

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS

and

DEPARTMENT OF JUSTICE,

Defendants

Civil Action No. 18-cv-02399 (D.C.)
First Supplemental Declaration

FIRST SUPPLEMENTAL DECLARATION OF SARAH LILLY

I, Sarah Lilly, declare the following pursuant to 28 U.S.C. § 1746:

I. DECLARANT'S BACKGROUND

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons ("BOP") as a Government Information Specialist for the Freedom of Information Act/Privacy Act ("FOIA/PA") Section, which is part of the Office of General Counsel. My office is located at FCI Beckley, WV. I have been assigned to my current position since August 2016. Prior to that time, I was assigned to the Consolidated Legal Center (CLC) at FCI Beckley from August 2010 until August 2016.

2. This Declaration is submitted in response to Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment. Plaintiff argues the following:

- a. 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;

- b. 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;
- c. BOP’s justifications for withholding the SIS Manual and the Inmate Communication Monitoring Decision Paper under Exemption 7(E) fail for three reasons:
 - (1) BOP does not meaningfully describe the techniques or procedures at issue, nor the context in which the techniques are used;
 - (2) BOP has not differentiated the information withheld in the redactions from that which is publicly available; and
 - (3) Third, BOP does not demonstrate that disclosure of this information would create a risk of circumvention of the law; and
- d. BOP’s redactions in two records—the SIS Manual and the Inmate Communication Monitoring Decision Paper—are also improper under Exemption 7(F).
 - (1) Exemption 7(F) cannot be justified with conclusory recitations of the law.

Exemption 5

3. Regarding Plaintiff’s challenges identified in paragraph 2a, *supra*, Plaintiff challenges the BOP’s application of 5 U.S.C. § 552(b)(5) to documents identified as Items “j” and “l.” The Plaintiff argues the BOP failed to identify the nature of the decisionmaking authority vested in the office or person and the BOP failed to identify where each person is in BOP’s chain of command.

4. In my original declaration, I identified Item “j” as an email exchange between some agencies of the Department of Justice concerning comments about the BOP’s proposed change

regarding inmate emails. I further iterated that agency discussions concerning regulation changes is a primary tool used by the BOP and DOJ staff to engage in open, frank discussions on matters of policy. Further, release of predisciplinary conversation about proposed policy changes causes a chilling effect on frank conversations amongst staff and/or decision makers which would harm the decision making process and this will in turn prevent the BOP from implementing well considered policy directives.

5. There were several DOJ agencies that provided comments concerning this proposed rule change. The U.S. Department of Justice Office for Access to Justice (“ATJ”) provided comments concerning the proposed rule change. The ATJ’s authority is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. In doing so, the ATJ staff works within the Department of Justice, across federal agencies to advance new statutory, policy, and practice changes. Also, the Office of Legal Policy (“OLP”) provided comments concerning the proposed rule change. The OLP’s authority is to develop and implement the Department’s significant policy initiatives, handle special projects that implicate the interests of multiple Department components, coordinate with other interested Department components and other Executive Branch agencies, and serve as the primary policy advisor to the Attorney General and the Deputy Attorney General. Importantly, it reviews and coordinates all regulations promulgated by the Department and all of its components. Finally, the BOP also provided comments concerning the proposed rule change. The BOP is a primary law enforcement agency pursuant to 18 U.S.C. § 4042(a)(1) that provides for the safekeeping, care, and subsistence of persons charged with or convicted of offenses against the United States, or held as a witness or otherwise pursuant to 18 U.S.C. § 4042(a)(2).

6. Regarding Plaintiff's challenges that are identified in paragraphs 2a and b, *supra*, in my original declaration, I identified Item "1" as "Decision Paper" concerning inmate communication monitoring. I further described the nature of "decision papers" and the purposes of "Decision Papers." Specifically, I identified "Decision Papers" are prepared by BOP staff, particularly executive level staff to explore policy positions of the agency. Further, the record is both undated and unsigned and is a draft record that was prepared in order to assist the Executive Staff of the BOP concerning the implementation of Video Conferencing for use by inmates across the BOP. BOP Decision Papers represents one of the primary tools used by the BOP for staff to engage in open, frank discussions on matters of policy between subordinates and superiors. Further, such papers go through extensive peer reviews and executive level inquiries before any decision to adopt or not adopt the paper as a new policy is reached. Release of a draft Decision Paper will cause a chilling effect on frank conversations amongst staff and/or decision makers which would harm the decision making process and this will in turn prevent the BOP from implementing well considered policy directives.

7. In addition to my statements in my original declaration, the nature of the decision as purported in the draft "Decision Paper" concerned deliberations senior level BOP staff discussing different approaches for monitoring Video Conferencing since it was going to be rolled out across the BOP. The draft "Decision Paper" identified several decision points and each senior BOP staff provided his or her feedback concerning those points. The individual feedback noted assessments of advantages and disadvantages of the decision point and individual feedback concerning the assessment of what policy will potentially work best.

8. The names of several senior BOP staff are included on the draft decision paper document; however, since it is unsigned, there is no clear basis that if this draft was the draft

document used by the BOP to deliberate policy considerations about Video Conferencing. The positions of BOP staff whose typed names appear on the “Decision Paper” include BOP Branch Chiefs who are senior staff within the BOP. Branch Chiefs are senior level managers within the several divisional offices of the BOP. Additionally, several Assistant Directors’ names were typed on the unsigned and undated “Decision Paper.” Assistant Directors are Senior Executive Service staff who are members of the Executive Staff for the BOP. Finally, several BOP Regional Directors typed positions appear on the “Decision Paper.” Regional Directors are Senior Executive Service staff who manage BOP facilities within their respective region. In this sense, Regional Directors manages the Wardens of the facilities within their respective region.

EXEMPTIONS 7E and 7F

9. Regarding paragraph 2c, *supra*, Plaintiff challenges the BOP’s application of 5 U.S.C. § 552(b)(7)(E) and (7)(F) to the document identified as Items “a” and “b.” Plaintiff argues that the BOP failed to “meaningfully” describe the techniques or procedures at issue or the context in which they are used, the BOP did not differentiate information withheld from that which is publicly available, and the BOP did not demonstrate that disclosure of the information would circumvent the law.

10. In my original declaration, I identified Items “a” and “b” as the Change Notice 1380.11, CN-1: Special Investigative Supervisors Manual (November 30, 2016). Further, I described the SIS Manual is compiled for law enforcement purposes to meet the BOP’s statutory authority pursuant to 18 U.S.C. § 4042(a) et seq. and 18 U.S.C. § 3050 et seq. to provide for the safekeeping of inmates within its facilities, and enforce the prevention of criminal activities. Title 18 U.S.C. § 3050 et seq. authorizes BOP staff make arrests, search inmates and visitors to BOP institutions, seize evidence, and otherwise protect inmates, staff, and the community. The BOP is

responsible for a inmate population that exceeds 155,000 inmates who are housed in 122 facilities across six regions. In connection with the BOP's statutory authority as identified 18 U.S.C. § 4042(a) et seq. and 18 U.S.C. § 3050 et seq., and to manage the largest department of corrections in the United States, the Special Investigative Supervisors Manual ("SIS Manual") is the primary investigative tool of the BOP that covers every aspect of BOP's specific investigative techniques and procedures to conduct law enforcement investigations and to safeguard not only inmates and staff, but members of the general public who visit the BOP for official business.

11. In my original declaration, contrary to the Plaintiff's assertion, I described the law enforcement techniques in detail. Specifically, I stated that the portions of the Special Investigative Supervisors Manual withheld are program guidance on everything from processing crime scenes, handling confidential informants and referring matters for prosecution. The information withheld represents critical components of the investigatory techniques of security staff of the BOP especially in a correctional setting where there are multiple witnesses and because the correctional setting creates a significant risk of evidence contamination or the compromising of witnesses by other witnesses and/or other inmates. Additionally, staff may be the subject of internal or external investigations, and therefore, the SIS Manual is a limited use internal BOP document that only select staff can access. In that sense, the BOP has not made public the information redacted and the BOP has not waived any FOIA exemption. The SIS Manual also covers national security issues related to inmates and the release of information concerning the investigative techniques not only endangers BOP facilities, but impacts national security issues domestically and abroad. Additionally, revealing certain topical headings within the SIS manual is tantamount to revealing the investigative technique as the topical headings, in and of themselves, are the investigative techniques used by the BOP for its investigations and revealing the same provides inmates and

staff members with counter-intelligence information that will then allow them to engage in manipulative tactics to avoid detection of criminal conduct.

12. In my original declaration, I stated how investigative techniques, in a correctional setting, are strategic decisions that account for the secure and orderly operations of the correctional facilities to ensure inmate and staff safety is not put in jeopardy. Disclosure of this information would reveal how the information was gathered and could provide an opportunity for inmates to manipulate victims or witnesses to an incident in an effort to improperly influence an investigation. If for example, the methods employed to handle confidential informants were disclosed, then inmates who cooperate with SIS staff in reporting potential disturbances, food strikes, drug introductions, weapons introductions, etc. would feel their identities could not be protected and this would chill any cooperation from the inmate population. Additionally, release of the withheld information would allow inmates to circumvent internal law enforcement investigations in BOP facilities by revealing how BOP collects information, BOP strategies in conducting these investigations, and how BOP prioritizes the various issues associated with an internal investigation. Release of this material to inmates or the general public would do great harm in undermining the effectiveness of how these internal investigations are performed which, in turn, would undermine the security of federal correctional facilities.

I declare under penalty of perjury and pursuant to 8 U.S.C. § 1746 that the foregoing is true and correct to the best my knowledge and belief.

Executed this 16th day of December of 2020.



Sarah Lilly
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FOIA Section
Office of General Counsel
Federal Bureau of Prisons