UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff, v. FEDERAL BUREAU OF PRISONS, *et al.* Defendants.	No. 18-cv-2399-KBJ

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this memorandum of law in support of its cross-motion for summary judgment against Defendants Federal Bureau of Prisons ("BOP") and Department of Justice ("DOJ"), including the Executive Office of United States Attorneys ("EOUSA") and Criminal Division (collectively, "Defendants"), and in opposition to Defendants' motion for summary judgment.[1]

PRELIMINARY STATEMENT

BOP provides most incarcerated individuals in its facilities—whether they are detained pre-trial, awaiting sentencing, or serving a sentence—with access to the Trust Fund Limited Inmate Computer System ("TRULINCS"). TRULINCS lets inmates send short emails to approved recipients, including attorneys. As a condition of use, BOP requires inmates to click on an acknowledgment that all communications will be monitored and that purports to waive attorney-client privilege in messages exchanged with their attorneys.

In August 2018, NACDL filed three FOIA requests to learn more about law enforcement and prosecutorial use of attorney-client email communications. First, NACDL requested records from BOP, including records related to the policies, practices, and procedures for monitoring inmate emails, as well as technical information about TRULINCS. *See* 2d Am. Compl. Ex. A, ECF No. 42-2. Second, NACDL requested records from various DOJ components, including requesting that the Criminal Division produce records related to the policies, practices, and procedures for requesting inmate emails from BOP. *See* 2d Am. Compl. Ex. B, ECF No. 42-3. Third, among other records, NACDL requested that EOUSA produce records from twenty-seven United States

[1] NACDL wishes to thank Schuyler Standley and Melody Wong, the students at the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley School of Law who drafted this Memorandum of Points and Authorities.

Attorney's Offices ("USAOs") related to the policies, practices, and procedures in those offices for obtaining or using inmate emails from BOP. *See* 2d Am. Compl. Ex. C, ECF No. 42-4.

Even though Defendants have released records that shed some light on attorney-client email monitoring practices, Defendants have not met their statutory obligations under the FOIA. Several USAOs, and thereby EOUSA, conducted inadequate searches or provided insufficiently detailed descriptions to meet the minimum standards set by the FOIA. 5 U.S.C. § 552(a)(3). Furthermore, BOP, the Criminal Division, and EOUSA inappropriately withheld or provided insufficient justifications for certain records under FOIA Exemptions 4, 5, 7(E), and 7(F). *See* 5 U.S.C. §§ 552(b)(4), (b)(5), (b)(7)(E), (b)(7)(F). NACDL also challenges specific deficiencies in Defendants' *Vaughn* indices and segregability analyses.

FACTUAL BACKGROUND

Email plays an invaluable role in attorney-client communications, and would be particularly useful for lawyers who need to quickly communicate with their clients who are in federal custody about important aspects of their case. Two recent events, the COVID-19 pandemic and a polar vortex in 2019, demonstrate how important it is for inmates to have multiple privileged methods of communication when crises eliminate in-person visits.

In March 2020, BOP went into a near-total lockdown for almost seven months. BOP suspended all visits—including legal visits—at its 122 correctional facilities in response to COVID-19 until early October 2020.[2] Throughout the lockdown, inmates had limited access to telephone calls and videoconferencing for privileged conversations with their attorneys, but only

[2] Fed. Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan* (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp. Some exceptions for lawyers could be made on a case-by-case basis at the local level. This restriction continued through multiple phases of BOP's COVID-19 Action Plan, until BOP modified its operations on October 8, 2020. Fed. Bureau of Prisons, *BOP Modified Operations* (Oct. 8, 2020), *archived at* https://perma.cc/4DRC-6WLH.

"to the extent practical" at their facility.[3] Even now, after the nationwide ban on in-person visits has lifted, in-person visits are still subject to local limitations.[4] In light of the precarious nature of in-person and videoconferencing visits, email is a vital tool for vindicating an incarcerated person's right to counsel given its ability to allow for communication when other means are unavailable or impractical.

The sorts of restrictions imposed in light of COVID-19 are not unprecedented. Almost two years ago, a polar vortex sweeping across North America brought arctic temperatures to New York City, resulting in a similar lockdown for inmates at the Metropolitan Detention Center ("MDC") in Brooklyn.[5] For six days, inmates were denied in-person visits and access to email, forcing them to rely solely on telephone lines for communicating with their attorneys. However, this was an ineffective solution for the roughly 1,600 individuals incarcerated at MDC Brooklyn because a fire caused power outages throughout the facility that restricted access to phone lines, and MDC Brooklyn consistently failed to communicate its contingency plans for accommodating legal visits and calls during the lockdown.[6]

But the need for privileged email communications is not limited to emergency situations. Although alternative methods of communications are generally available, confidential email is an

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[3] *See, e.g.*, Fed. Bureau of Prisons, *COVID-19 Action Plan: Phase Five* (Mar. 31, 2020, 6:30 p.m.), https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp; Fed. Bureau of Prisons, *Bureau of Prisons COVID-19 Action Plan: Phase Six* (Apr. 14, 2020), https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf; 28 C.F.R. § 540.106 (2020).

[4] Fed. Bureau of Prisons, *BOP Modified Operations* (Nov. 25, 2020), https://www.bop.gov/coronavirus/covid19_status.jsp, *archived at* https://perma.cc/7QZY-ACD7.

[5] Complaint for Declaratory & Injunctive Relief 4, *Fed. Def. of N.Y. v. Fed. Bureau of Prisons*, No 1:19-cv-660 (E.D.N.Y. Feb. 4, 2019); *see also* Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and "Frantic,"* N.Y. Times (Feb. 1, 2019), https://nyti.ms/2UCOImd; Annie Correal et al., *Protectors Try to Storm Brooklyn Jail with Little Heat or Electricity*, N.Y. Times (Feb 2, 2019), https://nyti.ms/2DRypfF.

[6] *See* Office of the Inspector Gen., Dep't of Justice, *Review and Inspections of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impacts on Inmates* 1, 33–36 (Sept. 2019), https://oig.justice.gov/reports/2019/e1904.pdf.

important attorney-client communication tool because it is instantaneous and relatively affordable. In fact, there is widespread support for providing inmates with routine access to privileged email. On September 21, 2020, the U.S. House of Representatives passed the Effective Assistance of Counsel in the Digital Era Act by a voice vote.[7] Among other protections, the bipartisan bill would extend attorney-client privilege to electronic communications sent to and from incarcerated individuals in BOP facilities and would prohibit monitoring of any privileged emails. The bill is now pending in the Senate and under consideration by the Senate Committee on the Judiciary.[8] The records sought by NACDL can assist the Senate in its deliberation of the Effective Assistance of Counsel in the Digital Era Act by providing important technical and factual context.

Twenty-eight months ago, on August 2, 2018, NACDL submitted three separate FOIA requests to BOP, several DOJ components (the Office of Information Policy, the Criminal Division, and the Office of Legal Counsel), and EOUSA to gather more information about their policies and practices regarding TRULINCS, BOP's capability to filter out certain emails, and requests for emails between inmates and their counsel. NACDL sued to enforce the requests on October 18, 2018. *See* Compl. for Injunctive Relief, ECF No. 1. NACDL filed a Second Amended Complaint on August 7, 2020, ECF No. 42, and Defendants filed an Amended Answer on August 21, 2020, ECF No. 43. This matter is now before the Court on Defendants' motion for summary judgment and NACDL's cross-motion for summary judgment.

STANDARD OF REVIEW

Congress enacted the FOIA to "ensure an informed citizenry," which it recognized is "vital to the functioning of a democratic society, needed to check against corruption and to hold the

[7] Effective Assistance of Counsel in the Digital Era Act, H.R. 5546, 116th Cong. (as passed by House Sept. 21, 2020), https://www.congress.gov/bill/116th-congress/house-bill/5546/actions.

[8] *Id.*

governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978). The purpose of the FOIA is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Courts recognize that the FOIA embodies "a general philosophy of full agency disclosures unless information is exempted under clearly delineated language." *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994) (quotations marks omitted). Accordingly, government agencies bear the burden of establishing that their searches were adequate and that any withheld records or redactions fall within the claimed FOIA exemptions. 5 U.S.C. § 552(a)(4)(B); *Ray*, 502 U.S. at 173. To satisfy this burden on summary judgment, agencies must submit affidavits that are "relatively detailed and nonconclusory and . . . submitted in good faith." *Morley v. CIA*, 508 F.3d 1108, 1116 (D.C. Cir. 2007) (quotation marks omitted).

Summary judgment is appropriate if the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists only when there is sufficient evidence such that a reasonable juror could find for the party opposing the motion." *Schoenman v. FBI*, 604 F. Supp. 2d 174, 186 (D.C. Cir. 2009). The district court conducts a *de novo* review of the record in a motion for summary judgment in a FOIA case. 5 U.S.C. § 552(a)(4)(B); *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice* (*CREW*), 746 F.3d 1082, 1091 (D.C. Cir. 2014). In the FOIA context, "all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester." *Schoenman*, 604 F. Supp. 2d at 186. Summary judgment for government defendants is appropriate "only after an agency seeking summary judgment proves that it has fully discharged its FOIA obligations." *Id.* at 187.

ARGUMENT

As explained more below, Defendants have failed to establish that they have fully discharged their obligations under the FOIA. First, EOUSA failed to make reasonable efforts to search for responsive records. Second, BOP and DOJ failed to justify their withholdings under FOIA Exemptions 4, 5, 7(E), and 7(F). Thus, the Court should deny Defendants' Motion for Summary Judgment and grant NACDL's Cross-Motion for Summary Judgment.

I. EOUSA failed to conduct an adequate search for responsive records.

EOUSA has not met its burden of demonstrating that the agency conducted adequate searches for records responsive to NACDL's request. The agency "must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983); *see also McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983) (stating that the "burden of persuasion on this matter is . . . on the agency").

Courts must assess the adequacy of a search under a "reasonableness test . . . consistent with congressional intent tilting the scale in favor of disclosure." *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998) (quotation marks omitted). An agency must perform "more than perfunctory searches" and "show that it made a good faith effort to conduct a search for requested records," including "follow[ing] through on obvious leads to discover requested documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 390–91 (D.C. Cir. 1999) (citations and quotation marks omitted).

Summary judgment for an agency is improper when the agency fails to provide a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched."

Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). The lack of a detailed declaration deprives "a FOIA requester [of] an opportunity to challenge the adequacy of the search" and prevents "the district court [from] determin[ing] if the search was adequate." *Id.* In addition to being relatively detailed, agency declarations must also be "non-conclusory" and "submitted in good faith." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citation and quotation marks omitted). "Conclusory statements that the agency has reviewed relevant files are insufficient to support summary judgment" for the agency. *Nation Mag. v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995).

Furthermore, an agency "has a duty to construe a FOIA request liberally." *Id.* This duty "includes searching for synonyms and logical variations of the words used in the request, and prohibits agencies from fishing myopically for a direct hit on the records using only the precise phrasing of the request." *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 373 F. Supp. 3d 120, 125 (D.D.C. 2019). While agencies have "discretion in crafting search terms," that "discretion is not boundless," and the "selected terms [must be] reasonably calculated to unearth responsive documents." *Am. Ctr. for Equitable Treatment, Inc. v. Office of Mgmt. & Budget*, 281 F. Supp. 3d 144, 151–52 (D.D.C. 2017) (citations and quotation marks omitted).

A search is inadequate if an agency "ignore[s] what it cannot help to know" and fails to pursue "a lead that is both clear and certain" in good faith. *Kowalczyk v. U.S. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996); *see also Valencia-Lucena*, 180 F.3d at 326 (holding a search was inadequate where it was "evident from the agency's disclosed records that a search of another of its records system might uncover the documents sought"). Because an agency must "revise its assessment of what is reasonable in a particular case to account for leads that emerge during its inquiry," courts "evaluate[] the reasonableness of an agency's search based on what the agency

knew at its conclusion rather than what the agency speculated at its inception." *Campbell*, 164 F.3d at 28 (quotation marks omitted). Where "the record itself reveals positive indications of overlooked materials," summary judgment for the agency is inappropriate. *Valencia-Lucena*, 180 F.3d at 327 (quotation marks omitted).

A. Multiple United States Attorney's Offices failed to provide reasonably detailed declarations regarding their searches.

Nine of the ten declarations submitted by EOUSA on behalf of various USAOs contain insufficient detail for NACDL to properly evaluate the adequacy of the search. First, three USAOs provide only cursory descriptions of several of the searches their offices conducted. Second, the declaration of EOUSA Attorney Advisor Vinay Jolly fails to describe the methodology used to review potentially responsive records referred to EOUSA from individual USAOs. Third, several of the USAO declarations contain inconsistencies and omissions that raise substantial doubt about the completeness and thoroughness of the searches.

1. Three USAOs provided only cursory descriptions of their searches.

The Eastern District of Pennsylvania, District of Colorado, and District of Arizona simply stated that they searched several locations, without setting forth the search terms or method of the searches performed. *See Oglesby*, 920 F.2d at 68 (holding that an affidavit must "set forth the search terms and the type of search performed").

Eastern District of Pennsylvania. The Eastern District of Pennsylvania provided inadequate descriptions of both its initial and subsequent searches. For its initial search, the office summarily asserts that "a search was done on EDPA's Criminal Division Manual as well as EDPA's Sharepoint Page and no written policy was found," without identifying if this was a manual or electronic search or the search terms used. Decl. of Beverly Brown ("Brown Decl.") ¶ 11. Descriptions that fail to describe the search terms used or methods performed are inadequate.

See Oglesby, 920 F.2d at 68. For its electronic searches in February 2019 and September 2020, the office again fails to explain the steps taken by the Criminal Appeals Chief. Brown Decl. ¶¶ 12, 18. This is insufficient. *See Morley*, 508 F.3d at 1122 (stating that a declaration is insufficient if it "merely identifies the [agency components] that were responsible for finding responsive documents without identifying the terms searched or explaining how the search was conducted"). The Brown Declaration states that the "Criminal Appeals Chief . . . did a search of his computer" in 2019, where he organized "pertinent old emails by topic and pertinent old papers by filed labels," and that the "Chief of the Criminal Division and the Chief of Appeals . . . searched their paper (Criminal Division Manual) and electronic files including mails and SharePoint" in 2020. Brown Decl. ¶¶ 12, 18. These statements describe where but not *how* this office conducted its search for relevant records.[9] The Brown Declaration is also silent as to which electronic files were searched.

District of Colorado. Likewise, out of the ten Assistant United States Attorneys ("AUSAs") in the District of Colorado tasked with searching for responsive records, three AUSAs—Julia Martinez, David Tonini, and Tim Neff—failed to identify the terms searched or explain how they each conducted their search. *See* Decl. of Teresa Robinson ("Robinson Decl.") ¶¶ 19–21. The deficiency of these descriptions is particularly glaring when compared to the search descriptions given by the seven other AUSAs. *See id.* ¶¶ 12–18. Because the Robinson Declaration asserts that "the only reasonable method of searching for documents responsive to this request is to query AUSAs individually," *id.* ¶ 9, NACDL is entitled to know the individualized search terms used to determine the adequacy of the searches, *see Morley*, 508 F.3d at 1122.

[9] EOUSA provided the Eastern District of Pennsylvania with a set of search terms, but the declaration does not indicate that the Criminal Chief or the Chief of Appeals used these terms in the September 2020 electronic search. *See* Brown Decl. ¶ 18.

District of Arizona. Finally, the District of Arizona failed to detail the declarant's method of searching the DOJ and USAO intranet pages, identify the files searched by "select [AUSAs] with significant experience within the USAO," or articulate the terms used to search their emails. Decl. of Michael A. Ambri ("Ambri Decl.") ¶ 4. The description of the subsequent search fares no better, as the District of Arizona reiterates that it "reviewed all written DOJ and USAO policies and procedures in electronic and written form" without any further elaboration. *Id.* ¶ 5. The declaration also fails to indicate when these searches were conducted. *See id.* ¶ 5 (stating that "[a]t the request of the [EOUSA], after the previous searches, the USAO went back and searched for potentially responsive records").

2. The Jolly Declaration improperly fails to describe the methodology used to review potentially responsive records referred from the USAOs.

EOUSA's declaration also fails to provide any information on the search it conducted of potentially responsive records referred from five USAOs: District of Massachusetts,[10] District of Colorado,[11] Eastern District of Virginia,[12] Southern District of Florida,[13] and Western District of Washington.[14] Rather than describe the search performed or provide the search terms or method used to determine which records were responsive to NACDL's request among the potentially responsive documents referred, EOUSA states in conclusory terms that "[r]esponsive documents

[10] The District of Massachusetts identified 168 potentially responsive records and referred an unspecified subset of these documents to EOUSA. Decl. of Susanne Husted ("Husted Decl.") ¶¶ 20–22.

[11] AUSAs Zeyen Wu, Pegeen Rhyne, Peter McNeilly, and Emily Treaster all identified potentially responsive records that were referred to EOUSA. Robinson Decl. ¶¶ 12, 16–18.

[12] Among the twenty-seven Criminal Division Supervisory and Managing AUSAs, and Senior Litigation Counsel, eight attorneys identified potentially responsive records, which were referred to EOUSA for review. Decl. of Tammy R. Zimmie ¶¶ 11–12.

[13] The electronic search yielded thirty-five emails, twelve memoranda, and one page of attorney notes, which were referred to EOUSA. Decl. of Francys Marcenaros ¶¶ 12–13.

[14] Potentially responsive records found in paper and electronic searches of network files and emails were provided to EOUSA. Aff. of Thomas M. Woods ¶ 5.

were identified and sent to EOUSA, and EOUSA processed and released all nonexempt . . . records." Decl. of Vinay J. Jolly ("Jolly Decl.") ¶ 8. This description fails to adequately explain the disposition of potentially responsive records referred from individual USAOs to EOUSA. *Compare Linder v. Exec. Office for U.S. Attorneys*, 315 F. Supp. 3d 596, 601 (D.D.C. 2018) (finding that failure to "specify why the district's initial estimate of 1,500 pages potentially responsive to [FOIA requester's] request resulted in providing 502 pages—a third of the initial estimate—to the EOUSA" rendered the declaration "insufficient to merit summary judgment"), *with Toensing v. U.S. Dep't of Justice*, 890 F. Supp. 2d 121, 145–46 (D.D.C. 2012) (finding a multi-layer search adequate where the agency's "affidavit exhaustively describes the multi-layer search, . . . who performed it, and what search terms were used"). EOUSA neither described terms used to narrow the universe of potentially responsive records, nor the methodology for determining responsive records for final release, and thus failed to provide a reasonably detailed affidavit.

3. Three USAOs submitted declarations that directly contradict the record or fail to describe searches that yielded responsive records.

Additionally, the declarations of three USAOs—Eastern District of Michigan, Eastern District of Pennsylvania, and Southern District of New York—contain statements that either directly contradict disclosed records or fail to reflect descriptions of searches that yielded responsive records.

Eastern District of Michigan. The Eastern District of Michigan identified only two potentially responsive records in its declaration: an email from AUSA Eric Strauss dated May 4, 2009 with two attachments, and a memorandum from Deputy Chief Benjamin Coats dated December 16, 2019. Decl. of Theresa M. Boyer ("Boyer Decl.") ¶¶ 9–10, 16–17. However, while EOUSA's *Vaughn* index reflects three responsive records from the office, only one matches the

description given in the Boyer Declaration. *See* EOUSA *Vaughn* Index 1, 3, 7 (indicating EOUSA Records 1, 5, and 16 are from E.D. Mich. and EOUSA Record 16 is the 2019 Coats memo).

Eastern District of Pennsylvania. Similarly, the Eastern District of Pennsylvania twice states that the May 2009 memo issued by EOUSA is the only responsive record it found, even though EOUSA's September 30, 2020 supplemental production included a March 27, 2009 letter from the United States Attorney and an AUSA in the Eastern District of Pennsylvania to an attorney at the Federal Detention Center ("FDC") in Philadelphia. *Compare* Brown Decl. ¶¶ 12, 18, *with* EOUSA *Vaughn* Index 1–2, 4 (indicating EOUSA Records 2–3 and 8 are from E.D. Pa.), *and* Ex. C.2 (letter from USAO in E.D. Pa. to FDC Philadelphia).

Southern District of New York. Like the other two offices, the Southern District of New York declared that its search yielded only "three documents that contain all USAO SDNY policies . . . under the file names SDNY TRULINCS 2016.05.25 Policy.pdf, SDNY TRULINCS 2017.10.06 External Email Chain, and SDNY TRULINCS 2017.10.06 Policy.pdf." Decl. of John M. McEnany ¶ 4. However, despite the assertion that there could "scarcely . . . [be] a policy in this area that [the declarant] would not be aware of," *id.* ¶ 5, the Southern District of New York has produced records beyond these three, *see* Ex. C.6 (additional policy record received from S.D.N.Y.). Without any description of the search that yielded this responsive record, the McEnany's Declaration is insufficient to justify summary judgment for Defendants.

B. Several United States Attorney's Offices conducted inadequate searches.

Six USAOs have not met their burden of showing —beyond material doubt —that they have conducted searches reasonably calculated to uncover all relevant documents. *See Weisberg*, 705 F.2d 1344 (holding that an adequate search is one "reasonably calculated to uncover all relevant documents"). These searches were inadequate in two respects. First, certain USAOs

employed search terms that were underinclusive and too restrictive to be reasonably calculated to uncover all responsive records. *See Judicial Watch v. DOJ*, 373 F. Supp. 3d at 125 (finding a search was unduly restrictive that failed to use logical alternative terms). Second, although disclosed records unmistakably point to other locations that may contain responsive records, several USAOs ignored these obvious leads in their search. *See Kowalczyk*, 73 F.3d at 389 (finding agencies must pursue clear and certain leads for a search to be adequate).

1. Five USAOs unreasonably narrowed the scope of NACDL's request.

Four USAOs unreasonably narrowed the scope of NACDL's request by using search terms that targeted only portions of the EOUSA request: Northern District of Illinois, District of Massachusetts, Eastern District of Michigan, and Eastern District of Pennsylvania. And two offices—Eastern District of Pennsylvania and District of Arizona—failed to liberally construe NACDL's request by searching only for a subset of the records requested.

Northern District of Illinois, District of Massachusetts, Eastern District of Michigan, and Eastern District of Pennsylvania. All four of these offices used search terms that unduly restricted the scope of the NACDL's request.[15] Specifically, using the term "Consent to Monitoring Agreement" was unreasonable because EOUSA and USAOs appear to often refer to BOP's monitoring policy colloquially in their correspondence and memoranda. The disclosed records, EOUSA declarations, and *Vaughn* indices are replete with colloquial references to the Consent to Monitoring Agreement, such as "consent to monitoring," "BOP email policy," "prisoner emails," and "email access," as well as general descriptions of the policy like "MCC's

[15] Each office gave slightly varied descriptions of the search terms. However, all four offices used the term "Consent to Monitoring Agreement" or "Consent to Monitor Agreement." *See* Decl. of Merle Payne ("Payne Decl.") ¶¶ 7–9; Husted Decl. ¶ 19; Boyer Decl. ¶ 14; Brown Decl. ¶ 16. Two offices—District of Massachusetts and Eastern District of Michigan—used the term "inmate transactional data." *See* Husted Decl. ¶ 19; Boyer Decl. ¶ 14. On September 21, 2020, EOUSA requested that the Eastern District of Pennsylvania conduct a "supplemental email search based on 'word searches,'" but this office did not say whether the terms were actually used. Brown Decl. ¶¶ 16, 18.

position is that inmate communications with attorneys using emails aren't privileged because inmates are warned that they are not private." *See* EOUSA *Vaughn* Index 1–2, 4 (discussing EOUSA Records 2–4, 8); Ex. C.1.

Like "Consent to Monitoring Agreement," the term "inmate transactional data" is overly formalistic, given that many AUSAs tend to use other terms, such as "jail e-mails" "inmate emails," "inmate communications," or "inmate correspondence" instead in their correspondence. *See, e.g.*, Exs. C.1, C.3, C.4, C.5, C.7.

The USAOs had an obligation to use a broader set of terms that would capture how their staff actually discuss BOP's email monitoring policies. *See, e.g.*, *Bagwell v. U.S. Dep't of Justice*, 311 F. Supp. 3d. 223, 229–30 (D.D.C. 2018) (indicating that agencies must search for relevant and common vernacular search terms in addition to formal terms); *Summers v. U.S. Dep't of Justice*, 934 F. Supp. 458, 461 (D.D.C. 1996) (requiring FBI to use "appointment" and "diary" as search terms because they are commonly used to describe the "commitment calendars" requested); *Judicial Watch v. DOJ*, 373 F. Supp. 3d at 125 (requiring the agency to search for both Special Counsel's name and title, as well as the office's commonly used acronym). At the very least, EOUSA should have tasked these USAOs to run searches with synonyms for "Consent to Monitoring Agreement" and "inmate transactional data" to avoid the risk of excluding any emails where these precise terms were not used. *See Gov't Accountability Project v. U.S. Dep't of Homeland Sec.*, 335 F. Supp. 3d 7, 12 (D.D.C. 2018) (observing that "FOIA requests are not a game of Battleship," and "[t]he requester should not have to score a direct hit on the records sought based on the precise phrasing of his request"). EOUSA's failure to search for obvious synonyms and logical variations run afoul of its obligation to construe FOIA requests liberally and conduct a

search reasonably likely to produce all responsive documents. Under these circumstances, the agency's search for records cannot be considered adequate.

Eastern District of Pennsylvania and District of Arizona. Similarly, whereas NACDL sought all records, external guidance, and legal or policy memoranda "regarding policies, practices, or procedures for requesting copies of inmates' emails from the BOP," Eastern District of Pennsylvania and District of Arizona improperly interpreted this request narrowly to mean only written policies. Brown Decl. ¶¶ 11–12; Ambri Decl. ¶¶ 4–5. The phrase "policies, practices, or procedures" indicates a broader request of which written policies are merely a subset.

EOUSA clearly understood that this request included informal practices and procedures, as evidenced by the records disclosed by the District of Puerto Rico and Western District of Pennsylvania, and the District of Colorado's declaration. *See, e.g.*, Exs. C.8, C.9; Robinson Decl. ¶ 8 (noting that although no written policies exist, "the USACO determined that line AUSAs . . . may have received or generated information relating to informal policies and procedures, or information relating to 'practices,' for requesting inmates' emails from the BOP"). EOUSA had an obligation to "select the interpretation that would likely yield the great number of responsive documents." *See Rodriguez v. Dep't of Def.*, 236 F. Supp. 3d 26, 36 (D.D.C. 2017). By refusing to read the FOIA request as drafted, Eastern District of Pennsylvania and District of Arizona improperly limited the scope of the search, rendering the search conducted inadequate. *See Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) (stating an agency is "bound to read [a request] as drafted, not as [the] agency officials . . . might wish it was drafted").

2. Two USAOs failed to pursue clear and certain leads.

Second, two USAOs—Northern District of Illinois and Western District of Washington—failed to pursue clear and certain leads contained in the record during their search.

Northern District of Illinois. Specifically, Northern District of Illinois impermissibly limited its search to the email accounts of two AUSAs and the office's Intranet website, despite discovering strong indication that responsive records may be in another file. Decl. of Merle Payne ("Payne Decl.") ¶¶ 7, 9–10; *see Campbell*, 164 F.3d at 28 (finding the FBI's assumption that review of one record system was sufficient became "untenable once the FBI discovered information suggesting the existence of documents" in another record system). In EOUSA's October 21, 2020 production, Northern District of Illinois disclosed a chart with a row titled "BOP (including MCC) Prisoner E-mail Accounts" that discussed the USAO's policy on requesting inmate emails. Ex. C.10. Below the statements that "[s]ubpoenas for these are not required" and that "a properly submitted written request from a law enforcement agency" sufficed, the document identifies an additional folder, "crimbank/narcotics/BOP-MCC Issues/Prisoner Email Accounts." *Id.* The file path, and the context in which it arose, constitute a clear and certain lead pointing to the probable existence of responsive records elsewhere. The Northern District of Illinois seemingly failed to search this folder[16] and did not provide an explanation for that choice, rendering the search inadequate. *See Kowalczyk*, 73 F.3d at 389.

Western District of Washington. Similarly, NACDL received records from Western District of Washington that referred to the possible existence of responsive records that the office failed to pursue. In BOP's August 31, 2020 supplemental production of records referred from EOUSA, the office produced its DOJ Book that clearly identifies the existence of relevant documents under the Resources section. Ex. B.3. In particular, the record contains hyperlinks to various forms, including "Request for Inmate Transactional Data" and "Letter Request for

[16] In its February 2019 search, the Executive AUSA searched the "NDIL BOPMCC-USMS Issues/Prisoner Email Accounts folder" for responsive information. Payne Decl. ¶ 5. It is unclear whether this refers to the same file path identified in the chart given the variations in the folder names.

Contents of Email Communications." Upon discovering these resources, Western District of Washington had an obligation to search for these responsive materials. While the office produced the "Request for Inmate Transactional Data," *see* Ex. B.11, it failed to do the same for the "Letter Request for Contents of Email Communications." Neither the Western District of Washington's affidavit, nor EOUSA's *Vaughn* index make any reference to this document. *See* Aff. of Thomas M. Woods; EOUSA *Vaughn* Index. Given that both documents are templates of requests sent to BOP, EOUSA's failure to search for the explicitly referenced form, "Letter Request for Contents of Email Communications," renders the agency's search inadequate because this template falls within the scope of Items 1 and 2 of NACDL's request.

* * *

For these reasons provided above, EOUSA's searches were inadequate. The Court should deny summary judgment to EOUSA and order that EOUSA supplement its inadequate descriptions identified above and conduct adequate searches.

II. Defendants did not meet their burden to justify withheld records under the FOIA's narrow statutory exemptions.

When an agency withholds responsive documents, it bears the burden of justifying that withheld records fall under nine narrowly construed exemptions. 5 U.S.C. § 552(a)(4). But the availability of exemptions should not "obscure . . . that disclosure, not secrecy, is the dominant legislative objective of the FOIA." *Rose*, 425 U.S. at 353.

An agency must provide "a relatively detailed justification, specifically identify[ing] the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006). Agencies typically provide that information in a *Vaughn* index, which "correlates each withheld document, or portion thereof, with a particular FOIA exemption

and the justification for nondisclosure." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 928 F. Supp. 2d 139, 144 (D.D.C. 2013); *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). "Conclusory" or "generalized" invocations of exemptions are "unacceptable." *Morley*, 508 F.3d at 1115.

To succeed on summary judgment, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). Otherwise, summary judgment should be granted for the requestor.

As explained more below, Defendants fail to meet their burden of justifying their withholdings of certain records or portions thereof under Exemptions 4, 5, 7(E), and 7(F).[17] Additionally, portions of the agencies' affidavits are conclusory, generalized, and broadly inadequate to facilitate assessment by the court or NACDL of whether claimed exemptions apply.

A. BOP improperly withheld information under FOIA Exemption 4.

To meet its burden under Exemption 4, an agency must establish that withheld information is: (1) "commercial or financial information,"[18] (2) "obtained from a person," and (3) "privileged or confidential." 5 U.S.C. § 552(b)(4). But "[n]ot every bit of information submitted to the government by a commercial entity qualifies for protection." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). For Exemption 4 to apply, the affected third party must retain a "commercial interest" in a record's contents. *Id.*; *see also Comptel v. FCC*, 910 F. Supp. 2d 100, 117 (D.D.C. 2012) (indicating that the term "commercial" should be

[17] NACDL is not challenging withholdings by any Defendant under Exemption 6 or 7(C). Additionally, NACDL is not challenging Exemption 5 withholdings in BOP Records d1, e, g1, i, k1, or k2, or Criminal Division Records 5–7, 13, 22, 25, 29, or 30. Nor is NACDL challenging Exemption 7 withholdings in BOP Records c1 or d2.

[18] Exemption 4 also protects trade secrets, but BOP has not claimed that the relevant records are such.

given its ordinary meaning). Both individuals and entities can be considered "a person" under Exemption 4, but the exemption does not apply to records "generated by the federal government." *Elec. Privacy Info. Ctr.*, 928 F. Supp. 2d at 147. Finally, a record must be "both customarily and actually treated as private by its owner" and "provided to the government under an assurance of privacy" to be considered "confidential within the meaning of Exemption 4." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (quotations marks omitted).

BOP improperly applied Exemption 4 to two records: the TRULINCS User Guide (BOP Record c1) and a screenshot of the TRULINCS "Portal" (BOP Record R2), Ex. B.10 at 83. The TRULINCS User Guide "represents pages of application" that are accessible to staff and inmates at BOP facilities, depending on their access privileges. Lilly Decl. ¶ 39(a). The screenshot of the TRULINCS Portal is part of a PowerPoint presentation by attorneys at BOP's Los Angeles Consolidated Legal Center to AUSAs in 2011. Lilly Decl. ¶ 39(n). In its explanations, BOP fails to meet its burden of demonstrating the records are properly withheld under Exemption 4.

First, BOP combines its justifications for the two records into one paragraph that appears to discuss only the User Guide. *See* Lilly Decl. ¶ 33; *see also* Defs.' Mem. of P. & A. 15–18 (discussing only the User Guide). This is improper. *See Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 237 (D.D.C. 2013) (indicating a document-by-document description is appropriate unless "withholdings comprise multiple, duplicative records" that can be discussed as a "category"). In combining its descriptions of records with distinct information, BOP has not met its obligation to provide a description of its Exemption 4 withholdings that allows the Court to "fairly evaluate" the applicability of the exemption. *Id.*

Second, BOP fails to establish the threshold requirements that the information in the withheld records be "commercial" and "obtained from a person." In describing both of the records

at issue here, BOP's declaration states that "the categories of information identified represent the proprietary property of the vendor" and that the vendor "developed and provided the software to the BOP under the assurance of its limited internal use." Lilly Decl. ¶ 33. However, these descriptions do not show the withheld information in either record is of a "commercial" nature, nor do they show that the information in the screengrab of the TRULINCS Portal was "obtained from a person."

In the context of government computer software documentation like the TRULINCS User Guide, federal regulations indicate "commercial software" is "software developed or regularly used for nongovernmental purposes," 48 C.F.R. § 252.227-7014(1), while "noncommercial software" is software that does not qualify as commercial software, *id.* § 252.227-7014(13). The grounding factor of these definitions is the availability of the software on the public market. There is no indication in BOP's declarations or in publicly available descriptions of TRULINCS that the software is available on the public market. Indeed, TRULINCS appears to be a BOP-tailored program. Thus, the supporting documentation to TRULINCS, including the User Guide, and screenshots of its interface are not "commercial" for purposes of Exemption 4.

Furthermore, Advanced Technologies Group ("ATG"), the developer of the TRULINCS software, does not maintain a commercial interest in the records. *See Comptel*, 910 F. Supp. 2d at 100. The TRULINCS User Guide appears to have been created and narrowly tailored for BOP's system requirements, and thus has no commercial value. *Pub. Citizen v. U.S. Dep't of Health & Human Servs.*, 975 F. Supp. 2d 81, 99 (D.D.C. 2013) (citation omitted) (stating that information is commercial only if "in and of itself, it serves a commercial function or is of a commercial nature"). The Lilly Declaration does not state how the User Guide is used by BOP staff, but based on the categories of information described, it likely provides tailored instructions to BOP staff and

inmates on how to use the TRULINCS application. *See* Lilly Decl. ¶ 33; *cf.* Ex. B.7 at 47 (a "Change Order" indicating that BOP narrowly tailors TRULINCS-related vendor requests to its specific needs). There would be little, if any, commercial value in a set of narrowly tailored instructions like those in the User Guide. As to the screenshot, it is educational, not commercial, because it was used to train AUSAs on how TRULINCS functions.

In addition, BOP provides no information demonstrating that the screenshot was obtained from a person. Indeed, the screenshot at issue appears to have been taken by BOP, placed in a PowerPoint, which describes the image as showing the TRULINCS "portal screen." Ex. B.10 at 83. Thus, BOP has failed to show that the screenshot was "obtained from a person." *See Elec. Privacy Info. Ctr.*, 928 F. Supp. 2d at 147.

Third, even if these records met the threshold inquiries, there is no indication that either record is customarily treated as confidential or has been actually treated as confidential by ATG. To be confidential, the owner must treat it as "private" or "secret." *See Argus Leader*, 139 S. Ct. at 2363. Not all "proprietary" information is kept secret. In the context of Exemption 4, courts have pointed to details about strict limitations on access to the information within the company as evidence that the owner actually maintains the confidentiality of its documents. *See, e.g.*, *Seife v. Food & Drug Admin.*, No. 17-cv-3960-JMF, 2020 WL 5913525, at *4 (S.D.N.Y. Oct. 6, 2020) (describing "strict confidentiality protocols" within and outside company in holding information was treated as confidential); *Am. Small Bus. League v. U.S. Dep't of Def.*, 411 F. Supp. 3d 824, 831 (N.D. Cal. 2019) (listing various security measures and protocols the company took to ensure confidentiality of records). Here, BOP states that the vendor "treats this information as confidential" and that its contract with BOP provided assurances of privacy. Lilly Decl. ¶ 33. The declaration, however, provides no information regarding the measures that ATG takes to keep the

portal screen shown in the screenshot, the User Guide, or the stated categories of information, confidential. *See* Lilly Decl. ¶¶ 31–33. This is insufficient to establish the information is actually treated as confidential within the meaning of Exemption 4. *See Seife*, WL 5913525, at *4.

Nor has BOP demonstrated that the relevant information is customarily kept confidential beyond a cursory statement, nor did Defendants provide evidence to the contrary. User guides are, by their nature, intended to be used by individuals outside of the companies that develop the related software. *See Fennell v. Navient Sols., LLC*, No. 6:17-cv-2083-Orl-37DCI, 2018 WL 7413302, at *4 (M.D. Fla. Oct. 16, 2018) ("[I]t is difficult to imagine that the excerpts from a software user manual, which is presumably commercially available, contains . . . confidential business or financial information."). The same is true for images of user interfaces like the screenshot. BOP's cursory statement that the information is customarily kept confidential, *see* Lilly Decl. ¶ 33, is unavailing.

Furthermore, the *Argus Leader* test contains an implicit assumption that the government also treats this information as confidential. *See Argus Leader*, 139 S. Ct. at 2362. But based on its own descriptions, BOP does not appear to treat either the TRULINCS User Guide or TRULINCS portal screenshot as confidential. BOP houses some 154,000 incarcerated individuals. *See About Our Agency*, Fed. Bureau of Prisons, https://www.bop.gov/about/agency/ (last accessed Dec. 3, 2020). BOP's description of the TRULINCS User Guide indicates that incarcerated individuals who can use TRULINCS have access to at least some pages in the User Guide. Lilly Decl. ¶ 39(a) (stating that "the TRULINCS User Guide represents pages of application that staff and inmates may see depending on their respective use privileges"). Similarly, the screenshot was disclosed in a PowerPoint presentation for AUSAs who are unaffiliated with BOP and who do not generally have access to TRULINCS. Lilly Decl. ¶ 35(n). Earlier in the same presentation, BOP included an

unredacted screenshot of another user interface from the TRULINCS system. Ex. B.10 at 82. This undermines BOP's assertions about the confidentiality of the information in these records.

In sum, BOP has not met its burden to justify its withholdings under Exemption 4 and the Court should order the release of these records.

B. Defendants fail to justify withholdings under Exemption 5.

BOP, the Criminal Division, and EOUSA invoked Exemption 5 for the majority of their withheld records, but their descriptions of the documents do not demonstrate the applicability of the exemption. Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 can apply to documents covered by various civil litigation privileges. *See Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 56 (D.D.C. 2014), *aff'd*, No. 15-5131, 2015 WL 9309920 (D.C. Cir. Dec. 4, 2015). Here, Defendants invoke the deliberative process privilege, the attorney work product privilege, and the attorney client privilege.[19]

1. Some records withheld under deliberative process privilege are not pre-decisional or deliberative and cannot be withheld under Exemption 5.

BOP, the Criminal Division, and EOUSA invoke the deliberative process privilege exception broadly across the records and information withheld under Exemption 5. NACDL is challenging Exemption 5 withholdings in BOP Records j and l; Criminal Division Records 1–4, 8–12, 14–22, 24, 26–28, and 31–33; and EOUSA Records 1–5, 11–13, and 15–16, 18–27. These withholdings are inappropriate because some of the records are finalized memoranda that cannot be considered "pre-decisional" or "deliberative," some are descriptive memoranda that are not

[19] NACDL is not challenging Exemption 5 withholdings for BOP Records d1, e, g1, i, k1, or k2; or Criminal Division Records 5–7, 13, 22, 25, or 29–30.

protected under the deliberative process privilege, and some do not appear to relate to a decisionmaking process.

The deliberative process privilege protects records which are "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *United States v. Nixon*, 418 U.S. 683 (1974). It is not a blank check to "develop a body of secret law . . . hidden behind a veil of privilege." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (internal quotations omitted). The deliberative process privilege justifies Exemption 5 withholdings only when records are both "deliberative" and "pre-decisional." *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991).

A deliberative communication is one that "is intended to facilitate or assist development of the agency's final position on the relevant issue." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014). To meet its burden, the "agency must establish what deliberative process is involved, and the role played by the documents in issue in the course of that process." *McKinley v. FDIC*, 268 F. Supp. 3d 234, 243 (D.D.C. 2017) (internal quotations omitted) (citing *Coastal States*, 617 F.2d at 868). The privilege "does not protect documents that merely state or explain agency decisions." *Judicial Watch, Inc. v. Dep't of Health & Human Servs.*, 27 F. Supp. 2d 240, 245 (D.D.C. 1998). Designation of a document as a "draft" is not sufficient on its own to establish that a document is deliberative. *Conservation Force*, 66 F. Supp. 3d at 60.

In addition to being deliberative, the record must be pre-decisional, meaning it was "generated before the adoption of an agency policy" and its release would "inaccurately reflect or prematurely disclose" agency policy. *Coastal States*, 617 F.2d at 866. If a deliberative record is later "adopted, formally or informally, as the agency position on an issue" or "used by the agency

in its dealings with the public," it loses deliberative process protection. *Id.*; *see also Martin v. EEOC*, 19 F. Supp. 3d 291, 307 (D.D.C. 2014).

Finalized memoranda are not "pre-decisional" or "deliberative." EOUSA invokes the deliberative process privilege to records which appear to constitute finalized memoranda acting as working law.[20] *ACLU v. NSA*, 925 F.3d 576, 598 (2d Cir. 2019) (stating that a document is working law and not covered by the deliberative process privilege when it "operates as functionally binding authority on agency decision-makers"). A number of the records withheld under the deliberative process privilege are memoranda from attorneys in ones of the USAOs to their staff or from Criminal Chiefs or their deputies to AUSAs with what appear to be finalized memoranda describing internal policies. *See*, *e.g.*, EOUSA Record 1 (withheld memo sent from Deputy Criminal Chief to AUSAs "detailing internal strategy and processes" for inmate communications); EOUSA Record 5 (same); EOUSA Record 12 (memo from Supervisory Criminal Chiefs re "prisoner email"); EOUSA Record 15 (memo on "Obtaining Jail Calls and Other Inmate Communications"); EOUSA Record 16 (E.D. Mich. Deputy Criminal Chief memo on "Procedures for Screening Jail Calls and Emails"); EOUSA Record 18 ("USA Memo to Criminal Division and National Security Division AUSAs regarding filter review protocol"); EOUSA Record 19 (memo from "AUSAs to Criminal AUSAs re Filter team protocol"); EOUSA 23 (email about "procedures for Covid measures and protecting attorney-client emails"). As these records appear to contain internal processes that are binding within the relevant USAOs, they are neither pre-decisional nor deliberative within the meaning of the deliberative process privilege. *See ACLU*, 925 F.3d at 598.

Descriptive memoranda are not protected under deliberative process privilege. The Criminal Division, and EOUSA also inappropriately withheld records under the deliberate process

[20] This argument applies to EOUSA Records 1, 5, 12, 15–16, 18–19, and 22–23.

privilege that describe, rather than deliberate about, current agency policies.[21] *See Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004) (stating that the "most basic requirement" for deliberative process privilege "is that a document be antecedent to the adoption of an agency policy"). These records cannot be pre-decisional because they post-date the adoption of the policy to which they relate and do not appear to discuss future changes. For example, the Criminal Division justifies its withholdings of these records under deliberative process privilege because the records include "a distillation of facts and information" and would "reveal their pre-decisional deliberations concerning . . . issues involved with obtaining or accessing of BOP inmate email communications . . . ." Criminal Division ("CRM") *Vaughn* Index 1–2. One of the records the Criminal Division withheld under this rationale was an "alert" that certain TRULINCS features had or had not been implemented. *See* CRM *Vaughn* Index 5 (describing CRM Record 4). As an "alert", this appears to be descriptive of the current status of TRULINCS, rather than deliberative or contributing to a policy decision. The Criminal Division also withheld documents which appear to describe the current practices or avenues for obtaining inmate email information. *See, e.g.*, CRM Record 9 (discussing "the methods for obtaining access to inmate email").[22]

Similarly, several EOUSA documents are descriptive memoranda or emails. Six records are described as memoranda "detailing internal strategy and processes."[23] Four records describe or have attached documents describing new procedures for obtaining inmate emails.[24] Two contain

[21] This argument applies to Criminal Division Records 1–4, 8–12, 14–15, 18–21, 28, and 31–33; and EOUSA Records 1, 5, 11, 15–16, 18, 20–21, and 24–26.

[22] Criminal Division Records 1–2, 3, 8–12, 14–15, 18–19, 21, 24, 26, and 31–32 similarly appear to discuss records that relate to extant policies rather than policies under consideration.

[23] EOUSA Records 1, 5, 11, 15–16, and 18.

[24] EOUSA Records 20–21 and 25–26. For documents 25 and 26, EOUSA claims that they contain "documents, including drafts, containing analysis of new BOP procedures." As the emails are from supervisors to AUSAs and the *Vaughn* index does not describe which documents are drafts or what decisionmaking process is at issue for the drafts, NACDL cannot distinguish between the "draft" documents and finalized memoranda in these records.

an "analysis of BOP procedures."[25] One is a nearly fully redacted "Circular" describing the "office's policy and guidance on the establishment and use of filter team." Ex. C.5 (EOUSA Record 22).

Neither the Criminal Division nor EOUSA demonstrated that these descriptive memoranda pre-date the finalized policy or that they contain information on a clear path to future policymaking. As these documents appear to merely provide policy descriptions, discuss best practices or current policies, or provide steps and methodology for accessing inmate emails, they are not deliberative. *Pub. Emps. for Envtl. Resp. v. EPA*, 288 F. Supp. 3d 15, 25 (D.D.C. 2017) (finding deliberative process privilege does not apply when a "record explains design choices that had already been made").

Records that do not have "function" or "significance" in a decisionmaking process are not deliberative. BOP, the Criminal Division, and EOUSA also withheld records without clear "function" or "significance" to the decisionmaking process.[26] *Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 168 (D.D.C. 2011); *see also Pub. Emps.*, 288 F. Supp. 3d at 23 (stating that a record must be a "direct part of the deliberative process" to be withheld under deliberative process privilege). Defendants' *Vaughn* indices do not establish "the nature of the decisionmaking authority vested in the office or person issuing the disputed document(s), and the positions in the chain of command of the parties to the documents." *Pub. Emps.*, 288 F. Supp. 3d at 23. In fact, from the descriptions of many documents withheld by Defendants, there is no obvious tie to any decisionmaking process at all.

[25] EOUSA Records 24–25.

[26] This argument applies to BOP Record j; Criminal Division Records 1–2, 10–12, 16, 18, 22, 24, 26, 27–28, and 31–33; and EOUSA Records 2–3, 20, 23–24, and 26–27.

BOP's Inmate Communication Monitoring Decision Paper and Criminal Division Record 16 were both withheld in full and provide no context or information about how these documents contributed to a decisionmaking process. These statements are insufficient to meet the agency's burden to demonstrate that documents are both pre-decisional and deliberative. For Criminal Division Records 26 and 27, the emails discussed actions in response to a policy change, but not how the emails fit within the Criminal Division's policy making.

Additionally, the finalized or descriptive memoranda discussed above were not described as being part of any particular decisionmaking process. This is at odds with descriptions of other withheld records. *Compare, e.g.*, CRM *Vaughn* entries for Records 1, *and* 19 (describing emails related to an undisclosed policy process), *with* CRM *Vaughn* entry for Record 30 (stating that that the emails in question contain "comments and recommendations to BOP" regarding BOP's revised rule).

For EOUSA's withholdings that are not finalized or descriptive memoranda, the record descriptions contain similar deficiencies. While three contain hints of discussions for future policy, the descriptions do not show how the records fit within a decisionmaking process. *See* EOUSA *Vaughn* entries for Records 3, 20, 24. And two records contain draft templates or procedures for AUSAs, but no description of how those guidelines relate to policymaking. *See* EOUSA *Vaughn* entries for Records 25–27.

The DOJ Book, "an internal electronic legal resource manual" that consists of compiled legal guides published on the DOJ intranet, has similar deficiencies. Ambri Decl. ¶ 7 (describing EOUSA Record 13). EOUSA Record 4 contains unspecified excerpts from the DOJ Book, and EOUSA Record 13 includes excerpts from the DOJ Book sections specific to the District of Arizona. As published, finalized resources, these records do not appear to be either pre-decisional

or deliberative. Although EOUSA asserts the deliberative process in withholding these records, it provides no explanation for how the privilege applies to them.

After a policy is final, deliberative records must be disclosed. Lastly, BOP has not established that BOP Record l did not "supply the basis for agency policy." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (finding that deliberative process does not apply to records which contributed to final policy). Indeed, the record is described as an undated "internal policy consideration tool to assess the implementation of inmate Video Conferencing across the BOP." Lilly Decl. ¶ 43(d). As video conferencing has now been implemented at BOP facilities, this decision paper likely contributed to the related policies that are now in place.

* * *

Release of these records would not "discourage candid discussion within the agency" or release agency policies prematurely. *Dudman Commc'ns Corp. v. U.S. Dep't of Air Force*, 815 F.2d 1565, 1567–68 (D.C. Cir. 1987). NACDL only challenges records that appear to describe or act as policies. Furthermore, Defendants have failed to demonstrate that release of these records would disclose the debates leading up to a policy decision. Thus, Defendants have not justified their deliberative process withholdings.

2. Defendants improperly withheld records under the attorney work product doctrine.

The attorney work product doctrine "does not extend to every written document generated by an attorney." *Shapiro v. U.S. Dep't of Justice*, 969 F. Supp. 2d 18, 29 (D.D.C. 2013) (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978)). It solely protects the "files and mental impressions of an attorney" that are "prepared in anticipation of litigation." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495 (1947). It provides no protection for records "prepared by lawyers 'in the ordinary course of business or for other nonlitigation

purposes.'" *Shapiro*, 969 F. Supp. 2d at 29 (quoting *In re Sealed Case*, 146 F.3d 881, 887 (D.C. Cir. 1998)). Furthermore, records exempted under work product doctrine must not contain "neutral accounts of government policy." *Nat'l Ass'n of Crim. Def. Lawyers v. Exec. Office for U.S. Att'ys*, 844 F.3d 246, 254 (D.C. Cir. 2016). Defendants have failed to meet their burden of showing that the relevant documents were prepared in anticipation of litigation for a substantial number of records withheld under the attorney work product doctrine.[27]

Defendants withheld records under the attorney work product doctrine that appear to consist solely of manuals and guidance without a specific litigation purpose.[28] High-level descriptions in manuals or guidance are not sufficient to show the depth of legal guidance required in order to receive work product protection. *See id.* at 256 (finding that "materials serving no cognizable adversarial function, such as policy manuals, generally would not constitute work product"); *see also Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121, 143 (D.D.C. 2013) (finding that "general standards" to guide ICE attorneys in exercise of prosecutorial discretion were not protected by work product privilege); *see also ACLU of N. Cal. v. U.S. Dep't of Justice*, 880 F.3d 473, 485 (9th Cir. 2018) (information with a non-adversarial function, such as instructions for acquiring court authorization or technical information, is not protected).

For example, both BOP and EOUSA withheld information in the DOJ Book, a manual containing guidance for DOJ attorneys, under the attorney work product doctrine. EOUSA

[27] NACDL is challenging work product doctrine withholdings in BOP Records c2, g2, and j; Criminal Division Records 1–4, 8–12, 14–21, 23-24, 26–28, and 31–33; and EOUSA Records 1–5, 12–13, 15–16, 18–19, and 21–27.

[28] The argument applies to BOP Records c2, g2, and j; Criminal Division Records 1–2, 9–12, 14, 17, 19–21, 28, and 31–32; and EOUSA Records 3–5, 13, 15–16, 18, and 23.

Records 4, 13; BOP Record R1, Ex. B.3.[29] Based on the disclosed information and the descriptions provided by EOUSA and BOP, the withheld information appears to be largely non-adversarial. For the BOP withholdings, the description of the section is unredacted and states that it discusses "common issues that arise" with BOP, "including how to obtain information relating to inmates, protocols for providing electronic discovery to incarcerated defendants, and how to arrange for proffers of incarcerated witnesses." Ex. B.3 at 25. None of that information appears adversarial, nor does it likely contain legal analysis that would impact litigation. Similarly, EOUSA's redactions cover portions of the DOJ Book "concerning protection and shielding of attorney-client emails," Jolly Decl. ¶ 10, including "guidance" about inmate emails, attorney-client communications, and "handling" the Stored Communications Act, *see* EOUSA *Vaughn* Index 2. While these records were withheld in full, it is unlikely that they contain substantially different information than the information BOP has already released. Rather than containing lists of applicable case law and legal theories for use in litigation, as was the case in a different NACDL case, *see NACDL*, 844 F.3d 246, these records appear to contain guidelines and procedures for attorneys to obtain inmate emails from BOP.

Other descriptions contain similar deficiencies. In BOP Record f, the agency withheld an email thread "discussing . . . attorney-client privilege for inmate e-mail," Lilly Decl. ¶ 35(d), but did not explain how these short emails contained sufficiently detailed litigation advice or governmental "legal theories" that would be useful in litigation. *See Coastal States*, 617 F.2d at 864; *see* Exhibit B.2. BOP's withholding of its Litigation Holds Protocols (BOP Records c2 and

[29] EOUSA's withholdings include portions of the broader manual (EOUSA Record 4) as well as District of Arizona-specific redactions (EOUSA Record 13). BOP's redactions are from Western District of Washington-specific portions of the manual. *See* Ex. B.3. It is not clear if district-specific portions are universally available to all USAOs or if each district's portion is created solely for internal use in that offices.

g2), has similar shortfalls since both consist of "staff guidance for issuing legal hold notice[s]." Lilly Decl. ¶¶ 35(a), (f).

EOUSA also withheld several memoranda describing guidelines for obtaining and screening communications, filter team protocols, descriptions of current policies, and even a memoranda detailing staff procedures for COVID-19 measures regarding protection for attorney client emails.[30] Defendants stated that these records contain "attorney . . . opinions related to proper procedures, . . . inadvertent production of attorney-client emails and ensuing filter team protocols, . . . [or] inmates communications with their attorneys" Defs.' Mem. of P. & A. 21. Alone, procedural descriptions are unlikely to be protected by work product doctrine. *See Judicial Watch v. DHS*, 926 F. Supp. 2d at 143 (stating that "general standards" on matters of prosecutorial discretion cannot be withheld under the work product doctrine because to "hold otherwise would constitute an over-broad reading . . . [that] could preclude almost all disclosure from an agency with responsibilities for law enforcement" (citations and quotation marks omitted)).

The Criminal Division similarly withheld several email chains consisting of non-adversarial guidelines for accessing inmate emails and technical descriptions of those capabilities.[31] For example, the contents of Criminal Division Records 3 and 4 are solely descriptions of TRULINCS's capabilities or BOP's programs, rather than impressions of attorneys formed in anticipation of litigation. Criminal Division Records 1–2, 14, and 20–21 contain email conversations regarding guidelines and best practices for law enforcement personnel seeking to obtain inmate emails. Criminal Division Records 9–12, 17, 19, 28, and 31–32 contain best practices for obtaining inmate emails in general, rather than just for law enforcement. Criminal

[30] This argument applies to EOUSA Records 3, 5, 12, 15–16, 18–19, and 21–27.

[31] This argument applies to Criminal Division Records 1–4, 8–12, 14–15, 17–21, 24, 26–28, and 31–33.

Division Records 24 and 26–27 discuss policies and the steps needed to inform AUSAs about their implementation. In its justifications for withholding all of these records under the attorney work product doctrine, the Criminal Division simply states that they discuss "subjects such as . . . applicable statutory and/or case law related to the issue of how a federal prosecutor would proceed in order to obtain BOP inmate email communications . . . ." Decl. of John Cunningham ("Cunningham Decl.") ¶ 25. It does not describe the intention to use this analysis in litigation or as a legal strategy. The Criminal Division also states that these email chains were prepared due to "the possibility of litigation . . . in connection with an underlying federal criminal investigation and/or subsequent prosecution," Defs.' Mem. of P. & A 20, but this statement is not sufficient to establish work product doctrine protection. The documents themselves do not appear to be prepared with the anticipation that the contents will be used to litigate inmate email acquisitions, only that the guidelines will be used to acquire inmate communications in connection with litigation.

Without demonstrating any litigation purposes for these withheld documents beyond neutral legal guidance, the agencies have not met their burden under the work product privilege.

3. Defendants fail to establish that the attorney-client privilege applies to records withheld under Exemption 5.

In the FOIA context, attorney-client privilege covers records that: (1) are communications between an attorney and a client, which can mean between agency employees and agency counsel; (2) contain legal advice; and (3) have been kept confidential. *See Fisher v. United States*, 425 U.S. 391, 403 (1976); *Coastal States*, 617 F.2d at 862 (explaining that attorney-client privilege exists "to assure that a client's confidences to his or her attorney will be protected, and therefore encourage clients to be as open and honest as possible with attorneys"). Communications are between an agency employee and their lawyer for the purposes of obtaining legal advice when

"the government is dealing with its attorneys as would any private party seeking advice to protect personal interests." *Coastal States*, 617 F.2d at 863 (finding that attorney-client privilege applies to "counseling . . . intended to assist the agency in protecting its interests" rather than "question and answer guidelines which might be found in an agency manual"). Furthermore, for such records to be considered confidential, the communications must stay between the attorney and a limited group of employees receiving the legal advice. *See id.* (indicating attorney-client privilege does not apply to legal materials that are widely shared within an agency).

NACDL challenges withholdings under attorney client privilege for two related records: EOUSA's DOJ Book withholdings in EOUSA Record 4 and 13. As described above, the DOJ Book is the "Department of Justice's internal electronic legal resource manual." Ambri Decl. ¶ 7. EOUSA contends that the DOJ Book contains "confidential . . . communications regarding possible AUSA access of prisoner email communications." Jolly Decl. ¶ 12. EOUSA stated that the DOJ Book was "created by DOJ attorneys for internal use by DOJ attorneys." *Id*. But it does not indicate that there was an attorney-client relationship between the authors of the DOJ Book and those who have access to it. It is unlikely that the unnamed attorneys who authored this guide have an attorney-client relationship with countless other unknown attorneys across the country. Additionally, there is no indication that the authors are in communication with the AUSAs using the DOJ Book.

Likewise, EOUSA has not shown that the withheld information in the DOJ book constitutes legal advice. *See In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (stating that agencies can only establish attorney-client privilege for communications with "the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding"). It appears that the DOJ Book consists of summaries of "common issues that arise"

out of access to inmate communications, Ex. B.3, which is insufficient to show the material is legal advice, *see id.*

Finally, EOUSA does not demonstrate that its withholdings of the DOJ Book in EOUSA Record 4 or 13 consist of material that is kept confidential for the purposes of attorney-client privilege. EOUSA implies the "client" in this relationship is the DOJ attorneys with access to this information, but fails to show how the information was restricted in a way to preserve confidentiality. *See Coastal States*, 617 F.2d at 863 (indicating that attorney-client privilege extends only to members "of an organization who are authorized to speak or act for the organization in relation to the subject matter of the communication"). Since the DOJ Book has been published on DOJ's intranet, *see* EOUSA Vaughn *Index* entry for Record 4, and the District of Arizona-specific withholdings are available to an undisclosed number of individuals within that office, EOUSA has not established how the records have been kept confidential within the meaning of attorney-client privilege. *Coastal States*, 617 F.2d at 863.

EOUSA has made no arguments that the AUSAs have the requisite attorney-client relationship, nor has it provided any indication that the DOJ Book meets the confidentiality required to maintain privilege. As such, EOUSA has failed to establish that the DOJ Book is a communication between an attorney and a client for legal advice, and that it was kept confidential.

C. BOP improperly withheld information under Exemption 7(E) and 7(F).

To withhold records under Exemption 7, agencies must first show that the responsive records are "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989). Even if records meet this threshold requirement, the withheld information must fall within one of six enumerated subsections. 5 U.S.C. § 552(b)(7). Relevant to this case are Exemption 7(E) and 7(F), which permit the withholding of information

which increases risks of circumvention of law or physical harm. *See id.* at §§ (b)(7)(E), (F). NACDL challenges BOP's withholdings of two records under these exemptions: the Special Investigative Supervisors Manual ("SIS Manual") (BOP Records a-b), *see* Ex. B.1, and the Inmate Communication Monitoring Decision Paper (BOP Record l).[32] As explained below, BOP has failed to justify these withholdings.

1. BOP failed to justify its withholdings under Exemption 7(E).

Exemption 7(E) permits the withholding of law enforcement records containing "techniques and procedures" or "guidelines" for law enforcement investigations or prosecutions, if agencies show that disclosure "might create a risk of circumvention." 5 U.S.C. § 552(b)(7)(E); *see also Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). Regardless of whether the records contain "techniques and procedures" or "guidelines," agencies must "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (internal quotations omitted). To do so, agencies must provide "1) a description of the technique or procedure at issue, 2) a reasonably detailed explanation of the context in which the technique is used, 3) an exploration of why the technique or procedure is not generally known to the public, and 4) an assessment of the way in which individuals could possibly circumvent the law if the information were disclosed." *Nat'l Pub. Radio, Inc. v. FBI*, No. 1:18-cv-3066-CJN, 2020 WL 5095526, at *7 (D.D.C. Aug. 28, 2020) (alterations and citation omitted). BOP's justifications for withholding the SIS Manual and the Inmate Communication Monitoring Decision Paper under Exemption 7(E) fail for three reasons.

[32] NACDL is not challenging the following records under Exemption 7: BOP Records c1 or d2. NACDL discusses concerns about the withholdings in R1 and R2 in Part II.D, *infra*.

First, BOP does not meaningfully describe the techniques or procedures at issue, nor the context in which the techniques are used. For the SIS Manual, BOP provides one paragraph in its declaration to explain the applicability of both exemptions 7(E) and 7(F).[33] Lilly Decl. ¶ 44(a). The released pages span three different chapters and seven sections covering distinct and unrelated topics. To justify these withholdings, the Lilly Declaration asserts that the manual contains "critical components of . . . investigatory techniques," the release of which would undermine the effectiveness of internal investigations. *Id*. To meet their burden, agencies must provide at least "*some* explanation of what procedures are involved and how they would be disclosed." *CREW*, 746 F.3d at 1102. Since the SIS contains a broad range of subject matters, as evidenced in its table of contents, *see* Ex. B.1 at 7–8, using one example to justify these redactions is insufficient.

For the Inmate Communication Monitoring Decision Paper, BOP states that Exemption 7(E) was applied to "limit information concerning the percentage of telephone calls and other communications monitored by the BOP." Lilly Decl. ¶ 44, 4th subpara. It further states that the information is a law enforcement technique and that it risks circumvention of the law. However, these "near verbatim recitation[s] of the statutory standard" are not sufficient to demonstrate how these percentages are a technique, procedure, or a guideline within the meaning of Exemption 7(E). *CREW*, 746 F.3d at 1102.

Second, BOP has not differentiated the information withheld in the redactions from that which is publicly available. In March 2020, the Office of the Inspector General released an "Audit of the Federal Bureau of Prisons' Monitoring of Inmate Communications to Prevent Radicalization" ("the Audit"). *See* Office of the Inspector Gen., Dep't of Justice, *Audit of the*

[33] The release of the SIS Manual was recently at issue in *Allen v. Department of Justice*. No. 17-cv-1197-CKK, 2020 WL 474526, at *6–7 (D.D.C. Jan. 29, 2020). There, the court relied on the declarations to find that 7(E) and 7(F) withholdings were proper. *Id.* However, as the withholdings were not contested in that case, *see id.*, this Court should conduct an independent assessment.

Federal Bureau of Prisons' Monitoring of Inmate Communications to Prevent Radicalization (Mar. 2020), https://www.oversight.gov/sites/default/files/oig-reports/a20042.pdf. This record is publicly available and was produced to NACDL by the EOUSA on September 15, 2020. It contains seventeen pages of in-depth descriptions and analysis of investigatory techniques, procedures, and guidelines used by BOP for monitoring inmate communications. *Id.* at 18–35. The Audit even quotes the SIS Manual and discusses the changes to communications monitoring required in its 2016 update, the exact redacted record at issue. *Id.* at 18. The Audit also notes that BOP acknowledged and implemented changes after the release of the Audit. *Id.* at 58. Finally, the Audit contains detailed percentages of email and telephone communications monitored by BOP between 2015 and 2018 in charts. *Id.* at 23, 29–33. In the context of the SIS Manual, neither the Lilly Declaration nor the Defendants' brief addresses the possibility that this information may be generally known by or available to the public.

For the Inmate Communication Monitoring Decision Paper, it is unclear how the redacted percentages of monitored communications are different from what is publicly known. The Audit report contained six highly detailed charts, spanning from 2015 to 2018, regarding this exact sort of information. *Id.* at 23, 29–33. It contains both exact numbers and percentages of communications monitored in the same facilities. *Id*. Based on the availability of the Audit, these BOP's descriptions are insufficient to address this prong of the Exemption 7(E) analysis.

Third, BOP does not demonstrate that disclosure of this information would create a risk of circumvention of the law. In its justification for withholding portions of the SIS Manual under Exemption 7(E), BOP recites the statutory language and claims that the exposure of the information would create a "significant risk" of "witness contamination" or could "allow inmates to circumvent internal law enforcement investigations in BOP facilities." Lilly Decl. ¶ 44(a). But

there is no indication that every Exemption 7(E) redaction in the SIS Manual is related to a risk of witness contamination or circumvention of BOP investigations. For example, the declaration does not indicate how information about confidential informants or witness contamination applies to the withholding of information about the "Electronic Messaging System." Ex. B.1 at 18–19.

BOP's justification for withholding the Inmate Communication Monitoring Decision Paper is an equally inadequate recitation that the disclosure of the percentages of communications monitoring would "allow inmates to circumvent internal law enforcement investigations in BOP facilities by revealing how BOP collects information." Lilly Decl. ¶ 44, 4th subpara. These boilerplate justifications are not sufficient to demonstrate that the information in either record would risk circumvention of the law. *See CREW*, 746 F.3d at 1101 (stating that boilerplate justifications "will not do" to justify withholdings).

For these reasons, BOP has not met its burden to demonstrate that either document is properly withheld under Exemption 7(E). *See Mayer Brown*, 562 F.3d at 1193.

2. BOP failed to justify its withholdings under Exemption 7(F).

BOP's redactions in two records—the SIS Manual and the Inmate Communication Monitoring Decision Paper—are also improper under Exemption 7(F). This exemption protects law enforcement records where disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). At a minimum, the agency must show a "reasonable expectation" of endangerment. *Pub. Emps. for Envtl. Resp. v. U.S. Sec., Int'l Boundary & Water Comm'n, U.S.-Mex.*, 740 F.3d 195, 205 (D.C. Cir. 2014). Exemption 7(F) can justify withholding information when there is a "nexus between disclosure and possible harm." *Antonelli v. Fed. Bureau of Prisons*, 623 F. Supp. 2d 55, 58 (D.D.C. 2009).

Like other exemptions, Exemption 7(F) cannot be justified with conclusory recitations of the law. *Petrucelli v. Dep't of Justice*, 51 F. Supp. 3d 142, 173 (D.D.C. 2014). However, BOP

relied solely on such conclusory recitations in its declaration to justify its Exemption 7(F) withholdings. Regarding the SIS Manual, BOP made the statement that "members of the general public will be subject to risks of physical violence or may be exposed to injury as a result of the release of this information." Lilly Decl. ¶ 44(a). Similarly, BOP attempts to justify withholding percentages in the Decision Paper by stating that "inmates and members of the general public will be subject to risks of physical violence or . . . to injury as a result of intentional damage to government property." Neither justification describes a logical pathway for the redacted information to lead to endangerment. *See Petrucelli*, 51 F. Supp. 3d at 173.

In sum, BOP has failed to establish that Exemption 7(E) or 7(F) applies to either record.

D. Defendants provided inadequate *Vaughn* indices that omit individualized descriptions of certain withheld documents.

The moment a FOIA request is submitted, the requestor "faces asymmetrical distribution of knowledge" as only the agencies "possesses, reviews, discloses, and withholds the subject matter of the request." *Judicial Watch v. FDA*, 449 F.3d at 146. The purpose of a *Vaughn* index is to remedy this asymmetry without compromising justifiable withholdings. *Id.* Thus, while the FOIA does not dictate the specific format of the government's explanations, an agency must submit *something* to justify its withholdings. *See, e.g., Tax Analysts v. IRS*, 410 F.3d 715, 720 (D.C. Cir. 2005) (indicating district court did not abuse its discretion in tailoring submissions of justifications for withholdings to complexity of issues in FOIA case). Here, Defendants have wholly omitted descriptions of some withheld records in their *Vaughn* indices.[34] Without

[34] BOP's declaration fails to discuss forty-nine pages withheld in full in BOP's 3/21/2019 production; and an email with a redacted subject dated March 20, 2020, Ex. B.8, an email with the subject "FDC Changes in EDiscovery Distribution and Information Regarding FDC SeaTac Pretrial Inmate Computers," Ex. B.6, and an email with the subject "USAO slideshow presentation," Ex. B.5, all disclosed in BOP 8/31/2020 production. The Criminal Division's

providing this information, Defendants cannot meet their burden on summary judgment. *See, e.g.*, *Judicial Watch v. FDA*, 449 F.3d at 146; *Elec. Privacy Info. Ctr.*, 928 F. Supp. 2d at 144.

Additionally, *Vaughn* indices must "adequately describe the withheld documents or deletions" and "state the particular FOIA exemption, and explain why the exemption applies." *Schoenman*, 604 F. Supp. 2d at 196 (citation omitted). The description must "specifically identif[y] the reasons why a particular exemption is relevant and correlat[e] those claims with the particular part of a withheld document to which they apply." *Judicial Watch v. FDA*, 449 F.3d at 146.

Some of Defendants' *Vaughn* indices fail to meet these standards. Some records lack *Vaughn* entries entirely, while other entries omit descriptions of asserted exemptions.

First, Defendants' *Vaughn* indices and declarations improperly conflated disparate records to a point that the descriptions are impossible to parse. For example, BOP combined its descriptions of two completely different PowerPoints by merging them into one document, BOP Record R2. *See* Ex. B.9 (undated PowerPoint on "Obtaining Records and Information from MDC-LA"); Ex. B.10 (June 24, 2011 PowerPoint on "Law Enforcement Requests for Records and Discovery"). BOP's description of the two PowerPoints does not differentiate between the two. *See* Lilly Decl. ¶¶ 32, 35(m), 39(n), 43(f), 44(d) (all describing BOP Records R2). However, one description erroneously attributed these PowerPoints to FDC SeaTac, mistakenly referencing a third PowerPoint, *see* Ex. B.4, while both R2 PowerPoints were created in the Central District of California, *see* Exs. B.9–10.

declaration fails to discuss eleven pages withheld in full in the Criminal Division's 8/30/19 production and eighty-seven pages withheld in full in the Criminal Division's 9/24/19 production. EOUSA's declaration fails to discuss fifteen pages withheld in full in EOUSA's 6/12/19 production; eight pages withheld in full in District of Colorado's 9/4/20 production; three pages withheld in full in District of Puerto Rico's 9/11/20 production; two pages withheld in full in Eastern District of Michigan's 10/9/20 production; and two pages withheld in full in Southern District of Florida's 10/27/20 production.

Second, BOP and EOUSA did not provide justifications for the application of certain exemptions for several documents in their *Vaughn* indices. For EOUSA Records 6 and 9, both withheld in full, the *Vaughn* index states that withholdings are solely pursuant to Exemptions 6 and 7(C), but the declaration and brief state that the withholdings are also pursuant to Exemption 5. Without clarification on these withholdings, NACDL cannot determine the applicability of the exemptions. For the DOJ Book (BOP Record R1) and for the two PowerPoint presentations (BOP Record R2), the BOP *Vaughn* index did not provide a justification for Exemption 7(F) redactions. *See* Lilly Decl. ¶ 44, 5th subpara. Finally, BOP did not provide any explanation for its redactions under Exemptions 5, 7(E), or 7(F) in the FDC SeaTAC PowerPoint presentation, produced on May 21, 2020. Ex. B.4.

In addition, descriptions of several documents applying Exemption 5 did not provide sufficient information to assess the applicability of the named privileges. For example, Criminal Division Record 16 names withholdings under attorney work product privilege but only provides a deliberative process privilege explanation. EOUSA also provided threadbare descriptions for some of its documents, including EOUSA Record 11, where the description merely states that it "withheld emails detailing internal strategy and analysis" that were protected by the work product doctrine. Similarly, for EOUSA Record 17, the description states "withheld content draft AUSA template because it is protected by the deliberative process and attorney work product privileges." These records are all withheld in full, so the descriptions are too conclusory to satisfy the agencies' obligations under the FOIA.

E. Defendants did not provide all reasonably segregable information.

Regardless of the exemption invoked, agencies must disclose any reasonable segregable portion of a record. *See* 5 U.S.C. § 552(a)(8)(A)(ii); *see also Judicial Watch v. USPS*, 297 F. Supp.

2d at 257 (indicating agencies must conduct a segregability analysis to "distinguish exempt from non-exempt material within each document"); *Vaughn*, 484 F.2d at 825 (stating that a full record is not exempt "merely because an isolated portion need not be disclosed"). Agencies must do more than provide "conclusory statements to demonstrate that all reasonably segregable information has been released." *Valfells v. CIA*, 717 F. Supp. 2d 110, 120 (D.D.C. 2010); *Stotter v. U.S. Agency for Int'l Dev.*, No. 14-cv-2156-KBJ, 2020 WL 5878033, at *6 (D.D.C. Oct. 3, 2020). "Non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 583 (D.C. Cir. 2020) (alteration omitted) (quoting *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). Particularly for records withheld in full, agencies "must provide a detailed justification for the withheld information's non-segregability." *Stotter*, 2020 WL 5878033, at *6.

BOP, the Criminal Division, and EOUSA failed to adequately justify their segregability analyses in their declarations and *Vaughn* indices. All three include boilerplate segregability language about the challenged records. *See, e.g.*, Lilly Decl. ¶ 29; Cunningham Decl. ¶ 41; Jolly Decl. ¶ 11. But, as discussed above, BOP's redactions in the SIS Manual are poorly explained, undercutting the agency's assertion that all reasonably segregable material has been released. Additionally, the Criminal Division withheld every single email chain in full, but those records all contain inherently at least the segregable information that is disclosed in the *Vaughn* index, such as the subject lines, dates, attachment names, and the disclosed names of senders and recipients.[35] The Criminal Division provides no justification for why this information is not segregable. BOP

[35] This argument applies to Criminal Division Records 1–34.

and EOUSA also redacted entire emails while disclosing segregable information in their *Vaughn* indices and declarations.[36]

NACDL respectfully requests that the Court conduct an *in camera* review of these records to ensure that Defendants released all reasonably segregable material. *See Mays v. Drug Enf't Admin.*, 234 F.3d 1324, 1328 (D.C. Cir. 2000) (indicating *in camera* review is proper where the record does not adequately establish all segregable material has been released).

F. EOUSA and BOP improperly redacted "non-responsive" information within responsive records.

It is well-established that agencies cannot withhold "non-responsive" information within responsive records. *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016). In other words, "a single record cannot be split into responsive and non-responsive bits." *Parker v. U.S. Dep't of Justice*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Only when the document contains such significant delineations that each section could be read and understood alone can its contents contain separate records. *See Shapiro v. CIA*, 247 F. Supp. 3d 53, 73–75 (D.D.C. 2017) (indicating that where chapters of books or sections of manuals can be understood as standalone records, agencies can withhold other non-responsive chapters or sections); *see also Inst. for Policy Studies v. CIA*, 388 F. Supp. 3d 51, 53–54 (D.D.C. 2019) (stating that agencies cannot "cleave[] records into individual sentences or paragraphs" to withhold non-responsive information). The "term 'agency records' should not be manipulated to avoid the basic structure of the FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies." *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1494 (D.C. Cir. 1984).

[36] This argument applies to BOP Record g1; the twenty-four pages of emails withheld in full in BOP Record j; and EOUSA Records 2, 11, 15, 20, and 24–27.

EOUSA improperly withheld "non-responsive" information within its disclosed records. EOUSA Record 22 contains gray boxes labeled "nonresponsive" on two pages, which appear to cover specific paragraphs. *See* Ex. C.5 at 14, 17. Similarly, EOUSA states that the Exemption 5 withholdings in the record "Email - Subject: A few items (October 19, 2017)" should instead say "non-responsive." Jolly Decl. ¶ 8 n.5. And a chart from Northern District of Illinois also appears to contain substantial "non-responsive" withholdings. *See* Ex. C.10 (showing only one row in a spreadsheet with unjustified redactions on either side of disclosed material). The purported non-responsiveness of the underlying material is the only justification provided for these redactions. "Non-responsive" withholdings also exist in the SIS Manual, where NACDL received only nineteen of at least sixty-seven pages of the manual because the other pages are allegedly non-responsive. *See* Lilly Decl. ¶ 26 (indicating SIS Manual is sixty-seven pages long).

Such withholdings of purportedly non-responsive material are improper. *See Am. Immigration Lawyers*, 830 F.3d at 677. Therefore, NACDL requests that this Court order disclosure of the "non-responsive" material within responsive records.

CONCLUSION

Based on the foregoing reasons, the Court should deny Defendants' motion for summary judgment and enter summary judgment in NACDL's favor.

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Respectfully submitted,

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