

APPENDIX D:

Redlined Second Amended Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
1660 L St., NW, 12th Floor
Washington, DC 20036

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS
320 First St., NW
Washington, DC 20534

and

DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., NW
Washington, DC 20530

Defendants.

No. 18-cv-2399-KBJ

SECOND AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Plaintiff the National Association of Criminal Defense Lawyers (“NACDL”) seeks injunctive and other appropriate relief to compel the release of agency records related to the federal government’s collection and monitoring of emails between inmates held in Federal Bureau of Prisons (“BOP”) facilities and their attorneys. NACDL filed three FOIA requests with Department of Justice (“DOJ”) components, the first to the BOP (the “BOP Request”); the second to the Criminal Division, the Office of Information Policy (“OIP”), and the Office of

Legal Counsel (“OLC”) (collectively, the “Main Justice Request”); and the third to the Executive Office for United States Attorneys (the “EOUSA Request”).

2. Among other things, NACDL requested records from the BOP regarding the technical features of the inmate email system, policies and guidance from Main Justice regarding the circumstances under which prosecutors may access emails between inmates and their attorneys, and records from the EOUSA regarding the practices of different U.S. Attorney’s Offices for obtaining emails between inmates and their attorneys.

3. There are currently over 128,000 inmates held in BOP facilities. Approved inmates at BOP facilities have access to an email system called TRULINCS. This system allows inmates to send short messages without attachments to approved individuals outside of BOP custody. Inmates can use TRULINCS to send emails to friends, loved ones, and, relevant to this litigation, their attorneys. Recipients can then access those messages using the website Corrlinks.com.

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4. To use TRULINCS, inmates are required to click on an agreement stating that their communications—including messages to or from their attorneys—will be monitored and that communications with their counsel will not be treated as privileged. If inmates and their attorneys choose to communicate via email, the BOP may on its own supply the contents of the messages to prosecutors for use against the inmates in court or prosecutors may request inmates’ emails from the BOP.

5. The possibility that prosecutors could use an inmate’s TRULINCS messages against them in criminal proceedings is not merely theoretical. For example, in *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011), Vincent Fumo, a well-known Pennsylvania state senator, was convicted of fraud, tax evasion, and obstruction of justice. Following Mr. Fumo’s trial, the Government appealed his sentence. The United States Court of Appeals for the Third Circuit

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vacated the sentence and remanded the case to the district court for resentencing. As part of its argument at resentencing, the prosecutors introduced over 12,000 pages of Mr. Fumo's prison emails, including communications with his attorneys, to show that Mr. Fumo lacked remorse and had not accepted responsibility for his crimes.

6. Email has largely supplanted traditional modes of communication. Inmates are often incarcerated a great distance from where their counsel is located. In some cases, email may be the only reasonable way for an inmate to engage in strategic discussions or confer on time-sensitive matters with his or her attorney.

7. BOP's policy of monitoring attorney-client communications over TRULINCS makes it excessively difficult for inmates to communicate confidentially with their defense attorneys. This places a burden on inmates' constitutional rights, including their Sixth Amendment right to effective assistance of counsel and their First Amendment right to freedom of expression. The policy also implicates Due Process because it puts inmates at a distinct disadvantage compared to federal prosecutors, who do not have to reveal the contents of their email communications to their litigation adversaries.

8. As a result of the BOP's policies, 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, unmonitored phone calls, and in-person visits. It can take two or more weeks for inmates to receive postal mail. Unmonitored calls can take weeks to schedule, correspondence to schedule these calls must sometimes be done via postal mail, and the calls themselves are typically expensive. For in-person visits, it can take defense attorneys hours in travel, processing, and waiting time before they can speak with their clients.

9. Reliance on these outdated forms of communication is particularly harmful given that the majority of inmates in BOP custody are represented by publicly funded counsel who already struggle with limited resources. Correspondingly, the additional time and expense related to client communication restricts the affordability of privately retained counsel.

10. NACDL seeks to inform the public and criminal defense attorneys about TRULINCS and the federal government's policies regarding monitoring and use of attorney-client emails in criminal proceedings. It also seeks this information to inform policy makers and to allow the public to better participate in recurrent debates in Congress about whether and how Congress should legislate changes to the BOP's and DOJ's policies.

PARTIES

11. Plaintiff National Association of Criminal Defense Lawyers is the nation's preeminent criminal defense bar association. Founded in 1958, NACDL seeks to ensure justice and due process for persons accused of crime; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of criminal justice. NACDL has thousands of direct members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges. NACDL also has tens of thousands of indirect members through NACDL's state and local affiliates. NACDL publishes *The Champion*, an award winning and often cited monthly publication, which is broadly distributed to members, judges, law libraries, and other members of the public.

12. Defendant the Department of Justice is a department of the Executive Branch of the United States Government. The DOJ is an "agency" within the meaning of 5 U.S.C. § 552(f)(1). The BOP, Criminal Division, OIP, OLC, and EOUSA are all components of Defendant DOJ.

13. Defendant the Federal Bureau of Prisons is a component of the DOJ. The BOP is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

JURISDICTION AND VENUE

14. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

15. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

NACDL’S FOIA REQUESTS AND AGENCY RESPONSES

The BOP Request and Productions

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16. On August 2, 2018, NACDL sent an email to the BOP requesting the following agency records made on or after January 1, 2016, by the BOP:¹

- a. All records containing the BOP’s policies, practices, or procedures governing the collection, retention, use, or sharing of inmates’ attorney-client emails.
- b. 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.
- c. 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.
- d. 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.
- e. 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.
- f. All records containing descriptions of any technology capable of filtering emails to or from particular individuals out of emails retained by BOP.

¹ A copy of the BOP Request is attached hereto as Appendix A.

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

17. In the BOP Request, NACDL also formally requested that it not be charged search or review fees because NACDL qualifies as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1). NACDL further requested that it be granted a waiver of all fees related to its request because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

18. On August 6, 2018, the BOP acknowledged receipt of the BOP Request, indicating it was received on August 2, 2018. The acknowledgment did not contain a determination regarding NACDL's request for waiver of fees.

19. Since the start of this litigation, the BOP has made several productions of records responsive to the BOP Request and of records referred to it by other agencies. However, as detailed below, the BOP has also withheld certain records in full or in part. The BOP has not met its burden of demonstrating that the records are exempt from disclosure under the FOIA.

Deleted: BOP, citing "unusual circumstances" as defined in 5 U.S.C. § 552(a)(6)(B)(i)-(iii), extended the time for its reply to the BOP Request by ten working days. Although the BOP's deadline has long since passed, to date, the BOP has not produced any records responsive to the BOP Request, cited any exemption under FOIA for its failure to produce the records requested, or issued a determination.

The Main Justice Request and Productions

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20. On August 2, 2018, NACDL sent identical requests by email or certified mail to three components of Main Justice: the Criminal Division, the OIP, and the OLC. NACDL requested the following agency records made on or after January 1, 2006, by the Office of the Attorney General, Office of the Deputy Attorney General, Office of the Associate Attorney General, Office of Legal Policy, Office of Legal Counsel, and DOJ Criminal Division:²

- a. All guidance, directives, emails, or other communications sent to any U.S. Attorney's Office(s) regarding policies, practices, or procedures for requesting copies of inmates' attorney-client emails from the BOP.
- b. All guidance, directives, emails, or other communications sent to any U.S. Attorney's Office(s) regarding policies, practices, or procedures for requesting copies of inmates' emails from the BOP, including non-attorney-client emails.
- c. All legal or policy memoranda concerning any decision to enact or change DOJ policies, practices, or procedures for requesting inmates' emails from the BOP, including any policies, practices, or procedures for requesting that the BOP exclude from production any emails between an inmate and their attorney, as well as any policies, practices, or procedures concerning the circumstances under which the government does not request such exclusions.

21. In the Main Justice Request, NACDL also formally requested that it not be charged search or review fees because NACDL qualifies as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1). NACDL further requested that it be granted a waiver of all fees related to its request because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

² A copy of the Main Justice Request is attached hereto as Appendix B.

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22. On August 24, 2018, the Criminal Division acknowledged receipt of the Main Justice Request, indicating it was received on August 3, 2018. The acknowledgment did not contain a determination regarding NACDL’s request for waiver of fees.

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23. Since the start of this litigation, the Criminal Division has made several productions of records responsive to the Main Justice Request. However, as detailed below, it has also withheld certain records in full or in part. The Criminal Division has not met its burden of demonstrating that the records are exempt from disclosure under the FOIA.

24. On September 6, 2018, the OIP acknowledged receipt of the Main Justice Request, indicating it was received on August 9, 2018.

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25. On May 23, 2019, the OIP informed NACDL that it had found no responsive records.

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26. On September 12, 2018, the OLC acknowledged receipt of the Main Justice Request, indicating it was received on August 2, 2018.

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27. On March 22, 2019, the OLC informed NACDL that it had found no responsive records.

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The EOUSA Request and Productions

28. On August 2, 2018, NACDL sent a letter by certified mail to the EOUSA requesting the following agency records made on or after January 1, 2006 by the U.S. Attorneys’ Offices for the Southern District of Alabama, District of Arizona, Central District of California, Northern District of California, Southern District of California, District of Colorado, Middle District of Florida, Southern District of Florida, District of Hawaii, Northern District of Illinois, District of Kansas, Eastern District of Kentucky, Eastern District of Louisiana, District of Massachusetts, Eastern District of Michigan, District of Minnesota, Eastern District of New

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York, Southern District of New York, Eastern District of Pennsylvania, Western District of Pennsylvania, District of Puerto Rico, Eastern District of Texas, Southern District of Texas, District of the Virgin Islands, Eastern District of Virginia, Eastern District of Washington, and Western District of Washington:³

- a. All records containing those U.S. Attorneys' Offices' policies, practices, or procedures for requesting copies of inmates' attorney-client emails from the BOP.
- b. All records containing those U.S. Attorneys' Offices' policies, practices, or procedures for requesting copies of inmates' emails from the BOP, including non-attorney-client emails.
- c. All external guidance, including directives, emails, or other communications, sent to those U.S. Attorneys' Offices, regarding policies, practices, or procedures for requesting copies of inmates' attorney-client emails from the BOP.
- d. All external guidance, including directives, emails, or other communications, sent to those U.S. Attorneys' Offices, regarding policies, practices, or procedures for requesting copies of inmates' emails from the BOP, including non-attorney-client emails.
- e. All records containing those U.S. Attorneys' Offices' policies, practices, or procedures concerning the use of attorney-client emails once they have been obtained from the BOP.
- f. All legal or policy memoranda concerning any decision to change those U.S. Attorneys' Offices' policies, practices, or procedures for requesting inmates' emails from the BOP, including any policies, practices, or procedures for requesting that the BOP exclude from production any emails between an inmate and their attorney, as well as any policies, practices, or procedures concerning the circumstances under which the government does not request such exclusions.

29. In the EOUSA Request, NACDL also formally requested that it not be charged search or review fees because NACDL qualifies as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1). NACDL further requested that it be granted a waiver of all fees related to its request because disclosure of the requested

³ A copy of the EOUSA Request is attached hereto as Exhibit C.

information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

30. On September 17, 2018, the EOUSA issued a determination letter, denying the EOUSA Request as “unduly burdensome” and arguing that a “reasonable search cannot be performed.”

31. On October 16, 2018, NACDL filed an administrative appeal (the “EOUSA Appeal”) with the OIP regarding the determination on the EOUSA Request.

32. On October 17, 2018, the OIP acknowledged it had received the EOUSA Appeal, indicating it was received on October 16, 2018.

33. To date, the EOUSA has not issued a determination regarding NACDL’s request for waiver of fees.

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34. Since the start of this litigation, the EOUSA has made several productions of records responsive to the EOUSA Request and of records referred to it by other agencies. However, as detailed below, it also withheld certain records in full or in part. The EOUSA has not met its burden of demonstrating that the records are exempt from disclosure under the FOIA.

35. Additionally, the EOUSA has failed to establish that the searches conducted for records responsive to the EOUSA request were adequate.

CAUSES OF ACTION

36. NACDL repeats and incorporates herein by reference the allegations of Paragraphs 1 through 35.

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BOP,

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37. The BOP's failure to make the records sought in the BOP Request, or referred to it by other agencies, promptly available violates the FOIA, 5 U.S.C. § 552(a)(3), and the BOP's corresponding regulations, and constitutes wrongful withholding of agency records.

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38. Specifically, the BOP's failure to adequately justify withholding the following records in full or in part violates the FOIA, 5 U.S.C. § 552(a)(3):

- a. Record titled "Change Notice 1380.11, CN-1: Special Investigative Supervisors Manual" and dated November 30, 2016 that was originally released in the BOP's March 21, 2019 production and for which a supplemental production was made on May 19, 2020;
- b. Forty-nine pages withheld in full in the BOP's March 21, 2019 production;
- c. Sixteen pages withheld in full in the BOP's April 30, 2019 production;
- d. Emails found at Bates stamp BOP FOIA 2018-06557-LIT 6 of 36 through BOP FOIA 2018-06557-LIT 24 of 36 that were released in the BOP's May 29, 2019 production;
- e. Emails found at Bates stamp BOP FOIA 2018-06557-LIT 30 of 36 that were released in the BOP's May 29, 2019 production;
- f. Emails found at Bates stamp BOP FOIA 2018-06557-LIT 34 of 36 that were released in the BOP's May 29, 2019 production;
- g. Six pages withheld in full in the BOP's May 29, 2019 production;
- h. Email found at Bates stamp BOP FOIA 2018-06557-LIT 1 of 8 that was released in the BOP's July 2, 2019 production;
- i. Two pages withheld in full in the BOP's August 1, 2019 production;
- j. Twenty-two pages withheld in full in the BOP's September 4, 2019 production;
- k. Emails found at Bates stamp BOP FOIA 2018-06557-LIT 5 of 10 through BOP FOIA 2018-06557-LIT 9 of 10 that were released in the BOP's September 16, 2019 production; and

1. Decision paper titled "Inmate Communication Monitoring" that is mentioned in emails from 2014 in the BOP's May 29, 2019 production, and that the BOP indicated it was withholding in full in its May 19, 2020 production.

39. The BOP's failure to grant NACDL's request for treatment as a news media representative violates 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1).

40. The BOP's failure to grant NACDL's request for a public interest fee waiver violates 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

41. NACDL is entitled to injunctive relief with respect to the release and disclosure of these records sought from the BOP,

The Criminal Division

42. The Criminal Division's failure to make the records sought in the Main Justice Request promptly available violates the FOIA, 5 U.S.C. § 552(a)(3), and the DOJ's corresponding regulations, and constitutes wrongful withholding of agency records.

43. Specifically, the Criminal Division's failure to adequately justify withholding the following records in full or in part violates the FOIA, 5 U.S.C. § 552(a)(3):

a. Email with redacted subject dated October 26, 2018 and the accompanying attachment that was released in the Criminal Division's August 30, 2019 production;

b. Fifty-six pages withheld in full in the Criminal Division's August 30, 2019 production; and

c. One hundred sixteen pages withheld in full in the Criminal Division's September 26, 2019 production.

44. The Criminal Division's failure to grant NACDL's request for treatment as a news media representative violates 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1).

45. The Criminal Division's failure to grant NACDL's request for a public interest fee waiver violates 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

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46. NACDL is entitled to injunctive relief with respect to the release and disclosure of these records sought from the Criminal Division.

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EOUSA

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47. The EOUSA's failure to make the records sought in the EOUSA Request, or referred to it by other agencies, promptly available violates the FOIA, 5 U.S.C. § 552(a)(3), and the DOJ's corresponding regulations, and constitutes wrongful withholding of agency records.

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48. Specifically, the EOUSA's failure to establish the adequacy of its search for records responsive to the EOUSA Request violates the FOIA, 5 U.S.C. § 552(a)(3).

49. Additionally, the EOUSA's failure to adequately justify withholding the following records in full or in part violates the FOIA, 5 U.S.C. § 552(a)(3):

- a. Email with the subject "A few items" dated October 19, 2017 that was released in the EOUSA's June 12, 2019 production;
- b. Forty-three pages withheld in full in the EOUSA's June 12, 2019 production;
- c. Record described as a "memorandum dated March 26, 2009" that was withheld in full in the EOUSA's June 19, 2019 production;
- d. Nine pages withheld in full in the EOUSA's October 10, 2019 production; and
- e. Four pages withheld in full in the EOUSA's October 15, 2019 production.

50. The EOUSA's failure to grant NACDL's request for treatment as a news media representative violates 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1).

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51. The EOUSA's failure to grant NACDL's request for a public interest fee waiver violates 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

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52. NACDL is entitled to injunctive relief with respect to the release and disclosure of these records sought from the EOUSA.

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PRAYER FOR RELIEF

WHEREFORE, NACDL requests that this Court:

- a. Order Defendant DOJ ~~specifically, the EOUSA~~ to conduct a thorough search for responsive records;
- b. Order Defendants BOP and DOJ to ~~release the responsive records detailed above;~~
- c. Enjoin Defendants BOP and DOJ from charging NACDL search, review, or duplication fees in connection with the requests;
- d. Award NACDL its reasonable costs and attorneys' fees incurred in this action;
- e. Grant such other relief as the Court may deem just and proper.

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DATED: August 7, 2020

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Respectfully submitted,

s/ Megan Graham

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