

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL )  
DEFENSE LAWYERS )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FEDERAL BUREAU OF PRISONS, ET AL. )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil Action No. 18-cv-02399 (KBJ)

**SUPPLEMENTAL DECLARATION OF VINAY J. JOLLY**

I, Vinay J. Jolly, declare the following to be a true and correct statement of facts:

1. I am an Attorney Advisor with the Executive Office for United States Attorneys ("EOUSA"), United States Department of Justice ("DOJ"). I am assigned to the component of EOUSA designated to administer the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, amended by the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, and the Privacy Act of 1974 ("PA"), 5 U.S.C. §552a. In that capacity, my responsibilities include the following: acting as liaison with other divisions and offices of the DOJ in responding to requests and litigation filed under both the FOIA/PA; reviewing FOIA/PA requests for access to records located in this office and the ninety-four United States Attorneys' Offices ("USAOs") and the case files arising therefrom; reviewing correspondence related to requests; reviewing of searches conducted in response to requests; locating responsive records; and preparing EOUSA responses thereto to ensure that determinations to withhold or release such responsive records are in

accordance with FOIA, PA, and Department of Justice regulations (28 C.F.R. §§16.3 et seq. and §§16.40 et seq.).

2. As an Attorney Advisor of the FOIA/PA Unit, EOUSA, I have the authority to release and withhold records requested under the FOIA/PA. The statements I make in this Supplemental Declaration are based upon my review of the official files and records of EOUSA, my own personal knowledge, and information acquired by me through the performance of my official duties.

3. Due to the nature of my official duties, I am familiar with the procedures followed by this office in responding to the FOIA requests made to EOUSA by Plaintiff. This Supplemental Declaration is being submitted in support of Defendant's Reply to its Motion for Summary Judgment and in opposition to Plaintiff's Motion.

#### **ADEQUACY OF THE SEARCH**

4. After receiving Plaintiff's request, EOUSA undertook the search for documents responsive to Plaintiff's FOIA request for the 27 districts. Following the receipt of potentially responsive records from the districts, EOUSA reviewed all records and released all non-exempt records.<sup>1</sup> The FOIA Contacts in each USAO, in consultation with all relevant personnel in the USAO, are deemed the most knowledgeable about their USAO recordkeeping practices, including locations and organization of files, both physical and digital records as well as electronic folder

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<sup>1</sup> By agreement between counsel on September 4, 2020, standard AUSA requests for emails from specific criminal cases untethered to policy were deemed nonresponsive. As such, there were no supplemental responses from the USAO-Massachusetts and Eastern District of Virginia as no records were determined to be responsive by EOUSA. Similarly, EOUSA did not reproduce records that were duplicative of records produced and/or otherwise already withheld.

file paths, and the best methods to search for records.<sup>2 3</sup> It is EOUSA's practice that each USAO conducts manual and electronic searches to search for all potentially responsive records.<sup>4</sup> In areas where additional explanation is needed regarding USAO searches, EOUSA secured supplemental declarations, confirmed with the USAOs that all locations were searched, or otherwise explained its handling of records found in the USAOs.<sup>5</sup> Each USAO used search terms from the FOIA request and did not narrowly tailor the search. Furthermore, the USAO searches were for any *written* records in the USAOs' possession, for which is the main purview of the FOIA. The

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<sup>2</sup> The USAO for the Eastern District of Michigan ("USAO-MIE") submitted all potentially responsive records to EOUSA in February 2019. EOUSA in turn described the withheld records on EOUSA's *Vaughn* Index as Documents 1 and 5. The USAO-MIE located an additional document, the December 16, 2019 Benjamin Coats memo on September 2020, and EOUSA withheld it as Document 16 on its *Vaughn* Index. The USAO-MIE did not describe in its declaration each document it provided to EOUSA and included all relevant documents for EOUSA to review, whether responsive or not, out of an abundance of caution. *See* Plaintiff's Cross Motion for Summary Judgment, Points and Authorities (hereinafter "Cross Motion") at 11-12.

<sup>3</sup> In the USAO for the Northern District of Illinois ("ILN"), EOUSA has confirmed that the file path Plaintiff discusses in its Cross Motion, at 15-16, was indeed searched. *See* Declaration annexed hereto.

<sup>4</sup> The USAO for the Eastern District of Pennsylvania ("USAO-PAE") searched for manual and electronic files such as the Sharepoint page, as well as provided the search terms used (Paragraphs 11, 16 and 18 of Declaration of Beverly Brown). EOUSA released all relevant non-exempt documents according to the FOIA request, included related records about policies. As such, for the USAO-PAE and for the USAO for the Southern District of New York, a few additional documents were located that *related* to USAO filter team policy rather than the policy itself. (See USAO-PAE withheld emails and memoranda as Documents 2-3 and 8 on the *Vaughn* Index).

<sup>5</sup> The USAO for the District of Colorado ("USAO-CO") has now submitted a supplemental declaration annexed hereto explaining the search terms and methods used for three AUSAs who conducted searches. *See* Cross Motion at 9. EOUSA submitted a supplemental response to the Plaintiff on September 4, 2020. EOUSA released responsive records from the USAO-Western District of Washington to the Plaintiff. Moreover, the requested letter template is listed as Document 17 on the *Vaughn* Index. *See* Cross Motion at 16-17. In addition, on October 27, 2020, EOUSA provided Plaintiff a supplemental response from the USAO-Southern District of Florida ("USAO-FLS").

policies sought by Plaintiff are comprised of a relatively small pool of records, and moreover, these policies are not uniform across the USAOs. The FOIA Contacts for each USAO that is the subject of this litigation have already attested in their Declarations that they are aware of no other locations within the USAO where other responsive records may exist.<sup>6</sup> As such, any additional searches are not warranted and would not be productive.

**JUSTIFICATION FOR NON-DISCLOSURE UNDER THE FOIA**

**EXEMPTION 5 U.S.C. §552(b)(5)**

**PRIVILEGED INFORMATION**

5. EOUSA invoked the attorney work-product privilege to protect records or portions of these records that are AUSA impressions and analysis relating to proper procedures to seek prisoner email, inadvertent production of attorney-client emails and ensuing filter team protocols, as well AUSA evaluations and opinions relating to inmate communications with their attorneys.<sup>7</sup> As such, EOUSA protected the documents described in the *Vaughn* Index, including internal USAO memoranda in Documents 1, 5, 12, 15-16, and 18-19. In particular, Document 12 is memorandum written by a line AUSA to his Supervisor containing legal analysis regarding prisoner emails and invocation of attorney-client privileges issues. Document 19 is a memorandum written by an AUSA in the USAO-WAW regarding handling of filter team emails inadvertently received and guidance to the criminal AUSAs on the proper steps to take following such receipt. Similarly, EOUSA invoked Exemption 5, attorney work product as well as attorney-

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<sup>6</sup> For example, the Civil Chief for the USAO-District of Arizona has stated in his Declaration that the Division Chiefs and multiple appropriate AUSAs with knowledge of the USAO's practices searched their paper and electronic files, and that there are no other places within the USAO where any additional responsive records to the FOIA request would be located.

<sup>7</sup> It is worth noting that the vast majority of Plaintiff's objections to documents withheld by EOUSA were not included in its Amended Complaint.

client privileges, to protect Documents 4 and 13, the DOJ Book, internal guidance for DOJ prosecutors that are authored by criminal working groups for AUSA prosecutions, and in anticipation of legal challenges for and uses in federal cases including litigation strategies. The DOJ Book, located on the intranet, the agency's internal website for the AUSA community, is confidential and cannot be accessed by the public. For all of the documents withheld, release of this information would provide the requester with the scope of the government's thinking by setting forth where the government sought develop policies, how the government developed its practices, and who the government relied upon to develop procedures for federal cases. Furthermore, for the documents listed on the *Vaughn* Index, the documents also contain strategy, possible courses of action in the USAO for legal cases, anticipated challenges, and are protected by the deliberative process privilege.<sup>8</sup>

6. Moreover, with respect to Footnote 34 of the Cross Motion, EOUSA has adequately described and accounted for all of these records. Document 22 on the *Vaughn* Index (the Circular from the USAO-FLS) was already released in part to the Plaintiff on October 27, 2020. The three

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<sup>8</sup> Document 23 is an intra-office AUSAs from the USAO-WAW discussion on how to treat inmate email communications during Covid including proposed procedures for the USAO to follow for criminal cases. Document 24 is an internal AUSA to AUSA email communication contemplating a response to the Deputy Director's inquiry on email screening procedures, including AUSA opinion on USAO handling of privileged communications. Similarly, Document 25 are internal USAO-WAW emails concerning possible action in the USAO after Federal Detention Center changes to requesting emails. Document 26 is an internal AUSA to AUSA email containing draft, proposed USAO-WAW templates for obtaining inmate emails and calls for possible adoption, including solicitation of AUSA input in formalizing such procedures. In addition, Document 27 contains the USAO-WAW templates, including draft changes, for filter teams and proposed protocol for procedures for the USAO when encountering potential privileged material. Documents 2 and 3 contain legal analysis and future action to be taken in the USAO-PAE, and invitation for discussion of such action, in light of BOP email policy change. EOUSA is dropping its assertion for deliberative process privilege for DOJ Book, namely Items 4 and 13 of its *Vaughn* Index, as well as for items 1, 5, 15-16, 18, 20, and 22 of its *Vaughn* Index.

pages of emails withheld for the USAO-District of Puerto Rico consist of confidential emails dated July 31, 2020 to August 19, 2020, between an AUSA and the DOJ Professional Attorney Responsibility Office regarding inadvertent viewing by an FBI agent of an inmate's emails with his/her attorney. This document was not included on the *Vaughn* Index as per agreement of counsel, whereas requests for inmate email pertaining to specific criminal cases were deemed nonresponsive. In any case, this material is clear attorney-client privileged material, work product, and contains third party information, all protected by FOIA exemptions 5, 6, and 7C.<sup>9</sup> For the USAO-MIE, the four pages withheld on October 9, 2020, were the December 16, 2019 Benjamin Coats memo, described in the Declaration from the USAO-MIE and *Vaughn* Index at 16. That memo from the Deputy Criminal Chief to criminal AUSAs contains legal analysis of the 6<sup>th</sup> Amendment, filter team processes, and addressed Professional Responsibility issues that may arise in criminal cases, and is protected by the attorney work-product privilege, Exemption b5. For the USAO-CO, the eight pages withheld on September 4, 2020, were emails between AUSAs and BOP regarding emails in a particular criminal case and were also referred to the BOP.<sup>10</sup>

7. For Item 22 on the *Vaughn* Index, released in part to the Plaintiff, EOUSA is removing the nonresponsive designations and replacing them with the b5 attorney work-product exemption. The Circular contains attorney analysis on the use of collateral investigations for filter teams and need to contact the Office of Professional Responsibility for the USAO-FLS. Furthermore, with respect to the document released in part from the USAO-ILN, the nonresponsive designations are being replaced with the b5 attorney work-product exemption, as the information concerns

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<sup>9</sup> Plaintiff has agreed not to challenge the search conducted in the USAO-Puerto Rico.

<sup>10</sup> Upon referral to the BOP, the BOP ultimately treated these emails between EOUSA and BOP as a consult. Per agreement of counsel for requests relating to inmate emails in specific criminal cases, these documents should no longer be considered responsive.

attorney analysis regarding prisoner recordings. For the October 19, 2017 USAO-NYE Document with subject “Email - Subject: A few items”, which was previously released in part, EOUSA is now releasing hereto the previous relevant withheld portions of the document. *See* Cross Motion at 44-45.<sup>11</sup>

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<sup>11</sup> With respect to Plaintiff’s challenges to Documents 6 and 9 on EOUSA’s *Vaughn* Index, *See* Cross Motion at 42, these documents were released in part not withheld in full.

SEGREGABILITY OF NON-EXEMPT INFORMATION

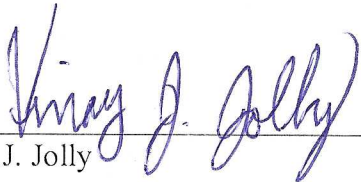
8. Each document was evaluated to determine if any information could be segregated and released. EOUSA has segregated and released the non-exempt responsive records to Plaintiff. All of the remaining records falls within one or more of the exemptions set forth above and are not segregable without revealing this protected information. The documents withheld in their entirety contained no meaningful portion that could be released without destroying the integrity of the documents, causing foreseeable harm, or without disclosing third-party privacy interests.

CONCLUSION

9. Each step in the handling of Plaintiff's request has been entirely consistent with the EOUSA's procedures adopted to ensure an equitable response to all persons seeking access to records under the FOIA/PA. Thus, the EOUSA has properly responded to Plaintiff's FOIA request.

I declare under penalty of perjury that the foregoing is true and correct and that Attachments hereto are true and correct copies.

Executed on DECEMBER 18<sup>TH</sup> 2020.

  
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Vinay J. Jolly  
Attorney Advisor  
EOUSA, FOIA/PA Unit



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL	)	
DEFENSE LAWYERS	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 18-cv-02399
	)	(KBJ)
	)	
FEDERAL BUREAU OF PRISONS, ET AL.	)	
	)	
Defendant.	)	

SUPPLEMENTAL DECLARATION OF MERLE A. PAYNE

I, Merle A. Payne declare as follows:

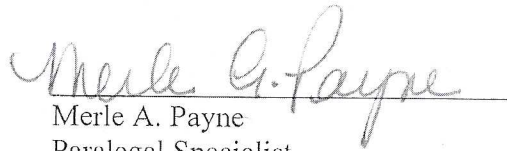
1. I am currently a Paralegal Specialist in the Criminal Division of the United States Attorneys Office for the Northern District of Illinois (“USAO/NDIL”). My responsibilities include serving as the FOIA Coordinator (“liaison”) to the Freedom of Information Act and Privacy Act Staff (“FOIA/PA”) for the Executive Office of the United States Attorneys (“EOUSA”) in Washington, D.C.

2. The purpose of this Supplemental declaration is to clarify the search performed in the NDIL.

3. NDIL did search the folder crimbank/narcotics/BOP-MCC Issues/Prisoner Email Accounts and provided responsive records to EOUSA on February 7, 2019. Amber Baker Mills, conducted the search and located documents from that folder which include pdfs: the 2-17-12 Email and Glockner 9-16-10 Email. Additional potentially responsive records were located.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 11<sup>th</sup> day of December 2020.

A handwritten signature in cursive script that reads "Merle A. Payne". The signature is written in black ink and is positioned above a horizontal line.

Merle A. Payne  
Paralegal Specialist  
USAO NDIL

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL )  
DEFENSE LAWYERS )

Plaintiff, )

v. )

Civil Action No. 18-cv-02399 (KBJ)

FEDERAL BUREAU OF PRISONS, ET AL. )

Defendant. )

SUPPLEMENTAL DECLARATION OF TERESA ROBINSON

I, Teresa Robinson, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me from official records and other personnel during the course of my employment, hereby declare as follows relating to the above-titled matter:

1. I am a Paralegal Specialist for the Civil Division of the United States Attorney’s Office for the District of Colorado (“USACO”). Since approximately April 2016, my duties have included serving as the Freedom of Information Act/Privacy Act (“FOIA//PA”) Coordinator for the USACO Civil Division. I later became the FOIA//PA Coordinator for both the USACO Civil and Criminal Divisions. My responsibilities in this position include coordinating with the Executive Office for United States Attorneys in response to all FOIA requests for records located in the USACO, and working with USACO employees to search for and gather documents in response to FOIA requests.

2. I am submitting this Supplemental Declaration to clarify the search done by three of our AUSAs.

FOIA 2018-005641

3. AUSA David Tonini identified one criminal prosecution that includes an ongoing investigation where he received inmate emails from the BOP. AUSA Tonini **manually searched** (emphasis added) his emails and electronic case files for this case, and he did not find any responsive documents. As such, search terms were not needed.

4. AUSA Tim Neff identified one criminal prosecution where he received inmate emails from the BOP. AUSA Neff **manually searched** (emphasis added) hard-copy files for this case, and he also conducted a manual search of electronic files, including emails, relating to the case. AUSA Neff did not find any responsive documents. As such, search terms were not needed.

5. AUSA Julia Martinez was only briefly involved in one case that involved inmate emails. Her involvement was limited to acting as a filter to review email communications of an inmate who may have communicated with his attorney. AUSA Martinez's involvement in this matter only spanned a couple days where she reviewed emails, and thus it was unlikely that she had responsive records. However, out of an abundance of caution, she searched her email inbox for responsive records, locating an email chain where she was asked to review emails for the Robinson matter. She used the keywords "TRULINCS" and "Robinson" to locate potentially responsive emails. She did not find anything responsive.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 9<sup>th</sup> day of December, 2020.

TERESA

Digitally signed by  
TERESA ROBINSON

ROBINSON

Date: 2020.12.09  
11:05:53 -07'00'

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Teresa Robinson  
Paralegal Specialist  
U.S. Attorney's Office  
for the District of Colorado

EOUSA b6, b7C

(USANYE)

**From:** Gatta, James (USANYE)  
**Sent:** Thursday, October 19, 2017 12:40 PM  
**To:** USANYE-Criminal\_Chiefs  
**Cc:** Geddes, Elizabeth (USANYE) [redacted] (USANYE)  
**Subject:** A few items  
**Attachments:** Disco Letter.docx; 2017-10-17 Letter to FD re BOP Email Policy.pdf

Folks,

A few items and updates, some we discussed yesterday and some we did not:

**BOP Inmate Emails:** Attached is the letter we sent to the Federal Defenders regarding our policy regarding BOP inmate emails, as well as our updated discovery letter, which is available on USATabs today. You will likely start hearing from defense counsel in connection with our requests for lists of defense personnel.

**General Crimes Deputy Chief & CHIP Coordinator:** Please have any AUSAs interested in either position let us (and you) know as soon as practicable, or by the end of the week.

**Brooklyn Office Bandwidth Upgrade:** The bandwidth in the Brooklyn office will be upgraded in an attempt to resolve issues involving the slowness of our network here. This upgrade will take place on **Tuesday, October 25 at 6 am**, and should last an hour. Please note that all internet access and cloud drive access will be unavailable during the upgrade. Emails will be available during this time through use of our iPhones, however. We are sorry for the inconvenience, but selected this time as one that is less intrusive than others.

**2017 Criminal Discovery Training with Andrew Goldsmith:** Our friend and Associate Deputy Attorney General Andrew Goldsmith will again join us in person for our yearly discovery training, on **Tuesday, December 5, 2017, from 9:30 to Noon**, in the Elizabeth J. Kramer Library (with a VTC hook-up to CI). You should be receiving an Outlook invite soon in connection with this training, which satisfies much of our yearly discovery training requirements and is always informative.

Please let us know if you have any questions or concerns with respect to any of the above.

Thanks,

Jim

**James D. Gatta**  
Chief, Criminal Division  
U.S. Attorney's Office  
Eastern District of New York

[redacted]  
EOUSA b6, b7C