EXHIBIT C

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United States Attorney
Western District of Tennessee

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November 2, 2020

Bruce McMullen
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165 Madison Avenue, Suite 2000
Memphis, TN 38103
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VIA EMAIL ONLY

Re: *Touhy* request and subpoena *duces tecum* in *American Civil Liberties Union of Tennessee, Inc. v. City of Memphis*, No. 2:17-cv-02120-JPM-jay

Dear Bruce:

This letter responds to the *Touhy* letter that you sent to Kevin Forder, Associate General Counsel for the Department of Justice on October 19, 2020 and the subpoena *duces tecum* that you served on Supervisor James Edge at the U.S. Marshals Service ("USMS") on October 19, 2020.

In your *Touhy* letter, you explained that "the Court found the City in contempt of the Consent Decree entered into in *Kendrick et al. v. Chandler et al.*, No. 2:76-cv-499 (W.D. Tenn. 1978)." As a result of this contempt finding, the Court entered several sanctions—among them, an order for the City of Memphis to collect and disclose "all work-related social media search terms used by all MPD officers," including "the search terms used by officers of the MGU, the OCU, and the Internet Crimes Against Children division."

To this end, you requested the social media searches for two MPD officers assigned to the Gulf Coast Regional Fugitive Task Force ("GCRFTF") in Memphis, Tennessee: Walter Doty and Cory Leatherwood ("the GCRFTF-Deputized Officers"). The USMS has already notified City Attorney Jennifer Sink that the USMS objects to this request because any social media searches performed by the GCRFTF-Deputized Officers while they were deputized with the GCRFTF occurred while they were under the direction and supervision of the USMS, not MPD. Nevertheless, you assert that the City conferred with Independent Monitor Ed Stanton III about this objection, and he confirmed that "the City must provide the social media search histories for

every MPD officer, regardless of whether that officer is deputized on a federal task force and using social media for federal investigations."

As you know, the Department of Justice's *Touhy* regulations provide that, in reviewing a request for third-party discovery, Department officials should consider "[w]hether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose" and "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a)(l)-(2). Additionally, the Department official will not approve disclosure that would "violate a statute . . . or a rule of procedure," "reveal classified information," or "reveal a confidential source or informant [or] investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* §§ 16.26(b)(l), (3)-(5). Nor "unless the administration of justice requires disclosure" will the Department official approve disclosure that "would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection," or "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* §§ 16.26(b)(4)-(5), (c).

Upon consideration of the relevant factors, the Department objects to your *Touhy* request and finds that relevant *Touhy* regulations prohibit disclosure of any social media search terms that the GCRFTF-Deputized Officers used while they were deputized with the GCRFTF for several reasons. First, disclosure is not appropriate under applicable rules of procedure and the rulings in *ACLU v. City of Memphis*. *See* 28 C.F.R. § 16.26(b)(1). Second, disclosure of social media search terms would (1) reveal investigatory records compiled for law enforcement purposes; (2) reveal a confidential source or informant; (3) potentially reveal classified information; and (4) violate the Privacy Act of 1974, 5 U.S.C. § 552a. As such, the Department respectfully declines to provide the information in your *Touhy* request.

First, the United States is not a party in *ACLU v. City of Memphis*, and neither the terms of the original *Kendrick* Consent Decree (D.E. # 1-1, at PageID # 10) nor Amended Kendrick Decree (D.E. # 379, at PageID # 12582) apply to the United States or any of its components. Indeed, both the original *Kendrick* Consent Decree and the Amended Kendrick Decree define "City of Memphis" to include "all present and future officials, employees, and other any other agents . . . of the City of Memphis, Tennessee." Neither definition includes federal employees, agents, or MPD officers deputized under federal law to work on federal task forces like the GCRFTF. Furthermore, the original *Kendrick* Consent Decree sought to remediate the City of Memphis' actions—not those of the federal government. *See* Opinion and Order, D.E. # 151, PageID # 6255.

Moreover, Deputy Chief Don Crowe's informational bulletin, which accompanied your *Touhy* request, specifically states that *MPD officers* must "submit all of the social media terms [they] have used for the purpose of conducting official police business." Because the underlying court orders and litigation name and apply only to MPD, "official police business" must include only MPD business and not federal law enforcement business. Indeed, MPD cannot control or report on the internal actions and investigations of any other state or federal law enforcement

agency, and MPD cannot mandate a search of federal investigations performed with federal agency technology. The orders in *ACLU v. City of Memphis* do not appear to direct MPD to do so.

Nevertheless, relevant *Touhy* regulations *do* include the GCRFTF-Deputized Officers as federal employees for *Touhy* purposes. *See* 28 C.F.R. § 16.21 (defining "employee" as "all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including United States Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials"). Accordingly, under these *Touhy* regulations, any state or local law enforcement officer assigned to a joint federal task force or other federal working group qualifies as a federal "employee" to the extent your *Touhy* request seeks information regarding his or her work on such a task force or working group. Because the GCRFTF-Deputized Officers performed work related to the GCRFTF while they were deputized, they are federal "employees" under the *Touhy* regulations—not MPD employees—when they ran social media searches for their work with the GCRFTF.

As such, any social media searches that the GCRFTF-Deputized Officers performed while working on the GCRFTF are not subject to your *Touhy* request. Compliance with your *Touhy* request would involve the disclosure of (1) material contained in the Department's files; (2) information related to such material; and (3) information acquired by the GCRFTF-Deputized Officers that they collected as part of their work on the GCRFTF. *See* 28 C.F.R. § 16.21. Accordingly, the Court's Order on the City's Noncompliance with Sanction Five (D.E. # 363) does not require MPD to produce social media searches by the GCRFTF-Deputized Officers while they were performing GCRFTF work.

Second, even if disclosure were appropriate under the rules of procedure governing *ACLU v. City of Memphis* (which it is not), "disclosure will not be made" because 28 C.F.R. §§ 16.26(b)(3)-(5) prohibit such disclosure. Your requests seek information that (to the extent it may exist) is contained within or derived from investigatory records compiled for law enforcement purposes. These records are infused with sensitive information concerning underlying Department investigations, as any social media searches were conducted in the furtherance of these investigations, and the search terms would reveal information obtained during these investigations. For example, disclosing a name as a search term would reveal an investigation's subject, associate, or witness—which would interfere with enforcement proceedings. Disclosing the search terms themselves would expose information regarding the Department's investigative techniques (and information obtained by investigative techniques)—both of which would then be impaired. Disclosure would also impair the Department's ability to use social media itself as an investigative technique. 28 C.F.R. §16.26(b)(5).

Your requests for information from law enforcement records are properly denied under both § 16.26(b)(5) and a claim of law enforcement privilege pursuant to § 16.26(a)(2). *See In re Dep't of Investigation of N.Y.*, 856 F.2d 481,484 (2d Cir. 1988); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *see also Willard v. IRS*, 776 F.2d 100, 103-04 (4th Cir. 1985) (recognizing the need to protect documents collected for law enforcement purposes from disclosure under Freedom of Information Act). Under these standards, the Department concludes that you have not made a showing of need for the requested documents that outweighs

the potential harm that disclosure of investigatory information could cause the United States—particularly as the underlying court orders do not expressly address federally deputized officers.

Furthermore, disclosing social media search terms could reveal classified information, as the national security investigations are classified. 28 C.F.R. § 16.26(b)(3). Additionally, if a search term was obtained through a classified process, the search term itself would be classified. *See id.* Additionally, the Department routinely reviews confidential source or informants' ("CHS") activities, including searches of their social media activity. 28 C.F.R. § 16.26(b)(4). As such, disclosing social media search terms could reveal CHS. *Id.* Finally, statutory bars also preclude the requested disclosure. *See* 28 C.F.R. § 16.26(b)(l). Under the Privacy Act, absent consent, the Department is generally prohibited from disclosing any information contained in a system of records pertaining to an individual. *See* 5 U.S.C. § 552a(b). The majority of the Department's social media search terms consist of Personal Identifiable Information protected by the Act. 28 C.F.R. § 16.26(b)(1).

In sum, the Department has determined that it will not authorize production of the GCRFTF-Deputized Officers' social media search terms used during their work on the GCRFTF at this time. If you have questions concerning this matter, please contact Audrey Calkins or Stuart Canale at 901-544-4231.

Sincerely,

D. MICHAEL DUNAVANT
United States Attorney

By: *s/ Stuart J. Canale*
Stuart J. Canale
Audrey M. Calkins
Assistant United States Attorneys

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Dear Bruce:

This letter responds to the *Touhy* letter that you sent to Joel E. Siskovic II, Supervisory Special Agent and Chief Division Counsel for the Federal Bureau of Investigation in Memphis on October 19, 2020 and the subpoenas *duces tecum* that you served on Supervisors James McIntosh, Joel Freund, and Tracey Branch at the Federal Bureau of Investigation ("FBI") on October 19, 2020.

In your *Touhy* letter, you explained that "the Court found the City in contempt of the Consent Decree entered into in *Kendrick et al. v. Chandler et al.*, No. 2:76-cv-499 (W.D. Tenn. 1978)." As a result of this contempt finding, the Court entered several sanctions—among them, an order for the City of Memphis to collect and disclose "all work-related social media search terms used by all MPD officers," including "the search terms used by officers of the MGU, the OCU, and the Internet Crimes Against Children division."

To this end, you requested the social media searches for (1) seven MPD officers assigned to the Safe Streets Task Force (Denetta Craig, Rickey Dugger, Scott Edwards, Milton Gonzalez, Darrold Hudson, James McDonald, and Eleiseis Tardugno); (2) two officers assigned with the Memphis Cargo Theft Task Force (Michael Gibbs and Thomas Walters); (3) one officer assigned with the Joint Terrorism Task Force (Keneth Hale); (4) one officer assigned with the Memphis Child Exploitation & Human Trafficking Task Force (Johns Chevalier); and (5) one officer

assigned with an FBI Task Force (Eric Dobbins). This letter collectively refers to these officers as "the FBI-Deputized Officers."

The FBI has already notified City Attorney Jennifer Sink that the FBI objects to this request because any social media searches performed by the FBI-Deputized Officers while they were deputized with the FBI occurred while they were under the direction and supervision of the FBI, not MPD. Nevertheless, you assert that the City conferred with Independent Monitor Ed Stanton III about this objection, and he confirmed that "the City must provide the social media search histories for every MPD officer, regardless of whether that officer is deputized on a federal task force and using social media for federal investigations."

As you know, the Department of Justice's *Touhy* regulations provide that, in reviewing a request for third-party discovery, Department officials should consider "[w]hether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose" and "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a)(l)-(2). Additionally, the Department official will not approve disclosure that would "violate a statute . . . or a rule of procedure," "reveal classified information," or "reveal a confidential source or informant [or] investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* §§ 16.26(b)(l), (3)-(5). Nor "unless the administration of justice requires disclosure" will the Department official approve disclosure that "would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection," or "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* §§ 16.26(b)(4)-(5), (c).

Upon consideration of the relevant factors, the Department objects to your *Touhy* request and finds that relevant *Touhy* regulations prohibit disclosure of any social media search terms that the FBI-Deputized Officers used while they were deputized with the FBI for several reasons. First, disclosure is not appropriate under applicable rules of procedure and the rulings in *ACLU v. City of Memphis*. *See* 28 C.F.R. § 16.26(b)(1). Second, disclosure of social media search terms would (1) reveal investigatory records compiled for law enforcement purposes; (2) reveal a confidential source or informant; (3) potentially reveal classified information; and (4) violate the Privacy Act of 1974, 5 U.S.C. § 552a. As such, the Department respectfully declines to provide the information in your *Touhy* request.

First, the United States is not a party in *ACLU v. City of Memphis*, and neither the terms of the original *Kendrick* Consent Decree (D.E. # 1-1, at PageID # 10) nor Amended Kendrick Decree (D.E. # 379, at PageID # 12582) apply to the United States or any of its components. Indeed, both the original *Kendrick* Consent Decree and the Amended Kendrick Decree define "City of Memphis" to include "all present and future officials, employees, and other any other agents . . . of the City of Memphis, Tennessee." Neither definition includes federal employees, agents, or MPD officers deputized under federal law to work on federal task forces like the FBI. Furthermore, the original *Kendrick* Consent Decree sought to remediate the City of Memphis' actions—not those of the federal government. *See* Opinion and Order, D.E. # 151, PageID # 6255.

Moreover, Deputy Chief Don Crowe's informational bulletin, which accompanied your *Touhy* request, specifically states that ***MPD officers*** must "submit all of the social media terms [they] have used for the purpose of conducting official police business." Because the underlying court orders and litigation name and apply only to MPD, "official police business" must include only MPD business and not federal law enforcement business. Indeed, MPD cannot control or report on the internal actions and investigations of any other state or federal law enforcement agency, and MPD cannot mandate a search of federal investigations performed with federal agency technology. The orders in *ACLU v. City of Memphis* do not appear to direct MPD to do so.

Nevertheless, relevant *Touhy* regulations ***do*** include the FBI-Deputized Officers as federal employees for *Touhy* purposes. *See* 28 C.F.R. § 16.21 (defining "employee" as "all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including United States Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials"). Accordingly, under these *Touhy* regulations, any state or local law enforcement officer assigned to a joint federal task force or other federal working group qualifies as a federal "employee" to the extent your *Touhy* request seeks information regarding his or her work on such a task force or working group. Because the FBI-Deputized Officers performed work related to the FBI while they were deputized, they are federal "employees" under the *Touhy* regulations—not MPD employees—when they ran social media searches for their work with the FBI.

As such, any social media searches that the FBI-Deputized Officers performed while working on the FBI are not subject to your *Touhy* request. Compliance with your *Touhy* request would involve the disclosure of (1) material contained in the Department's files; (2) information related to such material; and (3) information acquired by the FBI-Deputized Officers that they collected as part of their work on the FBI. *See* 28 C.F.R. § 16.21. Accordingly, the Court's Order on the City's Noncompliance with Sanction Five (D.E. # 363) does not require MPD to produce social media searches by the FBI-Deputized Officers while they were performing FBI work.

Second, even if disclosure were appropriate under the rules of procedure governing *ACLU v. City of Memphis* (which it is not), "disclosure will not be made" because 28 C.F.R. §§ 16.26(b)(3)-(5) prohibit such disclosure. Your requests seek information that (to the extent it may exist) is contained within or derived from investigatory records compiled for law enforcement purposes. These records are infused with sensitive information concerning underlying Department investigations, as any social media searches were conducted in the furtherance of these investigations, and the search terms would reveal information obtained during these investigations. For example, disclosing a name as a search term would reveal an investigation's subject, associate, or witness—which would interfere with enforcement proceedings. Disclosing the search terms themselves would expose information regarding the Department's investigative techniques (and information obtained by investigative techniques)—both of which would then be impaired. Disclosure would also impair the Department's ability to use social media itself as an investigative technique. 28 C.F.R. §16.26(b)(5).

Your requests for information from law enforcement records are properly denied under both § 16.26(b)(5) and a claim of law enforcement privilege pursuant to § 16.26(a)(2). *See In re*

Dep't of Investigation of N.Y., 856 F.2d 481,484 (2d Cir. 1988); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *see also Willard v. IRS*, 776 F.2d 100, 103-04 (4th Cir. 1985) (recognizing the need to protect documents collected for law enforcement purposes from disclosure under Freedom of Information Act). Under these standards, the Department concludes that you have not made a showing of need for the requested documents that outweighs the potential harm that disclosure of investigatory information could cause the United States—particularly as the underlying court orders do not expressly address federally deputized officers.

Furthermore, disclosing social media search terms could reveal classified information, as the national security investigations are classified. 28 C.F.R. § 16.26(b)(3). Additionally, if a search term was obtained through a classified process, the search term itself would be classified. *See id.* Additionally, the Department routinely reviews confidential source or informants' ("CHS") activities, including searches of their social media activity. 28 C.F.R. § 16.26(b)(4). As such, disclosing social media search terms could reveal CHS. *Id.* Finally, statutory bars also preclude the requested disclosure. *See* 28 C.F.R. § 16.26(b)(l). Under the Privacy Act, absent consent, the Department is generally prohibited from disclosing any information contained in a system of records pertaining to an individual. *See* 5 U.S.C. § 552a(b). The majority of the Department's social media search terms consist of Personal Identifiable Information protected by the Act. 28 C.F.R. § 16.26(b)(1).

In sum, the Department has determined that it will not authorize production of the FBI-Deputized Officers' social media search terms used during their work on the FBI at this time. If you have questions concerning this matter, please contact Audrey Calkins or Stuart Canale at 901-544-4231.

Sincerely,

D. MICHAEL DUNAVANT
United States Attorney

By: *s/ Stuart J. Canale*
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Dear Bruce:

This letter responds to the *Touhy* letter that you sent to Scott Davis, Division Counsel for DEA-Louisville Field Division, for the Drug Enforcement Administration on October 19, 2020 and the subpoena *duces tecum* that you served on Supervisor Daniel Behren at the Drug Enforcement Administration ("DEA") on October 19, 2020.

In your *Touhy* letter, you explained that "the Court found the City in contempt of the Consent Decree entered into in *Kendrick et al. v. Chandler et al.*, No. 2:76-cv-499 (W.D. Tenn. 1978)." As a result of this contempt finding, the Court entered several sanctions—among them, an order for the City of Memphis to collect and disclose "all work-related social media search terms used by all MPD officers," including "the search terms used by officers of the MGU, the OCU, and the Internet Crimes Against Children division."

To this end, you requested the social media searches for three MPD officers assigned to the DEA Task Force in Memphis, Tennessee: John Richardson, Brandon Evans, and Derrick Knowlton ("the DEA-Deputized Officers"). The DEA has already notified City Attorney Jennifer Sink that the DEA objects to this request because any social media searches performed by the DEA-Deputized Officers while they were deputized with the DEA occurred while they were under the direction and supervision of the DEA, not MPD. Nevertheless, you assert that the City conferred with Independent Monitor Ed Stanton III about this objection, and he confirmed that

"the City must provide the social media search histories for every MPD officer, regardless of whether that officer is deputized on a federal task force and using social media for federal investigations."

As you know, the Department of Justice's *Touhy* regulations provide that, in reviewing a request for third-party discovery, Department officials should consider "[w]hether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose" and "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a)(l)-(2). Additionally, the Department official will not approve disclosure that would "violate a statute . . . or a rule of procedure," "reveal classified information," or "reveal a confidential source or informant [or] investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* §§ 16.26(b)(l), (3)-(5). Nor "unless the administration of justice requires disclosure" will the Department official approve disclosure that "would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection," or "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* §§ 16.26(b)(4)-(5), (c).

Upon consideration of the relevant factors, the Department objects to your *Touhy* request and finds that relevant *Touhy* regulations prohibit disclosure of any social media search terms that the DEA-Deputized Officers used while they were deputized with the DEA for several reasons. First, disclosure is not appropriate under applicable rules of procedure and the rulings in *ACLU v. City of Memphis*. *See* 28 C.F.R. § 16.26(b)(1). Second, disclosure of social media search terms would (1) reveal investigatory records compiled for law enforcement purposes; (2) reveal a confidential source or informant; (3) potentially reveal classified information; and (4) violate the Privacy Act of 1974, 5 U.S.C. § 552a. As such, the Department respectfully declines to provide the information in your *Touhy* request.

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Moreover, Deputy Chief Don Crowe's informational bulletin, which accompanied your *Touhy* request, specifically states that <u>*MPD officers*</u> must "submit all of the social media terms [they] have used for the purpose of conducting official police business." Because the underlying court orders and litigation name and apply only to MPD, "official police business" must include only MPD business and not federal law enforcement business. Indeed, MPD cannot control or report on the internal actions and investigations of any other state or federal law enforcement

agency, and MPD cannot mandate a search of federal investigations performed with federal agency technology. The orders in *ACLU v. City of Memphis* do not appear to direct MPD to do so.

Nevertheless, relevant *Touhy* regulations *do* include the DEA-Deputized Officers as federal employees for *Touhy* purposes. *See* 28 C.F.R. § 16.21 (defining "employee" as "all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including United States Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials"). Accordingly, under these *Touhy* regulations, any state or local law enforcement officer assigned to a joint federal task force or other federal working group qualifies as a federal "employee" to the extent your *Touhy* request seeks information regarding his or her work on such a task force or working group. Because the DEA-Deputized Officers performed work related to the DEA while they were deputized, they are federal "employees" under the *Touhy* regulations—not MPD employees—when they ran social media searches for their work with the DEA.

As such, any social media searches that the DEA-Deputized Officers performed while working on the DEA are not subject to your *Touhy* request. Compliance with your *Touhy* request would involve the disclosure of (1) material contained in the Department's files; (2) information related to such material; and (3) information acquired by the DEA-Deputized Officers that they collected as part of their work on the DEA. *See* 28 C.F.R. § 16.21. Accordingly, the Court's Order on the City's Noncompliance with Sanction Five (D.E. # 363) does not require MPD to produce social media searches by the DEA-Deputized Officers while they were performing DEA work.

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In sum, the Department has determined that it will not authorize production of the DEA-Deputized Officers' social media search terms used during their work on the DEA at this time. If you have questions concerning this matter, please contact Audrey Calkins or Stuart Canale at 901-544-4231.

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