

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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NATIONAL ASSOCIATION OF CRIMINAL))
DEFENSE LAWYERS,))
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Plaintiff,))
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v.)	No. 18-cv-2399 (KBJ)
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FEDERAL BUREAU OF PRISONS))
and DEPARTMENT OF JUSTICE,))
))
Defendants.))
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SECOND DECLARATION OF JOHN E. CUNNINGHAM III

I, John E. Cunningham III, declare the following to be a true and correct statement of facts:

1. I am a Trial Attorney in the United States Department of Justice (DOJ), Criminal Division and am currently assigned to the Freedom of Information Act (FOIA) and Privacy Act (PA) Unit, a component of the Office of Enforcement Operations (OEO), where I have worked since November 7, 2011. I have been employed as a Trial Attorney with DOJ since October 1998. From October 13, 1998 to November 7, 2011, I was employed by the Fraud Section of the Criminal Division.

2. The FOIA/PA Unit is responsible for processing FOIA/PA requests seeking information from the Criminal Division. FOIA/PA Unit staff determine whether the Criminal Division maintains records responsive to FOIA requests, and if so, whether they can be released in accordance with the FOIA/PA. In processing such requests, the FOIA/PA Unit consults with other components within the DOJ, as well as with other Executive Branch agencies.

3. I submit this declaration in further support of the U.S. Department of Justice's (DOJ) motion for summary judgment and in opposition to the Plaintiff's cross-motion for summary judgment. This declaration supplements my first declaration dated October 26, 2020 ("First" Cunningham Declaration), and is intended to provide additional information regarding the Criminal Division's application of FOIA Exemption 5, 5 U.S.C. § 552(b)(5) to the seventeen CRM documents at issue: 1-2, 3, 8-12, 14-15, 18-19, 21, 24, 26, and 31-32.

Application of FOIA Exemption 5

4. As described in the First Cunningham Declaration, the Criminal Division withheld information in CRM documents numbered: 1-2, 3, 8-12, 14-15, 18-19, 21, 24, 26, and 31-32, pursuant to FOIA Exemption 5 because the information contained therein constitutes privileged attorney work-product.

5. The Criminal Division records at issue here involve email chains between and amongst trial attorneys working within OEO, the Electronic Surveillance Unit (ESU), the Special Operation Unit (SOU)¹, the Computer Crimes and Intellectual Property Section (CCIPS),

¹OEO-SOU is a section within the Criminal Division responsible for overseeing the operation of both the Witness Security program (WitSec) and the Special Administrative Measures (SAMs) program. CRM DOC. NO. 24 involves an email reply to an earlier inquiry from the Office of Legislative Policy (OLP), which had been forwarded to the OEO-SOU supervisory attorney managers, and inquires of them, whether the BOP inmate email program would impact either of their existing programs. Thus, OEO-SOU supervisory attorney managers were tasked with initially reviewing the operational aspects of the BOP inmate email program, and later, providing OLP with an opinion about whether the BOP program would have any specific legal ramifications which might impact or affect the operation of the programs. The substance of this email involves a discussion pertaining to this issue, and further involves the OEO-SOU's supervisory attorney managers seeking further clarification regarding these issues. OEO-SOU supervisory attorney managers then proceed to convey back their determinations to OLP. Based upon the foregoing, this material constitutes attorney work-product between and amongst DOJ supervisory attorney managers who were seeking to ascertain the legal implications, ramifications and/or impact of the BOP inmate email program upon existing DOJ programs, *i.e.*, Witsec and SAMs.

Assistant U.S. Attorneys (AUSAs) and Federal Bureau of Prison (BOP) attorneys. OEO, which includes ESU and SOU does not initiate or conduct any criminal investigations. CCIPS is responsible for implementing the Department's national strategies in combating computer and intellectual property crimes worldwide. The (CCIP's) section's attorneys work to improve the domestic and international infrastructure - legal, technological, and operational - to pursue network criminals most effectively. CCIPS attorneys regularly run complex investigations. Both OEO-ESU and CCIPS sections' attorneys handle unique legal and investigative issues raised by emerging computer and telecommunications technologies and train federal, state, and local law enforcement personnel. They provide substantive expertise to the DOJ leadership on these issues, which includes commenting on and proposing legislation. In developing their expertise and forming their opinions on various legal strategies, the OEO-ESU and CCIPS sections' attorneys consult with other departmental attorneys, and particularly, Assistant U.S. Attorneys (AUSAs), who utilize the various electronic surveillance techniques on a regular basis. These consultations are often done in the context of presentations that OEO-ESU and CCIPS attorneys provide to Assistant U.S. Attorneys regarding developments in various areas of electronic surveillance.

6. Moreover, with regard to the CRM documents at issue here, most, if not all, involve instances where federal agencies operating outside the Criminal Division, *i.e.*, the Executive Office for United States Attorneys (EOUSA), AUSAs, the BOP and the IRS, have purposely sought out technical "experts" working at CCIPS and ESU, in order to consult with them and seek their advice regarding the best methods, practices and procedures to utilize or employ when seeking to monitor and/or obtain BOP inmate email. Further, although the Criminal Division does offer technical advice and guidance to outside entities and agencies, the Criminal Division is not, and was not, the ultimate decision-maker on how the monitoring of

inmate email should be conducted by the BOP and/or how a federal prosecutor or investigator should proceed when seeking to obtain evidence for their investigation or prosecution of an individual accused of violating federal law and/or someone who has improperly or criminally used the BOP inmate email system.

7. CRM DOC. NO. 1 is an email chain which involving an internal strategy discussion amongst CCIPS supervisory attorney managers and their subordinate CCIPS trial attorneys and discusses the topic of BOP inmate email monitoring. The CCIPS trial attorneys discuss the federal statutory issues pertaining to this subject matter and what steps CCIPS should recommend to BOP as the best legal approaches to follow in order to engage in the monitoring of inmate email communications. The CCIPS supervisory attorney managers and trial attorneys herein are engaged in a strategy discussion to determine the best methods, practices and legal approaches for BOP to utilize in order to mitigate and/or minimize potential or future litigation risks regarding this subject matter.

8. CRM DOC. NO's 2, 9-12, and 14, essentially, are a series of overlapping email chains between and amongst an AUSA, who is asking for assistance regarding specific legal questions sent to a former ESU Deputy Chief, CCIPS trial attorneys, and CCIP's supervisory attorney managers. The emails involve an AUSA who is seeking the advice of other DOJ attorneys concerning the best methods, practices and procedures for AUSAs (or other DOJ attorneys) to utilize or employ when they are seeking to obtain inmate electronic communications as evidence from the BOP. The email chain contains a give-and-take discussion between and amongst this group of DOJ attorneys surrounding the applicability and desirability of relying upon certain federal statutory authorities addressing this issue, and further discusses whether BOP inmate email communications, can or should be obtained in reliance upon certain

federal statutory authority, and/or through other forms of compulsion, *i.e.*, a federal grand jury subpoena. The email chains further discuss which, if any, of these options, is the most viable, practicable and legally defensible for AUSAs (or other DOJ attorneys) when they seek to obtain electronic evidence, *i.e.*, inmate email from the BOP.

9. CRM DOC NO. 3 is an email chain which was initiated by an email from the BOP, and contains two attachments also created by the BOP and which were then forwarded onto OEO-SOU. The first attachment pertains to requests for inmate emails and the second attachment relates to the BOP TRULINCS program. The email correspondence from BOP contains a message from a BOP staff member to OEO-SOU, wherein the BOP staff member alerts and advises OEO-SOU of specific format changes which have been and/or are being implemented by the BOP regarding their TRULINCS program.

10. CRM DOC. NO. 8 is an email chain involving an internal strategy discussion amongst CCIPS supervisory attorney managers and their subordinate CCIPS trial attorneys and, although this email is related to another legal matter, it does briefly mention and discusses the subject matter of BOP inmate email monitoring and makes mention of the legal procedures which CCIPS is considering to propose to other DOJ trial attorneys and AUSAs, for use whenever they seek to obtain electronic evidence from an internet provider, *i.e.*, Comcast. Further, the CCIPS internal strategy discussion discusses the similarities and differences between the current Comcast case issues and related issues recently confronted by the section (at least one email references the BOP inmate email monitoring issue discussed “last week”) by DOJ trial attorneys and AUSAs seeking to access and/or obtain BOP inmate email. The CCIPS supervisory attorney managers and their subordinate CCIPS trial attorneys are engaged in an internal strategy discussion designed to determine the best methods, practices and legal

approaches to offer other DOJ trial attorneys and AUSAs, in order to mitigate and minimize potential and/or future litigation risks regarding this subject matter.

11. CRM DOC. NO. 15 is an email chain involving a discussion between and amongst CCIPS supervisory attorney managers, AUSAs, BOP attorneys and an IRS employee, wherein they discuss the issue of the BOP's disclosure of inmate email to federal law enforcement officers. Essentially, the email chain discusses what are some of the specific legal options available to federal law enforcement officers, including whether the disclosure of BOP inmate email to federal law enforcement should be affected either through a compulsory and/or non-compulsory process, *i.e.*, voluntary disclosure.

12. CRM DOC. NO. 18 is an email chain involving a discussion between and amongst multiple AUSAs, a former ESU Deputy Chief, and BOP attorneys concerning the efforts made by an AUSA (who directly participates in the instant email chain), and who is attempting to obtain a "named" BOP inmate's email through "stipulation" with the BOP inmate's defense attorney. The email chain further discusses the particulars of the BOP inmate's criminal prosecution and focuses upon the efforts made by the AUSA who is endeavoring to obtain the BOP emails of the inmate for purposes directly related to that inmate's ongoing criminal prosecution. The AUSA discusses his reasoning for seeking the inmate's email, including how it would aid, support, bolster and establish the element of the inmate's "criminal intent" toward his commission of an underlying offense. Essentially, the email chain at issue here constitutes an ongoing legal strategy discussion between and amongst DOJ attorneys, one of whom is actively seeking legal advice and guidance from other DOJ attorneys, and which directly involves the issue of the best methods, practices and procedures for that AUSA to utilize in order to obtain the inmate's BOP email.

13. CRM DOC. NO. 19 is an email from a CCIPS trial attorney to AUSAs and a former ESU Deputy Chief, which therein discusses federal statutory authority and decisional case law related to the issue of the use of compulsory and non-compulsory processes when endeavoring to obtain stored electronic communications. In this instance, the CCIPS trial attorney is offering the AUSAs his legal guidance and direction, supported by citation to underlying federal statutory authority and decisional case law regarding the subject of obtaining BOP inmate email.

14. CRM DOC. NO. 21 is an email chain between and amongst a CCIPS trial attorney, a former ESU Deputy Chief and an AUSA. The email chain contains a discussion between and among DOJ attorneys about a recent Third Circuit decision which considered the issue of whether the FDC-Philadelphia was a provider of electronic communication service or remote computing service, and whether or not that particular ruling had any applicability or impact upon the issue of inmate email services as supplied by the BOP.

15. CRM DOC. NO. 26 is an email chain involving an internal discussion amongst CCIPS supervisory attorney managers and subordinate CCIPS trial attorneys, and who, although recognizing that the BOP appears to have “finalized” their policies pertaining to inmate access to email, the CCIPS supervisory attorney managers also want to seek further clarification and information directly from the BOP, about how the BOP intends to implement and/or enact their inmate access to email communication program, and what specific safeguards the BOP will be employing. Essentially, this email chain seeks clarification as to the methods the BOP will employ to monitor inmate email communication, *i.e.*, does the BOP intend to post written signage in their computer rooms and/or will the BOP utilize some type of banner headline on

their computers, which will advise inmates that they are expressly and/or impliedly consenting to monitoring by the BOP, whenever electing to use the BOP computers.

16. CRM DOC. NO. 26 is in the nature of an in-house discussion, amongst and between CCIPS supervisory attorney managers and subordinate CCIPS trial attorneys, and relates to the issue of clarification of specific details, guidelines and/or measures that CCIPS anticipates that the BOP should and/or will implement in order to mitigate risks to the program from prospective and/or potential litigation. In one instance, the CCIPS supervisory attorney manager directs the subordinate CCIPS trial attorney to contact the BOP and obtain further clarification and/or answers from the BOP concerning these issues. CRM DOC. NO. 26 further constitutes attorney work-product because it involves a discussion between a CCIPS supervisory attorney manager and a subordinate CCIPS trial attorney, and contains a discussion about what the CCIPS supervisory attorney manager expects and/or anticipates to see from the BOP regarding safeguards to their inmate email program. The email chain involves the CCIPS supervisory attorney manager inquiring of a subordinate CCIPS trial attorney about steps already taken, or being undertaken, by the BOP, and further directs the subordinate to follow-up with the BOP. The CCIPS supervisory attorney manager also discusses with the subordinate CCIPS trial attorney, certain proposals and/or best practices for the BOP to employ, and the CCIPS supervisory attorney manager further discusses the best means to convey this information to other DOJ staff and AUSAs in the field.

17. CRM DOC. NO. 31 consists of an email chain between a former ESU Deputy Chief, CCIPS trial attorney and an AUSA, which discusses the proper methods, processes and procedures, for federal law enforcement officers to utilize when seeking to monitor and/or obtain

inmate email communications in connection with either ongoing and/or prospective criminal investigations and prosecutions.

18. CRM DOC. NO. 32 consists of an email chain containing a discussion of the applicability of federal statutes and decisional case law to the issue of obtaining access to inmate email communications. The AUSA involved in this email chain is seeking the technical advice, expertise and/or guidance of both the former ESU Deputy Chief and an CCIPS trial attorney, concerning the issue of best methods and/or tactics for AUSAs to employ when seeking to obtain BOP inmate email. CRM DOC. NO. 32 is an email chain between a former ESU Deputy Chief and a SMO trial attorney, which therein, further discusses the applicability of specifically referenced DOJ guidelines and/or other federal statutory law to issues arising as a result of BOP policies granting inmate access to email communications. In this instance, the SMO trial attorney is inquiring of, and/or seeking guidance from the former ESU Deputy Chief, about whether specifically referenced DOJ guidelines are applicable and/or whether these same DOJ guidelines and/or federal statutory case law govern the BOP policies governing inmate email communications.

19. Next, Plaintiff argues that the records the Criminal Division has withheld subject to Exemption (b)(5), the deliberative process privilege, and which are not pre-decisional, since they post-date the adoption of the policy they relate to, *i.e.*, the BOP's policy of permitting inmates access to email communications. To the contrary, the Criminal Division has not withheld any records identified in its *Vaughn* index subject to Exemption (b)(5), the deliberative process privilege, as pre-decisional, merely because they post-date the adoption of the BOP inmate email policy in question. The records identified above and described as being withheld in full subject to Exemption (b)(5), relate to altogether new issues which have arisen as a result of the creation of

the underlying BOP policy. Those issues which are fully described and identified in the above referenced email chains involve both general and specific issues which confront federal law enforcement as the direct result of the enactment of the BOP policy involving inmate email communications. As a result of the enactment of this BOP policy, issues arising from the ability of federal law enforcement to successfully monitor, access and obtain BOP inmate email arose. DOJ attorneys, including AUSA's, BOP attorneys and other federal law enforcement officers in the field routinely reach out to Criminal Division trial attorneys employed by CCIPS and ESU, since it is well known within the federal law enforcement community that the attorneys employed by these offices have personnel with certain technical expertise, experience and renown in this unique area of the law. The advice provided by CCIPS and ESU, is, by its very nature, pre-decisional, and is based upon their extant knowledge of relevant federal statutory authorities, as well as the most current decisional case law impacting this subject matter area. Moreover, after having consulted with Criminal Division technical and legal experts with CCIPS and ESU, other federal agencies and entities, *i.e.*, the Executive Office for United States Attorneys, AUSAs, the BOP and the IRS, are the ultimate decision-makers insofar as how they will elect to proceed in both the monitoring and/or the accessing of BOP inmate email.

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

Executed this 18th day of December 2020.



John E. Cunningham III