFox, following a Request for Proposals seeking a platform capable of "constant monitoring of publicly available data on social media platforms based on contractor-developed algorithms and/or keywords relevant to national security and location," as well as, among other features, the ability to customize notifications based on keywords, location, subject matter, and "identifiers." *See* Fed. Bureau of Investigation, *Social Media Alerting Statement of Work*, Request for Proposals 15F06720R0000063 (Jan. 17, 2020). These contractors have been subject to public criticism in the past, in part

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[2] *See* Quinta Jurecic, *Why Didn't the FBI Review Social Media Posts Announcing Plans for the Capitol Riot?*, Lawfare (June 29, 2021), https://www.lawfareblog.com/why-didnt-fbi-review-social-media-posts-announcing-plans-capitol-riot; Ken Dilanian, *Why did the FBI miss the threats about Jan. 6 on social media?*, NBC News (Mar. 8, 2021), https://www.nbcnews.com/politics/justice-department/fbi-official-told-congress-bureau-can-t-monitor-americans-social-n1259769; Ryan Goodman & Andrew Weissman, *Where was the FBI before the attack on the Capitol?*, Wash. Post (June 17, 2021), https://www.washingtonpost.com/opinions/2021/06/17/chris-wray-testimony-fbi-jan-6-capitol/; *FBI Director Christopher Wray Testifies on U.S. Capitol Attack,* C-SPAN, at 03:11:11 (June 15, 2021), https://www.c-span.org/video/?512552-1/fbi-director-christopher-wray-testifies-us-capitol-attack (testifying that the FBI cannot monitor social media "just in case").

[3] *See* FBI Domestic Investigations and Operations Guide, Appendix L, § 4; Attorney General's Guidelines for Domestic FBI Operations 25–26, 27, 17, 29–30.

[4] *See* Russell Brandom, *The FBI just got its hands on data that Twitter wouldn't give the CIA*, Verge (Nov. 14, 2016) (reporting the FBI's 2016 contract with Dataminr), https://www.theverge.com/2016/11/14/13629248/fbi-dataminr-twitter-surveillance-contract-scanning-police; Fed. Bureau of Investigation, *Social Media Alerting Subscription*, Request for Proposal DJF194750PR0000369 (Jul. 8, 2019), https://sam.gov/opp/fe943e551236e0e62ee0843d5803781e/view.

because of reports of possible racial bias built into the analytic intelligence "products" they offer.[5]

Despite this publicly available information, the precise nature of the services for which the FBI contracts with firms like Dataminr and ZeroFox remains unclear. Given concerns about the broad aggregation and analysis of First Amendment–protected activity and the integrity of the services the FBI uses for these purposes, the nature of the FBI's social media monitoring capabilities is a subject of the utmost public concern. To help the public learn how the FBI may be collecting data regarding online activity, the Knight Institute submits this FOIA request.

II. Records requested

The Knight Institute seeks the following records:

1. All requests for proposals, responses to requests for proposals, contracts, and formal or informal agreements related to services provided by ZeroFox, Inc., pertaining to:

    a. The contract awarded on December 30, 2020, with contract award number 15F06721P0002431,[6]

    b. The renewal of the December 30, 2020 contract referenced in Item 1.a., and

    c. Any other contract or agreement currently in effect.

2. All requests for proposals, responses to requests for proposals, contracts, and formal or informal agreements related to services provided by Dataminr, Inc., pertaining to:

    a. The contract awarded on August 27, 2020, with contract award number 15F06720P0001757,[7]

    b. The renewal of the August 27, 2020 contract referenced in Item 2.a., and

    c. Any other contract or agreement currently in effect.

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[5] Sam Biddle, *Twitter Surveillance Startup Targets Communities of Color for Police*, Intercept (Oct. 21, 2020), https://theintercept.com/2020/10/21/dataminr-twitter-surveillance-racial-profiling/; Brandon E. Patterson, *Black Lives Matter organizers were labeled as "threat actors" by a cybersecurity firm*, Mother Jones (Aug. 3, 2015), https://www.motherjones.com/politics/2015/08/zerofox-report-baltimore-black-lives-matter/.

[6] *See* Fed. Bureau of Investigation, FBI Social Media Alerting, Award Notice 15F06721P0002431 (Dec. 30, 2020), https://sam.gov/opp/8005073a48684e46860c4522720acbba/view.

[7] *See* Fed. Bureau of Investigation, COTS Software Award, Award Notice 15F06720P0001757 (Aug. 27, 2020), https://sam.gov/opp/b4eb337505c447519307ad8eef742f2a/view.

We ask that you disclose all segregable portions of otherwise exempt records. *See* 5 U.S.C. § 552(b). We also ask that you provide responsive electronic records in their native file format. *See* 5 U.S.C. § 552(a)(3)(B). If the records are not producible in that format, please provide the records electronically in a text-searchable, static-image format (*e.g.*, PDF), in the best image quality in the agency's possession, and in separate, Bates-stamped files.

III. Application for expedited processing

The Knight Institute requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a "compelling need" for the records sought because the information they contain is "urgent[ly]" needed by an organization primarily engaged in disseminating information "to inform the public about actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

A. The Knight Institute is primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The Knight First Amendment Institute was established at Columbia University to defend and strengthen the freedoms of speech and the press in the digital age. Research and public education are essential to the Institute's mission.[8] Obtaining information about government activity, analyzing that information, and publishing and disseminating it to the press and public are among the core activities the Institute performs. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information") (quoting *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).[9]

For example, the Institute disseminates information about government activity—including information about government activity obtained under FOIA—through a variety of means, including its website,[10] Twitter account,[11] press releases,[12] blog posts,[13] op-eds,[14] and regular engagement with the

[8] Mike McPhate, *Columbia University to Open a First Amendment Institute*, N.Y. Times (May 17, 2016), https://perma.cc/YC9M-LUAD; James Rosen, *New Institute Aspires to Protect First Amendment in Digital Era*, McClatchy DC (May 20, 2016), https://perma.cc/ZS2K-FPED.

[9] *See About the Knight Institute*, Knight First Amendment Inst., https://perma.cc/8UYT-RUUZ (explaining that a priority of the Knight Institute's work is "ensuring access to information necessary for self-government").

[10] *See* Knight First Amendment Inst., https://knightcolumbia.org (last visited Jul. 22, 2021).

[11] *See* Knight First Amendment Inst. (@knightcolumbia), Twitter, https://perma.cc/4KXK-7MC4 (Knight Institute account with over 13,000 followers).

[12] *Knight Institute Calls on DOJ's Executive Office for Immigration Review to Suspend Policy Silencing Immigration Judges*, (Jan. 6, 2020), https://perma.cc/GT69-A8SC (describing an agency policy obtained through FOIA).

press.[15] The Institute also publishes records obtained through FOIA in "Reading Rooms" on the Institute's website, which allows the public to search, filter, and view the records.[16]

Through its research program, the Institute has published multiple influential essay series, including one focused on reimagining the First Amendment in the digital age, one addressing the technology giants' power to shape public discourse, and another on the relationship between big data and self-government.[17] In addition, the Institute has convened four research symposia—drawing practitioners, lawyers, academics, and journalists—to debate, discuss, and reflect on key issues in First Amendment doctrine and free speech theory. The first, "A First Amendment for All? Free Expression in an Age of Inequality," was held in March 2018;[18] the second, "The Tech Giants, Monopoly Power, and Public Discourse," was held in November 2019;[19] the

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[13] *See, e.g.*, Anna Diakun, *Redactions in CDC Communications Policies Leave Key Questions Unanswered*, Knight First Amendment Inst. (June 12, 2020), https://perma.cc/GQX3-WKCN; Stephanie Krent, *Recently Released OLC Opinions from 1974 Shed Light on Current Legal Debates*, Knight First Amendment Inst. (May 18, 2020), https://perma.cc/34N2-UAQ3.

[14] *See, e.g.*, Anna Diakun & Trevor Timm, *For the Biden Administration, Who Counts as News Media?*, Colum. Journalism Rev. (June 9, 2021), https://perma.cc/PR7T-75FQ; Jameel Jaffer & Ramya Krishnan, *We May Never See John Bolton's Book*, N.Y. Times (Jan. 30, 2020), https://perma.cc/HGY9-638T.

[15] *See* Cora Currier, *Government Can Spy on Journalists in the U.S. Using Invasive Foreign Intelligence Process*, Intercept (Sept. 17, 2018, 11:43 AM), https://perma.cc/YQ7F-NZ5R (reporting on DOJ rules obtained by the Knight Institute under FOIA); Jessica Jerreat, *CDC Media Guidance Blacklists VOA Interview Requests,* VOA News (June 14, 2020, 7:59 PM), https://perma.cc/2KVX-WGYR (reporting on CDC email obtained by the Knight Institute under FOIA); Ellen Nakashima, *U.S. Spy Agencies Sued for Records on Whether They Warned Khashoggi of Impending Threat of Harm*, Wash. Post (Nov. 20, 2018, 8:57 PM), https://perma.cc/C6CW-TSDA (describing FOIA lawsuits); Charlie Savage, *U.S. Government Went Through These People's Phones at the Border. Read Their Stories.*, N.Y. Times (Dec. 22, 2017), https://perma.cc/H7P2-RK2T (describing and publishing several hundred complaints obtained by the Knight Institute about warrantless searches of electronic devices at the border).

[16] *See, e.g.*, *The OLC's Opinions*, Knight First Amendment Inst., https://knightcolumbia.org/reading-room/olc-opinions (last visited Jul. 22, 2021).

[17] *See Research*, Knight First Amendment Inst., https://perma.cc/TVD9-39RK.

[18] *A First Amendment for All? Free Expression in an Age of Inequality*, Knight First Amendment Inst. (Mar. 23, 2018, 8:30 AM); https://perma.cc/DM59-74KG.

[19] *Leading Legal Scholars, Economists, and Technologists to Headline Fall Symposium*, Knight First Amendment Inst. (Jan. 8, 2020), https://perma.cc./86DE-TPQS.

third, "Data and Democracy," was held in October 2020;[20] and the fourth, "Reimagine the Internet," was held virtually in May 2021.[21]

B. *The records sought are urgently needed to inform the public about actual or alleged government activity.*

The records sought are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). Specifically, the requested records relate to the FBI's technical capability to conduct surveillance on social media.

The nature and extent of the FBI's ability to monitor social media has been the object of persistent public attention in recent months. A series of reports beginning in the summer of 2020 indicated that FBI agents used social media to monitor protest organizers and Black Lives Matter activists.[22] Then, following the January 6, 2021 attack on the U.S. Capitol, public attention focused on the FBI's capability and authority to monitor social media for threats to national security. The subsequent public conversation caused confusion, with the Director of the FBI testifying to Congress that the Bureau cannot monitor social media "just in case,"[23] and critics arguing that the FBI's own internal guidelines appear to permit it to monitor social media in a wide variety of circumstances.[24] Particularly given ongoing Congressional attention to the intelligence failures that enabled the January 6 attack, it is essential that these questions be resolved as expeditiously as possible.[25]

Moreover, disclosure of the requested records will shed light on the extent to which the Bureau's use of these tools is likely to burden Americans' exercise of their First Amendment rights—including those of speech and association—and their privacy online.

For these reasons, the Knight Institute is entitled to expedited processing.

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[20] *Data and Democracy*, Knight First Amendment Inst., https://knightcolumbia.org/events/data-and-democracy (last visited Jul. 22, 2021).

[21] *Reimagine the Internet*, Knight First Amendment Inst., https://knightcolumbia.org/events/reimagine-the-internet?mc_cid=263ee459e6&mc_eid=UNIQID (last visited Jul. 30, 2021).

[22] *See, e.g.*, Sam Biddle, *Police Surveilled George Floyd Protests with Help from Twitter-Affiliated Startup Dataminr*, Intercept (Jul. 9, 2020), https://theintercept.com/2020/07/09/twitter-dataminr-police-spy-surveillance-black-lives-matter-protests/; Biddle, *supra* note 5.

[23] *FBI Director Christopher Wray Testifies on U.S. Capitol Attack*, C-SPAN, at 03:11:11 (June 15, 2021), https://www.c-span.org/video/?512552-1/fbi-director-christopher-wray-testifies-us-capitol-attack.

[24] *See supra* note 2.

[25] *See, e.g.*, Charlie Savage & Luke Broadwater, *Court Issues Brief Hold on Release of Trump Files in Jan. 6 Inquiry*, N.Y. Times (Nov. 11, 2021), https://www.nytimes.com/2021/11/11/us/politics/trump-files-january-6.html.

IV. Application for waiver or limitation of fees

The Knight Institute requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and that disclosure is "likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

For the reasons explained above, disclosure of the records would be in the public interest. Moreover, disclosure would not further the Knight Institute's commercial interest. The Institute will make any information disclosed available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA to ensure "that it be liberally construed in favor of waivers for noncommercial requesters." *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

The Knight Institute also requests a waiver of search and review fees on the grounds that it qualifies as an "educational . . . institution" whose purposes include "scholarly . . . research" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Institute has a substantial educational mission. Situated within a prominent academic research university, the Institute performs scholarly research on the application of the First Amendment in the digital era. As described above, the Institute's research program brings together academics and practitioners of different disciplines to study contemporary First Amendment issues and offer informed, nonpartisan commentary and solutions. It publishes that commentary in many forms, including in scholarly publications and in short-form essays.

The Knight Institute also requests a waiver of search and review fees on the grounds that it is a "representative[] of the news media" within the meaning of FOIA and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The Institute meets the statutory definition of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of the FOIA); *accord Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011); *ACLU*, 321 F. Supp. 2d at 30 n.5. Courts have found other non-profit organizations, whose mission of research and public education is similar to that of the Knight Institute, to be "representatives of the news media." *See, e.g.*, *Cause of Action v. IRS*, No. 13-0920, 2015 WL 5120863 (D.C. Cir. Aug. 28, 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit group that disseminated an electronic newsletter and published

books was a "representative of the news media" for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).

For these reasons, the Knight Institute is entitled to a fee waiver.

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Thank you for your attention to our request. We would be happy to discuss its terms with you over the phone or via email to clarify any aspect of it.

/s/ *Anna Diakun*
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