

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS

and

DEPARTMENT OF JUSTICE,

Defendants.

Civil Action No. 18-2399 (KBJ)

EIGHTH JOINT STATUS REPORT

Per the Court's order, Plaintiff National Association of Criminal Defense Lawyers ("NACDL") and Defendants Federal Bureau of Prisons ("BOP") and Department of Justice ("DOJ") respectfully submit this omnibus Eighth Joint Status Report. *See* Minute Order, Aug. 13, 2019 ("Aug. 13 Order").

Overview

1. At issue in this case are three Freedom of Information Act ("FOIA") requests filed by NACDL with various of Defendants' component offices.

2. On August 2, 2018, NACDL filed a FOIA request with the BOP ("the BOP Request") seeking, among other things, information about technical features of the BOP's inmate email system and related policies. *See* Ex. A to Am. Compl., ECF No. 9-2.

3. On August 2, 2018, NACDL filed a FOIA request with DOJ's Office of Information Policy ("OIP"), Office of Legal Counsel ("OLC"), and Criminal Division seeking, among other

things, policies and guidance regarding the circumstances under which prosecutors may access emails between inmates and their attorneys. *See* Ex. B to Am. Compl., ECF No. 9-3.

4. On August 2, 2018, NACDL filed a FOIA request with the Executive Office for United States Attorneys (“the EOUSA Request”) seeking, among other things, records regarding the practices of different U.S. Attorney’s Offices for obtaining emails between inmates and their attorneys. *See* Ex. C to Am. Compl., ECF No. 9-4.

5. On October 18, 2018, NACDL sued to enforce the BOP Request and the Main Justice Request. *See* Compl., ECF No. 1. On November 15, 2018, NACDL filed an Amended Complaint to enforce all three Requests. *See* Am. Compl., ECF No. 9. Defendants filed an Answer on February 11, 2019. *See* Ans., ECF No. 18.

6. The parties have since filed seven previous Joint Status Reports that provide more detail about their negotiations and the agencies’ productions to date. *See* Joint Status Report (“1st JSR”), ECF No. 20; Joint Status Report, ECF No. 22; 3d Joint Status Report, ECF No. 23; 4th Joint Status Report, ECF No. 24; 5th Joint Status Report, ECF No. 25; 6th Joint Status Report (“6th JSR”), ECF No. 26; 7th Joint Status Report (“7th JSR”), ECF No. 30.

Productions Related to the BOP Request

7. The BOP has now completed its productions related to the BOP Request. The BOP continues to process and issue determinations concerning records referred to it by other component defendants.

8. Below is a summary of the BOP’s productions to date:

a. On March 21, 2019, the BOP made its first production to NACDL. In the letter accompanying the production, the BOP stated that the release included the processing of 7,972 pages. 6th JSR ¶ 14. After removal of nonresponsive pages and pages created as a result of the

search process, a total of 207 pages were responsive to the BOP Request. *Id.* Of those 207 pages, 140 pages were released in full, eighteen were released in part, and forty-nine were withheld in full. *Id.*

b. On April 30, 2019, the BOP made its second production to NACDL. In the letter accompanying the production, the BOP stated the release included the processing of 812 pages. *Id.* ¶ 15. After removal of nonresponsive pages and pages created as a result of the search process, a total of 302 pages were responsive to the BOP Request. *Id.* Of those 302 pages, 253 pages were released in full, thirty-three pages were released in part, and sixteen pages were withheld from release in full. *Id.*

c. On May 29, 2019, the BOP made its third production to NACDL. In the letter accompanying the production, the BOP stated the release included the processing of 801 pages. *Id.* ¶ 16. After removal of nonresponsive pages and pages created as a result of the search process, a total of forty-four pages were responsive to the BOP Request. *Id.* Of the forty-four pages, three pages were released in full, twenty-seven pages were released in part, and three pages were withheld from release in full. *Id.* Additionally, eight pages were referred to the EOUSA. *Id.*

d. On July 2, 2019, the BOP made its fourth production to NACDL. In the letter accompanying the production, the BOP stated that the release included the processing of 859 pages. 7th JSR ¶ 9. After removal of nonresponsive pages and pages created as a result of the search process, a total of forty-one pages were responsive to the BOP Request. *Id.* Of those forty-one pages, two pages were released in full, nineteen pages were released in part, and twenty pages were duplicative of records that had already been produced. *Id.* The production also included the release of the eight pages that had previously been referred to the EOUSA related to the BOP Request, two of which were released in full and six of which were released in part. *Id.*

e. On August 1, 2019, the BOP made its fifth production to NACDL. In the letter accompanying the production, the BOP stated that the release included the processing of 792 pages. *Id.* ¶ 10. After removal of nonresponsive pages and pages created as a result of the search process, a total of twenty-eight pages were responsive to the BOP Request. *Id.* Of those twenty-eight pages, fifteen pages were released in part, two pages were withheld in full, and eleven pages were duplicative of records that had already been produced. *Id.*

f. On September 4, 2019, the BOP made its sixth production to NACDL. In the letter accompanying the production, the BOP stated that the release included the processing of 1,677 pages. After removal of nonresponsive pages and pages created as a result of the search process, a total of thirty-four pages responsive to the BOP Request. Of those thirty-four pages, two pages were released in full, two pages were released in part, twenty-two pages were withheld in full, and nine pages were duplicative of previously released records.

g. On September 16, 2019, the BOP sent a letter to NACDL summarizing all of its rolling releases.

Productions Related to the Main Justice Request

9. **OIP.** As described in earlier Joint Status Reports, the parties agreed that OIP would complete its search by March 25, 2019, and would complete production of any non-exempt responsive records by May 24, 2019. 1st JSR ¶¶ 8, 16. On May 23, 2019, OIP informed NACDL that it had located no records responsive to the Main Justice Request. *See* 6th JSR ¶ 18.

10. **OLC.** On March 22, OLC informed NACDL that it had found no records responsive to the Main Justice Request. *See Id.* ¶ 19.

11. The Criminal Division.

a. The Criminal Division ran three searches, which the parties are referring to as Search 1, Search 2, and Search 3, corresponding to the three categories of records sought in the Main Justice Request.

b. On August 13, 2019, the Court ordered the Criminal Division to “process and produce records responsive to Searches 1 and 3 at a rate of no fewer than 500 pages per month” and to “make monthly productions of documents, with the first such production occurring on or before 8/30/2019.” Aug. 13 Order.

c. On August 30, 2019, the Criminal Division made its first production to NACDL. That production included a review of 647 pages of potentially responsive records gathered in Search 3. After removal of nonresponsive and duplicative pages, a total of 134 pages were responsive to the Main Justice Request. Of those 134 pages, two pages were released in full, three pages were released in part, and fifty-six pages were withheld in full. Additionally, the Criminal Division referred fifty-five pages to the EOUSA and eighteen pages to the BOP for direct response to NACDL.

d. On September 26, 2019, the Criminal Division made its second production to NACDL. That production included a review of 2,132 pages of potentially responsive records gathered in Search 1. After removal of nonresponsive and duplicative pages, a total of 307 pages were responsive to the Main Justice Request. Of those 307 pages, twenty-two pages were released in full, one page was released in part, and 116 pages were withheld in full. Additionally, the Criminal Division referred eighteen pages to the EOUSA and 150 pages to the BOP for direct response to NACDL.

12. BOP.

a. On September 16, 2019, the BOP made its seventh production to NACDL. That production included processing of the nineteen pages referred to the BOP by the Criminal Division related to Search 3.¹ The BOP released two pages in full, eight pages in part, and indicated that nine pages were duplicative of previously released records.

b. On September 24, 2019, the BOP made its eighth production to NACDL. That production included processing of the 150 pages referred to the BOP by the Criminal Division related to Search 1. The BOP determined that four pages were non-responsive. Of the remaining 146 pages, the BOP released one page in full, five pages in part, and indicated that 140 pages were duplicative of previously released records.

13. EOUSA.

a. On June 19, 2019, the EOUSA processed two records that had been referred to it by the Criminal Division related to the Main Justice Request. The EOUSA had previously partially released one of the records and withheld the other record in full.

b. On October 10, 2019, the EOUSA produced records that had been referred to it by the Criminal Division related to the Main Justice Request. The EOUSA released thirty pages in part and withheld nine pages in full. Additionally, the EOUSA indicated that it was referring pages to the BOP for a direct response to NACDL.

c. On October 15, 2019, the EOUSA produced records that had been referred to it by the Criminal Division related to the Main Justice Request. The EOUSA released thirteen pages in part, withheld four pages in full, and indicated that an unspecified number of pages were referred

¹ The parties acknowledge the one-page discrepancy between the Criminal Division's and the BOP's letters, but agree that the BOP has processed the records referred to it related to Search 3.

to the BOP. Additionally, the EOUSA indicated that it was referring pages to the BOP for a direct response to NACDL.

Productions Related to the EOUSA Request

14. **EOUSA.** The EOUSA identified 233 pages of records responsive to the EOUSA Request. 7th JSR ¶ 16. On June 12, 2019, the EOUSA released thirty-eight pages in full, released nine pages in part, and withheld forty-three pages in full. *Id.* EOUSA also indicated that it had referred records to the BOP and Criminal Division for review and release. *See* 6th JSR ¶¶ 22–24.

15. **BOP.**

a. The BOP’s fourth production included seventy-one pages that had been referred to the BOP by the EOUSA related to the EOUSA Request. 7th JSR ¶ 9. Of those seventy-one pages, fifty-four pages were released in full, and nine pages were duplicative of other records in the production. *Id.* The remaining eight pages from the EOUSA’s referral were held for processing as part of the BOP’s fifth production. *Id.*

b. The BOP’s fifth production included the remaining eight pages of EOUSA’s referral related to the EOUSA Request. *Id.* ¶ 10. Of those pages, one page was released in part and seven were referred back to the EOUSA because they were not BOP records. *Id.*

16. **Criminal Division.** To NACDL’s knowledge, the Criminal Division has not yet produced the records referred to it by the EOUSA.

The Criminal Division’s Search 2

17. Per the Court’s order, the Criminal Division and NACDL have met and conferred “regarding refining search terms or otherwise narrowing the scope of records at issue with respect to Search 2.” Aug. 13 Order.

18. The Criminal Division has indicated that Search 2 resulted in 50,980 “items,” which does not necessarily correspond to the number of responsive records. *See* 6th JSR ¶ 20(e), n.1. The Criminal Division has not reviewed those records for responsiveness, nor has it de-duplicated the records.

19. The parties have agreed that the Criminal Division will run a new Search 2. The parameters of New Search 2 are:

a. Terms to be used: (“Bureau of Prisons” OR BOP) **AND** (guidance OR policy OR practice) **AND** (inmate! OR prisoner!) **AND** email

b. If the Criminal Division is able, it will require the “(inmate! OR prisoner!)” term be in the same paragraph as the “email” term.

c. Timeframe: The Criminal Division will search for records created on or after January 1, 2014.

Potential Summary Judgment Motions

20. **Adequacy of Defendants’ Searches.** NACDL may challenge the adequacy of some of the searches conducted. Defendants have continued sharing information about the searches they ran, and the parties plan to continue their negotiations on this front. Based on the information received to date, and unless circumstances substantially change, NACDL does not plan to challenge the adequacy of OLC’s search.

21. **Defendants’ Withholdings.** NACDL may challenge some of Defendants’ withholdings of information. The parties will continue negotiating in an attempt to narrow their disputes, but will not be able to assess the overall scope of challenges until the Criminal Division has completed its productions of responsive records.

