

APPENDIX A:

The BOP Request



Eugene Baime
Supervisory Attorney
FOIA/Privacy Act Requests
Federal Bureau of Prisons
Department of Justice
Room 924, HOLC Building
320 First Street, N.W.
Washington, DC 20534
Phone: (202) 514-6655
Email: OGC_EFOIA@BOP.GOV

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Re: Freedom of Information Act Request

To Whom It May Concern:

The National Association of Criminal Defense Lawyers (“NACDL”)¹ submits this request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records concerning federal prosecutors’ access to emails between individuals held at Bureau of Prisons (“BOP”) facilities and their legal counsel.

I. Background

To use the email system at BOP facilities, inmates must consent to having their email monitored, including email to and from their attorneys.² If inmates and their attorneys choose to communicate via email, the BOP may supply the contents of the emails to prosecutors for use against the inmates in court,³ and indeed prosecutors assert the right to request inmates’ emails

¹ Founded in 1958 as a professional bar association, NACDL is the preeminent organization in the United States dedicated to defense attorneys’ mission of ensuring fairness in the criminal justice system. NACDL has thousands of direct members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges.

² In relevant part, the BOP email system’s “Consent to Monitoring” agreement states: “I am notified of, acknowledge, and voluntarily consent to having my messages and transactional data (incoming and outgoing) monitored, read, [and] retained by Bureau staff I am notified of, acknowledge, and voluntarily consent that this provision applies to messages both to and from my attorney or other legal representative, and that such messages will not be treated as privileged communications.” U.S. Dep’t. of Justice, Fed. Bureau of Prisons, “Inmate Agreement for Participating in TRULINCS Electronic Messaging Program,” https://www.bop.gov/policy/forms/BP_A0934.pdf.

³ See, e.g., *United States v. Walia*, No. 14-CR-213-MKB, 2014 WL 3734522, at *16 (E.D.N.Y. Jul. 25, 2014) (denying defendant’s pre-trial motion to prevent prosecutors from reviewing emails with his attorneys).

from the BOP.⁴ As a result, inmates who wish to avoid government review of their attorney-client communications must rely on slower and costlier forms of communication, such as postal mail and in-person visits.

A recent letter from the United States Attorney's Office for the Eastern District of New York indicates that the BOP "now has the technical capability to filter out of its production of BOP email communications emails to and from a particular email address."⁵ The letter further states that "the government now agrees to request that the BOP exclude from most productions communications between a defendant and his or her attorneys and other legal assistants and paralegals on their staff."⁶ It is unclear what "most productions" encompasses, and it is also unclear whether other U.S. Attorneys' Offices have adopted similar policies concerning emails exchanged between inmates and their attorneys.

The Supreme Court has consistently recognized the foundational importance of the attorney-client privilege as a means to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."⁷ The American Bar Association has also emphasized the importance of the privilege, and recently adopted a resolution urging "the Department of Justice and the Federal Bureau of Prisons to amend their policies . . . to permit attorneys and their incarcerated clients to communicate confidentially via email and thereby maintain the attorney-client privilege."⁸

NACDL seeks to inform the public about the extent to which United States Attorneys' Offices obtain attorney-client emails from the BOP. As email has largely supplanted traditional modes of communication, access to email may be the only way for inmates to engage in strategic discussions or confer on time-sensitive matters with their attorneys. This is especially true for the majority of inmates represented by publicly funded counsel that already strain to provide adequate representation with limited resources.⁹ Indeed, for inmates, access to confidential email can be the difference between a successful and failed defense.

⁴ Letter from James D. Gatta, Criminal Division Chief, U.S. Attorney's Office for the Eastern District of New York, to Deirdre D. von Dornum, Attorney-in-Charge, Federal Defenders of New York, at 1 (Oct. 17, 2017) (attached hereto as Exhibit 1) ("The Office frequently requests that the BOP produce to the government BOP email communications and has taken the position that BOP email communications, including those between a defendant and his or her attorney, are not privileged communications.").

⁵ *Id.*

⁶ *Id.*

⁷ *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); see also *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009).

⁸ Am. Bar Ass'n, Resolution 10A (adopted Feb. 2016), <https://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/10a.pdf>.

⁹ See Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics Special Report (Nov. 2000), available at <https://www.bjs.gov/content/pub/pdf/dccc.pdf> (noting that over eighty percent of felony defendants charged with violent crime in the nation's seventy-

II. Records Requested

NACDL requests the following records made on or after January 1, 2016 by the BOP:

1. All records containing the BOP's policies, practices, or procedures governing the collection, retention, use, or sharing of inmates' attorney-client emails.
2. All records containing the BOP's policies, practices, or procedures governing the collection, retention, use, or sharing of inmates' emails, including non-attorney-client emails.
3. All external guidance, including directives, emails, or other communications sent to the BOP, regarding policies, practices, or procedures governing the collection, retention, use, or sharing of inmates' attorney-client emails.
4. All external guidance, including directives, emails, or other communications sent to the BOP, regarding policies, practices, or procedures governing the collection, retention, use, or sharing of inmates' emails, including non-attorney-client emails.
5. All records containing descriptions of any technology capable of filtering emails to or from particular individuals out of BOP productions of inmates' emails to third parties.
6. All records containing descriptions of any technology capable of filtering emails to or from particular individuals out of emails retained by BOP.
7. All records containing the BOP's policies, practices, or procedures for the use of any filtering technology for inmate email. Such records would include any policies, practices, or procedures for the use of filtering technology for inmate email within the BOP, in response to government requests for production of inmates' emails, or under any other circumstances.
8. All documentation provided to the BOP by any company providing inmate email access technology or technology to filter inmate email, including any contracts, agreements, technical specifications, or proposals.
9. All records containing the BOP's policies, practices, or procedures for reviewing and processing inmates' email communications. Such records would include any policies, practices, or procedures directing BOP staff with respect to when and how inmates' emails should be reviewed, as well as any information concerning

five largest counties relied on publicly financed attorneys); Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES (Aug. 23, 2013), available at <https://nyti.ms/2GOiMWc> (explaining that federal budget cuts in the 2014 fiscal year caused federal defender offices around the country to reduce staff and spend less on things like expert witnesses).

the use of algorithms or other electronic data processing techniques to monitor the content of inmates' emails.

Where a document contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unusually burdensome, we ask that you give us an opportunity to narrow our request. Please 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 or a generally accessible electronic format (e.g., for tabular data, XLS or CSV). *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, 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 Waiver or Limitation of Fees

NACDL 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 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 NACDL's commercial interest. NACDL will make any disclosed information 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." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (citation omitted).

In addition, NACDL requests a waiver of search and review fees on the ground 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). NACDL qualifies as a "representative of the news media" because, as explained above, 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 Nat'l Sec. Archive v. U.S. Dep't of Defense*, 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 FOIA); *Serv. Women's Action Network v. U.S. Dep't of Defense*, 888 F. Supp. 2d 282, 287–88 (D. Conn. 2012); *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004). Courts have found other non-profit organizations with research and public education missions similar to that of NACDL to be representatives of the news media. *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dep't of Defense*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding non-profit group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133

F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” qualified as a news media requester).

For these reasons, NACDL is entitled to a fee waiver.

* * *

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 the request or, where reasonable, to narrow it.

I certify that the foregoing is true and correct.

Sincerely,



Jumana Musa, Director,
Fourth Amendment Center,
NACDL