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. 18-2399 (KBJ)

DEFENDANTS' REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff's arguments set forth in its memorandum in support of its cross-motion for summary judgment and in opposition to Defendant's motion for summary judgment (ECF No. 50) ("Pl. Opposition") fail to show that Defendants, the Federal Bureau of Prisons ("BOP") and the United States Department of Justice ("the "Department"), have conducted an inadequate search and/or have improperly withheld information exempt from release under Freedom of Information Act ("FOIA") Exemptions 4, 5, 7(E) ,and 7(F). As such, Defendants are entitled to summary judgment in this suit.

First, Plaintiff is incorrect in asserting that the Executive Office for United States Attorneys ("EOUSA") has not met its burden to prove that it conducted adequate searches for records responsive to NACDL's request. The declarations submitted by the ten U.S. Attorney's Offices contain sufficient detail about their searches, which were exhaustive and reasonably calculated to uncover all responsive documents. Second, BOP properly withheld materials under FOIA Exemption 4, because BOP withheld information that is commercial, obtained from a person, and given under an implied assurance of confidentiality. Third, BOP, the Criminal Division, and EOUSA properly invoked the deliberative process privilege because they have established that the deliberative process privilege clearly applies of these records, as they pre-date any final agency decisions and involve candid thoughts and opinions of staff. Fourth, BOP, the Criminal Division, and EOUSA properly withheld materials under the attorney-work product privilege, as the materials directly relate to BOP and Department of Justice legal strategies. Lastly, Plaintiff fails to establish that BOP has improperly withheld records pursuant to 7(E), as the records in question contains law enforcement sensitive information which, if disclosed, would potentially allow circumvention of the law.

Because EOUSA's search is adequate and Defendants' withholdings are proper, this Court

should grant Defendants' motion for summary judgment.

ARGUMENT

I. DEFENDANT EOUSA PERFORMED A REASONABLE SEARCH

EOUSA has met its burden of proving that the ten U.S. Attorney's Offices conducted adequate, if not exhaustive, searches. For the reasons set forth in its opening memorandum and the additional grounds discussed below, EOUSA is entitled to summary judgment.

An agency must undertake a search that is "reasonably calculated to uncover all relevant documents," and can search for responsive records in accordance with the manner in which its records systems are indexed. *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3, 13 (D.D.C. 1998). In this case, each of the ten U.S. Attorney's Offices conducted a search that was tailored to their office's specific organization system, which are all disparate from one another, to uncover a relatively narrow set of specific policies related to prison inmate emails. *See* Supplemental Declaration of Vinay Jolly ("Jolly Suppl. Decl.") ¶ 4. In fact, all ten of these Offices have attested that they are aware of no other location where responsive documents would reside, even if tasked with another search. *Id.* at 4.

A. EOUSA Provided Sufficient Details to Demonstrate the Adequacy of its Searches

Courts have held that "[t]he FOIA does not require that a 'search' of records take any particular form." *Toensing v. Dep't of Justice*, 890 F.Supp.2d 121, 144 (D.D.C. 2012). Instead, the courts have held that a reasonable search should be "tailored to the nature of the request." *See Rugiero v. Dep't of Justice*, 257 F.3d 534, 547 (6th Cir. 2001) ("The FOIA requires a reasonable search tailored to the nature of the request"). Lastly, an agency is entitled to a presumption of good faith. *Defenders of Wildlife v. Dep't of Interior*, 314 F. Supp. 2d 1, 8 (D.D.C. 2004). Contrary to these assertions, Plaintiff attempts to prove ten U.S. Attorney's Offices conducted inadequate

searches by essentially creating a "standard search" for this case, and then enumerating the ways that it perceives that these offices failed to reach this standard by nitpicking at small details while ignoring the greater context.

For example, Plaintiff maintains that inadequate searches were performed by three offices because the offices did not supply the search terms used in their searches and/or did not specify how people searched for documents. Pl. Opposition at 8-10. Plaintiff relies on the assertion in *Oglesby v. U.S. Department of Army* that search descriptions must include search terms or methods to be deemed adequate. 920 F.2d 57, 68 (D.C. Cir. 1990). However, Plaintiff's argument is weakened by the fact that it takes this requirement out of context with the rest of the opinion. *Oglesby* only mentions search terms as part of a sufficiently detailed affidavit, which should also include "the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Id*. at 68. Additionally, unlike this case, the fatal flaw of the affidavit at issue in *Oglesby* was that it "[did] not show, with reasonable detail, that the search method, namely searching the Central Records, was reasonably calculated to uncover all relevant documents." *Id.* Here, declarations from each U.S. Attorney's Office have detailed the types of searches that were performed, what locations were searched, who searched for the records, and averred that all files likely to contain responsive records were searched. Additionally, it is EOUSA's practice that each office conducts manual and electronic searches to search for all potentially responsive records. Jolly Suppl. Decl. ¶ 4.

Moreover, this is a narrow pool of records well known to criminal Assistant U.S. Attorneys ("AUSA"). *Id.* Courts have held that "[a]lthough a reasonable search of electronic records may necessitate the use of search terms in some cases, FOIA does not demand it in all cases involving electronic records." *James Madison Project v. Dep't of Justice*, 267 F. Supp. 3d 154, 161 (D.D.C.

2017). In *James Madison Project*, the Court held that an agency had conducted a reasonable search because "the responsive files were readily identifiable without search terms and the records in all of the files were individually reviewed," and thus "us[ed] methods which [could] be reasonably expected to produce the information requested." *Id.* (citing to *Oglesby*, 920 F.2d at 68). Similarly here, the U.S. Attorney's Offices in question relied on their FOIA contacts in each office, who worked "in consultation with all relevant personnel in the [U.S. Attorney's Office]" and were "the most knowledgeable about their USAO recordkeeping practices, including locations and organization of files, both physical and digital records as well as electronic folder file paths, and the best methods to search for records." Jolly Suppl. Decl. ¶ 4. The offices then tasked attorneys with significant experience in this area, and who had been in the office for long periods of time. *Id.* These ten U.S. Attorney's Offices were not mining giant electronic databases for records in their searches (which was the case in *Oglesby*); they are instead searching their well-known internal resources such as intranet sites, office policy banks, personal files, and emails for a few well-known policies and resources commonly used by each office. *Id.*

Specifically, the U.S. Attorney's Office for Eastern District of Pennsylvania states that the Criminal Chief and Chief of Appeals searched the Criminal Division Manual, the office's SharePoint Page, and their own computer files, which were organized by topic. Declaration of Beverly Brown ¶¶ 10-18. The declaration also specified when paper and/or electronic files were searched, and averred that all files likely to contain responsive records were searched. *Id.* ¶¶ 12, 18-19.

The U.S. Attorney's Office for the District of Colorado has clarified in a supplemental declaration how and where the three AUSAs in question searched. The first AUSA ran manual searches of his emails and electronic case file, stemming from one criminal prosecution that

includes an ongoing investigation where he received inmate emails from the BOP. Supplemental Declaration of Teresa Robinson ¶ 3 (attached hereto). Since it was only one case and the AUSA reviewed all files, no search terms were needed. *Id.* The second AUSA conducted manual searches of his hard-copy and electronic files stemming from one criminal prosecution where he received inmate emails from the BOP. *Id.* ¶ 4. Since it was only one case and the AUSA reviewed all files, no search terms were needed. *Id.* The final AUSA was briefly involved for a few days on a case involving inmate emails, acting as a filter to certain emails. *Id.* ¶ 5. Despite her limited involvement, she searched her emails using the keywords "TRULINCS" and "Robinson" to locate potentially responsive emails, but found no responsive records. *Id.*

Lastly, the District of Arizona details the number of employees tasked (19 attorneys including the Civil Chief, the two Criminal Division Chiefs, and the Unit Chiefs); where the attorneys searched (intranet sites for the Department and the District of Arizona; archived emails; emails and paper files; all "written DOJ and USAO policies and procedures in electronic and written form," regardless of date); and what key words were used ("prisoner email", "Bureau of Prisons email", "inmate email", "BOP email"). Declaration of Michael A. Ambri ¶¶ 4-5. Plaintiff maintains that this description is inadequate because, for example, the declaration "failed to detail the declarant's method of searching the DOJ and USAO intranet pages" and that the selected AUSAs tasked with searching did not specify where they searched. However, the selected AUSAs specified that they "searched their email and paper files where they believed such materials might be located if they existed." *Id.* ¶ 4.

Next, the four U.S. Attorney's Offices identified by Plaintiff did not impermissibly narrowed the scope of their request searches by only using the specific search terms "Consent to Monitoring Agreement" and ""inmate transactional data," and not using more colloquial terms.

Pl. Opposition at 13-14. Plaintiff's FOIA request sought records, guidance, communications, and memoranda about "policies, practices, or procedures for requesting copies of inmates' attorney-client emails from the BOP," Pl. Second Amended Compl. ¶ 28, and Plaintiff also specifically stated that they did not want records related to individual criminal cases. First, it seems unlikely that formal or informal "policies, practices, or procedures" would not include some form of these terms, given that they are integral to the topics of such records. Jolly Suppl. Decl. at 2, fn. 1. Thus, searching these terms is the most likely way to identify records. Second, Plaintiff attempts to make it appear that these four offices – the Northern District of Illinois, District of Massachusetts, Eastern District of Michigan, and Eastern District of Pennsylvania – used these terms alone, when that is clearly not the case. The Northern District of Illinois office searched emails using the term "BOP Inmate Emails", and then searched their office's intranet website using the terms "Bureau of Prisons", "BOP", "Consent to Monitoring Agreement", and "Trulincs." Declaration of Merle A. Payne, ¶¶ 4, 7. The Executive AUSA and the Criminal Chief, deemed to be the most likely to know where any responsive records would exist due to their experience and tenure in the office, also searched their emails using the terms "Bureau of Prisons", "BOP", "Consent to Monitoring Agreement", and "Trulincs." *Id.* ¶¶ 8-10. In fact, the email contained in Plaintiff's referenced Exhibit C.1 is from the Northern District of Illinois, found using these same search terms. The Eastern District of Michigan office used the words from "policies, practices, or procedures for requesting copies of inmates' attorney-client emails from the Bureau of Prisons" as search terms; searched physical files using the term "inmate emails"; and searched emails using search strings that utilized a variety of terms (""BOP" or "Bureau of Prisons" AND Trulincs or "filter team" or "inmate transactional data""; "BOP" or "Bureau of Prisons" AND "Consent to Monitoring Agreement" or "inmate email" within20"). Declaration of Theresa Boyer ¶¶ 8, 10, 14. The

District of Massachusetts office specified that in searching all email accounts for its office, it used the keyword search strings ((“Bureau of Prisons” OR “BOP”) AND “Consent to monitoring agreement”) OR ((“Bureau of Prisons” OR “BOP”) AND “inmate transactional data”). Declaration of Susanne Husted ¶ 19. Lastly, the Eastern District of Pennsylvania office searched emails using the terms “BOP” or “Bureau of Prisons”, “inmate”, “Consent to Monitor Agreement”, or “inmate within 20 words of email.” Declaration of Beverly Brown ¶ 16. These terms were sufficiently broad to capture records related to Plaintiff’s request, and did not result in any narrowing of the scope.

Plaintiff claims that two offices, the Northern District of Illinois and the Western District of Washington, “failed to pursue clear and certain leads,” but Plaintiff is mistaken. Pl. Opposition at 15-17. However, the Northern District of Illinois confirmed that the file path discussed by Plaintiff on page 15 of their memorandum was indeed searched, even though the name of the folder has changed. *See* Declaration of Merle Payne ¶ 8; Supplemental Declaration of Merle Payne ¶ 3 (attached hereto). Additionally, the “Letter Request for Contents of Email Communications” from the Western District of Washington was produced to Plaintiff, and is included on EOUSA’s *Vaughn* Index as Document 17. . Pl. Opposition at 16-17; Jolly Suppl. Decl. at 3, fn. 5; EOUSA *Vaughn* index, Document 17.

Lastly, every declaration submitted by each U.S. Attorney’s Office addressed only documents challenged by Plaintiff in their Second Amended Complaint, and did not cover every document produced to Plaintiff or any documents that were produced out of an abundance of caution that lacked a clear nexus to the FOIA request. Jolly Suppl. Decl. ¶ 4.

B. EOUSA Reviewed and Released All Records

EOUSA tasked all 27 U.S. Attorney’s Offices listed in Plaintiff’s FOIA request; those

offices conducted searches and referred any records found to EOUSA, who processed all documents for release to Plaintiff. Jolly Suppl. Dec. ¶ 4. Plaintiff maintains that EOUSA fails to describe its "methodology used to review potentially responsive records referred" from U.S. Attorney's Offices," noting that five offices specifically stated that records were "referred" to EOUSA. Pl. Opposition at 10-11. However, all 27 offices referred their records to EOUSA for processing and production, because EOUSA is the office solely responsible for the processing of records in EOUSA FOIA cases. On September 4, 2020, Plaintiff's counsel and EOUSA agreed that EOUSA could exclude any routine AUSA requests for emails related to specific criminal cases, and only focus on policy and procedure based emails. Jolly Suppl. Dec. at 2, fn. 1. EOUSA therefore reviewed each document individually and marked any emails or records relating to a specific criminal case as nonresponsive based on that agreement. *Id.* EOUSA also did not reproduce records that were duplicative of records produced and/or otherwise already withheld in full by EOUSA. *Id.* All other records were processed and produced to Plaintiff. *Id.* ¶ 4.

In short, these ten U.S. Attorney's Offices have given the Court enough detail to show that they put forth good faith efforts to conduct adequate searches, and have averred that "all files likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 68. Any additional searches would not yield further documents. The Court should grant summary judgment to EOUSA and deny Plaintiff's cross-motion.

II. DEFENDANTS PROPERLY APPLIED FOIA EXEMPTIONS TO RECORDS

Defendants have met their burden of justifying withholdings of certain records or portions thereof under Exemptions 4, 5, 7(E), and 7(F), and their supporting materials give the Court enough detail of their justifications. For the reasons set forth in its opening memorandum and the additional grounds discussed below, they are entitled to summary judgment.

A. BOP Properly Withheld Information Pursuant to Exemption 4

FOIA Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [which is] privileged or confidential." 5 U.S.C. § 552(b). This exemption helps to safeguard the interests of both the government and submitters of information. To qualify for Exemption 4 protection, information must meet three basic elements: The information must be 1) commercial or financial, 2) obtained from a person, and 3) privileged or confidential. *See Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). BOP has appropriately found that the TRULINCS User Guide and the screenshot of the TRULINCS Portal fall squarely within the plain language of FOIA Exemption 4. The information at issue is: (1) commercial information; (2) obtained from a person; that is (3) confidential. Plaintiffs' challenges on each of Exemption 4's requirements fail. As explained in more detail below, this information meets the plain meaning of "commercial information" and has been "obtained from a person" pursuant to the law in this Circuit. Moreover, the information requested is confidential pursuant to the Supreme Court's recent *Food Marketing Institute* decision. *See* 139 S. Ct. 2356 (2019).

i. BOP Information Withheld Pursuant to Exemption 4 is Commercial

First, in order to qualify for confidential treatment under Exemption 4, information must be "commercial" or "financial." In the D.C. Circuit, "[t]he terms 'commercial' or 'financial,' for purposes of FOIA Exemption 4, should be given their 'ordinary meanings.'" *See, e.g., Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982) and *Bd. of Trade of the City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 (D.C. Cir. 1980)). The court has held again and again that records are commercial so long as the submitter has a "commercial interest" in them. *Id.* Here, the withheld information directly concerns the entirety of the software features

offered to BOP by the Advanced Technologies Group, L.L.C, ("ATG"), the company that owns and develops TRULINCS. ATG is a company focused entirely on providing software for correctional facilities, both public and private. *See, e.g.*, ATG, "Our Partners," https://www.a-t-g.com/our-partners-104 (last visited December 16, 2020). The company holds a definite commercial interest in its own software, specifically the messaging services (such a TRULINCS) that is its most popular product. *Id.* Plaintiff argues that ATG lacks a commercial interest, relying on a regulation from the Department of Defense, 48 C.F.R. § 252.227-7014(1), and a misconstrued view of *Public Citizen Health Research Group*. First, a regulation from the Department of Defense has no bearing on the Bureau of Prisons, which is a part of DOJ. Second, the D.C. Circuit has specifically rejected the argument that the term "commercial" be confined to records that "actually reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290.

ii. BOP Information Withheld Pursuant to Exemption 4 was Obtained from a Person

Second, Exemption 4 requires that the information be obtained from a person. 5 U.S.C. § 551(2). The FOIA includes in its definition of "person" companies, such as ATG. *Id.* (defining a person as an "individual, partnership, corporation, association, or public or private organization other than an agency"). In determining whether information is "obtained from a person," the D.C. Circuit reflects a plain language approach and focuses on whether the information at issue originated from outside the federal agency. *See Bd. Of Trade of City of Chicago*, 627 F.2d at 404 (finding that information is considered "obtained from a person" if the information originated from an individual, corporation, or other entity, and so long as the information did not originate within the federal government). BOP did not produce or create TRULINCS; ATG did. ATG also

supplied a User Guide to train BOP employees on the system. Thus both documents, while used by the government, were obtained from a corporation. *Id.*

Plaintiff argues that since the Portal appears to be a screenshot, it is not obtained from a person. However, information that was supplied to the government by a "person" outside of government is considered "obtained from a person" for purposes of Exemption 4, even when that information appears in Agency-generated documents. *See Gulf & W. Indus. v. United States*, 615 F.2d 527, 529-30 (D.C. Cir. 1979) (finding that information submitted to the government and then incorporated into Agency documents was "obtained from a person" for purposes of Exemption 4); *see also Pub. Citizen Health Research Grp. v. NIH*, 209 F.Supp.2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the agency, that did "not alter the fact that the licensee is the ultimate source of [the] information," inasmuch as the licensee "must provide the information in the first instance"); *Ctr. for Auto Safety v. U.S. Dep't of Treasury*, 133 F.Supp.3d 109, 123 (D.D.C. 2015) (quoting *COMPTEL*, 910 F.Supp.2d at 17) (holding that "[i]nformation originally obtained from an outside source, but later included in Agency documents, may be considered 'obtained from a person'" and qualify for Exemption 4 protection). The key inquiry is who "…the source of the information [was] in the first instance," and not necessarily who created the particular document. *In Defense of Animals v. National Institutes of Health*, 543 F.Supp.2d 83, 103 (D.D.C. 2008).

iii. BOP Information Withheld Pursuant to Exemption 4 is Confidential

The TRULINCS User Guide and screenshots of the Portal, which contain links to every functionality offered to system administrators, are actually and customarily treated as private by ATG. Accordingly, this information is "confidential" within the meaning of Exemption 4.

Confidentiality is the key consideration in evaluating the application of Exemption 4. In

Food Marketing Institute, the Supreme Court held that "confidential," as it is used in Exemption 4, must be given its "ordinary, contemporary, common meaning" at the time the statute was enacted in 1966 and that "[t]he term 'confidential' meant then, as it does now, 'private' or 'secret.'" 139 S. Ct. at 2362-63 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The Supreme Court explained that information might be considered "confidential" under two conditions: "In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it." *Id.* "In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." *Id.* The Court determined that the first condition — that the information customarily be kept private or closely held by the submitter — must be met because "it is hard to see how information could be deemed confidential if its owner shares it freely." *Id.* at 2363. As to the second condition — whether information must be communicated to the government with some assurance that it will be kept private — the Court left open the question of whether this condition was required to demonstrate that information is "confidential" within the meaning of Exemption 4, as that condition was clearly satisfied in the case before it. *Id.* at 2363. Accordingly, the Court held that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Id.* at 2366.

The FOIA is intended to require disclosure when it will "contribut[e] significantly to public understanding of the operations or activities of the government." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). However, Congress did not design FOIA generally to require disclosure of the commercial or financial information of businesses. Just as the "disclosure of records regarding private citizens,

identifiable by name, is not what the framers of the FOIA had in mind," the disclosure of commercial or financial information about private individuals, businesses, and other organizations is not what Congress intended FOIA to address. *Id.* at 765. The standard of confidentiality adopted in *Food Marketing Institute* is applicable to the facts at issue in this case. As applied here, both of these records have been customarily and actually treated as confidential by ATG and BOP, and thus qualify as confidential under FOIA.

First, while the BOP Systems of Record Notice for the Inmate Electronic Message Record System explains what information is collected and how it is stored, the exact features and functionalities that ATG offers in TRULINCS is not revealed to the public by BOP or ATG. *See* 82 FR 24147 (5-25-2017). The User Guide, combined with the screenshot of the Portal, would reveal those features and functionalities. Given that ATG must bid for this contract with the government, and that contract amount is public, the company goes to great lengths to keep this information confidential and thus keep their competitive edge. *See, e.g.,* Congressional Budget Office, Cost Estimate: H.R. 5546, Effective Assistance of Counsel in the Digital Era Act, Sept. 21, 2020, https://www.cbo.gov/system/files/2020-09/hr5546.pdf (last visited Dec. 16. 2020) (stating that BOP spent $14 million operate TRULINCS through a private vendor (ATG)). As stated in the first declaration from Sarah Lilly, these items are customarily considered confidential in the software industry, as evidenced by the contract stipulation from ATG that BOP "shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the Contractor." Decl. of Sarah Lilly ¶ 33.

The User Guide is a document that explains the exact features and functionalities of TRULINCS in great detail, and is specific to the BOP system. The User Guide is therefore not commercially available to the public or even other clients. Therefore, Plaintiff's reliance on

Fennell v. Navient Sols., LLC is misplaced, as this User Manual and Portal screen are not public; additionally, *Fennell* concerns filing documents under seal in Florida and has no nexus to FOIA or this district. No. 6:17-cv-2083-Orl-37DCI, 2018 WL 7413302 (M.D. Fla. Oct. 16, 2018).

Plaintiff also argues that the BOP does not hold these documents as confidential because the User Guide is given to BOP employees and/or AUSAs for training purposes, and thus BOP demonstrates that they do not keep this information confidential. Pl. Opposition at 22-23. However, the Portal and User Guide are used to train employees on a system that they must use for their jobs, which is not the same as public dissemination of the information. Moreover, although the Supreme Court in *Food Marketing Institute* reserved the question of whether Exemption 4 requires the government to give an assurance that it will maintain the information in confidence, if this Court reaches the question, it should hold that no such assurance is required. Information may be "confidential" based on circumstances independent of the context in which the government receives it. Such information is "confidential" if it is generally held in confidence or kept secret by those who convey it to the government. The submission of such "confidential" information to the government does not automatically strip it of its confidential status because, "[i]n common usage, confidentiality is not limited to complete anonymity or secrecy." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 173 (1993). So long as the context in which the information is provided does not indicate that the government would itself publicly disseminate it, the information remains confidential under Exemption 4.

Moreover, at least one Court in this Circuit has determined that such express assurances are *not* required. In *Gellman v. United States Department of Homeland Security*, the U.S. District Court for the District of Columbia found that, where the submitter has demonstrated that they actually and customarily treat information as private, the absence of an express assurance of

confidentiality will not otherwise invalidate a determination that the information is entitled to confidential treatment. No. 16-CV-635 (CRC), 2020 WL 1323896, at *11 (D.D.C. Mar. 20, 2020). For an implied assurance of confidentiality, the Court considers the context in which the information was received as supporting an implied assurance existed. *Citizens for Responsibility & Ethics in Washington v. United States DOC*, No. 1:18-cv-03022 (CJN), 2020 U.S. Dist. LEXIS 146783, at *9 (D.D.C. Aug. 14, 2020). The contract terms signed by BOP, combined with the fact that these documents have never publicly disclosed the BOP-side User Guide and/or Portal interface, satisfy this requirement.

Lastly, FOIA intended to require disclosure when it will "contribut[e] significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii)). It is arguable that this User Guide and Portal interface do not in fact contribute significantly to public understanding of operations and activities of BOP such that they must be disclosed. BOP has repeatedly and publicly acknowledged that emails are monitored and not private on TRULINCS: there are disclaimers on the portal to all users (inmate and outside contact) stating as much, as well as on the BOP website about inmate phone calls and emails. *See, e.g.*, BOP, Stay in Touch, https://www.bop.gov/inmates/communications.jsp (last visited December 16, 2020) ("Inmates and their contacts must consent to monitoring prior to using the system. In addition, all messages are screened for content that could jeopardize the public or the safety, security, or orderly operation of the facility"). BOP (and EOUSA) have explained their use of filter teams to obtain emails for criminal prosecutions and given materials to Plaintiff about these activities. It is arguable that knowing how to navigate TRULINCS or what buttons to click to enact features would not "contribute significantly" to the public understanding of government operations or activities, as the public will never use the BOP side of TRULINCS, and therefore

are exempt from disclosure under FOIA.

B. Defendants Properly Invoked the Deliberative Process Privilege[1]

Plaintiff challenges withholdings applied under FOIA Exemption 5's deliberative process privilege in certain records (BOP Records j and l; Criminal Division Records 1–4, 8–12, 14–22, 24, 26–28, and 31–33; and EOUSA Records 12 and 23[2]).

The documents in question do not consist of "finalized" memoranda, and thus are pre-decisional or deliberative, despite Plaintiff's arguments otherwise. *See* Pl. Opposition at 25. EOUSA Document 12 is legal memorandum written by a junior AUSA for his supervisor that lays out legal analysis regarding prisoner emails and invocation of attorney-client privileges issues; it was not "finalized," circulated to other employees, or introduced as official office policy. Jolly Suppl. Decl. ¶ 11. Document 23 is an email between AUSAs in the Western District of Washington on how to treat inmate email communications during the COVID-19 crisis, including possible procedures for the USAO to follow for criminal cases. It is also not a "finalized" memoranda, as it is an email containing candid opinions and ideas during an unprecedented crisis that is not memorialized in an official way. Jolly Suppl. Decl. at 5, fn. 8. "Examples of predecisional documents include 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.'" *Cleveland v. United States*, 128 F. Supp. 3d 284, 298–99 (D.D.C. 2015) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). As such, these

[1] Defendants wish to note for the Court that many of Plaintiff's objections to documents withheld by EOUSA were not included in its Amended Complaint.

[2] EOUSA is dropping it 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. Jolly Suppl. Decl. at 5, fn. 8.

documents are protected by the deliberative process privilege.

Second, these documents contain discussions about novel issues that arose *from* the new underlying BOP policy, which is why they are dated after the BOP policy was adopted. The Criminal Division invoked the deliberative process privilege (in conjunction with the attorney-work product privilege) to protect Criminal Division Records 1–4, 8–12, 14–22, 24, 26–28, and 31–33, all of which relate to brand new issues that arose *from* the new underlying BOP policy, meaning that Plaintiff's focus on the underlying BOP policy date is irrelevant. *See* Supplemental Declaration of John Cunningham ("Cunningham Suppl. Decl") ¶ 17. Employees at the Department and BOP reached out to the Criminal Division trial attorneys, who have certain expertise, experience and renown in this area of the law, to obtain advice for potential future policies or procedures. *Id.* The Criminal Division does not create policies for these divisions; it instead offers guidance. As a result, these emails contain pre-decisional opinions, advice, proposals, and helpful case law, and not any sort of final or decisional materials relating to the baseline BOP email policy, as Plaintiff assumes. *Id.* Similarly, EOUSA Document 25 consists of internal emails concerning possible action in the USAO after Federal Detention Center changes to requesting emails, and EOUSA Document 26 are draft, proposed templates for that particular office for obtaining inmate emails and calls for possible adoption, including solicitation of AUSA input in formalizing such procedures. Jolly Suppl. Decl. at 5, fn. 8. In short, Plaintiff's reliance on *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004), is misplaced because these documents are not tied to the BOP policy in question; they sprung up from the BOP policy in question, and therefore, even though they are dated after the adoption of a BOP policy, they are still predecisional, and not just "descriptive memoranda." *See* Pl. Opposition at 25-26.

Lastly, as explained below, the documents in question have only one purpose: to share

legal advice and guidance to inform decisionmakers and assist in policy formulation regarding criminal litigation matters. As showcased above, the Criminal Division is often consulted by other divisions of the Department due to their specialized expertise in criminal law issues; the very nature of the Division is one of providing opinions, advice, and guidance to assist decisionmakers in their deliberative process. Cunningham Suppl. Decl ¶ 17; *see also Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. Dep't of Justice*, 697 F.3d 184, 194 (2d Cir. 2012) (holding that documents are deliberative when they are "'related to the process by which policies are formulated'"). Therefore, the withheld documents contained guidance solicited by divisions looking to advice on particular topics. *Id.* Similarly, the documents in question from EOUSA consist of emails to a working group (Document 2); an email between AUSAs discussion proposed plans for email-related issues (Documents 3, 23); emails containing draft documents with edits and/or opinions on how to respond to inquiries (Document 24, 25, 26, 27); and/or emails calling for AUSA input on proposed policies (Document 27). *See* Jolly Suppl. Decl. at 5, fn. 8. These emails clearly fit into a decision making process, as they solicit opinions from AUSAs and/or working groups, and contain either draft policies containing edits or opinions and suggestions for how to solve legal issues posed in inmate communications. *Id.* Likewise, BOP withheld a Decision Paper containing the deliberations of senior level BOP staff on different approaches for monitoring video conferencing, which was slated to be offered at BOP. Lilly Suppl. Decl. ¶¶ 7-8. This decision paper identified several decision points that required input from each senior staff member. *Id.* The individual feedback contained assessments of "advantages and disadvantages of the decision point and individual feedback concerning the assessment of what policy will potentially work best." *Id.* Overall, Plaintiff's assertion that these records do not serve a role in a decision-making process is baseless.

Release of these records would chill the candid exchange of the candid and comprehensive discussions that are essential for efficient and effective agency decision-making. Defendants have provided sufficient detail and context about the documents to justify their application of the deliberative process privilege to select records.

C. Defendants Properly Invoked the Attorney-Work Product Privilege

Defendants properly applied the attorney-work product privilege to documents prepared by an attorney in contemplation of litigation, articulated in their motion for summary judgment. Plaintiff's allegations, namely that the document are not prepared in anticipation of litigation and/or do not have a specific litigation purpose, do not correlate to the actual content and purpose of the withheld documents, as explained by the supplemental declarations submitted by EOUSA and the Criminal Division. Pl .Opposition at 29-33; *see, generally*, Jolly Suppl. Decl.; Cunningham Suppl. Decl.

The DOJ Book is an internal guidance document for DOJ prosecutors, authored by criminal working groups focused on AUSA prosecutions, and created in anticipation of legal challenges for and uses in federal cases. Jolly Suppl. Dec. ¶ 11. In *National Association of Criminal Defense Lawyers v. EOUSA*, the Court held that "a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation" and thus, the Department's Blue Book, which contained litigation strategies and information, could be used for ordinary business purposes without losing its protected status. 844 F.3d 246, 255 (D.C. Cir. 2016) (citing to *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010)). As a result, "material generated in anticipation of litigation may also be used for ordinary business purposes without losing its protected status," nor does any educational purpose negate the document's "adversarial use in (and its preparation in anticipation

of) litigation." *Id.* at 137. The Court also differentiated the Blue Book from the United States Attorneys' Manual, which is merely neutral accounts of government policy and available to the public on the DOJ website. *Id.* at 138. Lastly, the Court held that "disclosure of the publicly-available information a lawyer has decided to include in a litigation guide—such as citations of (or specific quotations from) particular judicial decisions and other legal sources—would tend to reveal the lawyer's thoughts about which authorities are important and for which purposes," stating that these cases exist in context to litigation strategy. *Id.* at 256.

Unlike the public United States Attorneys' Manual, the DOJ Book is an internal-use only document located on the DOJ intranet for the AUSA community that cannot be accessed by the public. Jolly Suppl. Decl. ¶ 11. The document encompasses the scope of the government's thinking "by setting forth where the government sought to develop policies, how the government developed its practices, and who the government relied upon to develop procedures for federal cases." *Id.* It is updated constantly to incorporate new case law or changes in statutes and regulations, and serves as a repository of focused information authored by AUSAs who specialize in that area of law. Thus, it is more like the Blue Book than the United States Attorneys' Manual, because it does have an adversarial function, versus just reiterations of policies. As such, it should qualify for the attorney-work product privilege under the logic of *National Association of Criminal Defense Lawyers.*

EOUSA invoked the attorney work-product privilege to protect records containing "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." Jolly Suppl. Decl. ¶ 11. These memoranda (including Document 12 and 19, described above) were written by AUSAs and

contain legal analysis and suggestions in anticipation of upcoming criminal litigations that may involve requesting inmate emails from BOP. *Id.* Additionally, as further detailed in the Supplemental Declaration of John Cunningham, the Criminal Division withheld information in Documents numbered 1-2, 3, 8-12, 14-15, 18-19, 21, 24, 26, and 31-32 because the records contain emails between federal agencies (like EOUSA and the Internal Revenue Service) and experts at the Criminal Division (specifically the Electronic Surveillance Unit and the Computer Crimes and Intellectual Property Section). Cunningham Suppl. Decl. ¶¶ 5-6. These emails either address issues arising in specific cases, or how recent case law will affect how AUSAs prosecute in criminal cases, regarding monitoring and/or requests for BOP inmate email. *Id.* These emails contain mental impressions, conclusions, opinions, personal beliefs or legal theories meant to help AUSAs properly prepare for a case through obtaining information and preparing a legal strategy. *See Hunt v. U.S. Marine Corps*, 935 F. Supp. 46, 53 (D.D.C. 1996). Thus, these documents, prepared by attorneys, only relate to potential or ongoing litigations.

Defendants have demonstrated that the withheld documents have proper litigation purposes and are not just recitations of agency policies, and for that reason can justify their withholdings under the attorney work-product privilege.

D. BOP's Withholdings Pursuant to Exemption 7(E) are Appropriate

Plaintiff challenges the BOP's application of FOIA Exemption (7)(E) to BOP Documents a and b, arguing that BOP failed to "meaningfully" describe the techniques or procedures, that the information is publicly available, and BOP did not demonstrate that disclosure of the information would circumvent the law. Pl. Opposition at 37-39.

BOP's declarations have attested that the withheld portions of the Special Investigative Supervisors ("SIS") Manual is an internal-use only guide that covers everything from processing

crime scenes, handling confidential informants, and referring matters for prosecution, all of which are "critical components of the investigatory techniques of security staff of the BOP." Lilly Suppl. Decl. ¶ 11. BOP cannot "meaningfully" describe any techniques without actually revealing those very techniques. Instead, BOP must rely on descriptions of why this guidance is important to BOP. For example, the processing of crime scenes in the Manual is especially vital in a correctional setting, where a correctional setting carries a "significant risk of evidence contamination." *Id.* Likewise, techniques for handling of witnesses and informants are important because crimes committed in correctional facilities carry a risk of witnesses being compromised by other witnesses and/or other inmates. *Id.*

Plaintiff cites to an audit conducted by the DOJ Office of the Inspector General, which contains limited information from the Special Investigative Supervisors Manual, as evidence that the Manual is publicly available. Pl. Opposition at 38. The BOP considers the SIS Manual to be an internal-use document that only select staff can access, and BOP maintains that the Manual is not public. The disclosure of certain summarized information by an oversight body does not waive BOP's ability to apply FOIA exemptions to the actual SIS Manual itself.

Lastly, disclosure of the SIS Manual would help criminals circumvent the law. In *Blackwell v. Federal Bureau of Investigation*, the Court held that "'[r]ather than requiring a highly specific burden of showing how the law will be circumvented, [E]xemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law." 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting *Mayer Brown LLP, v. Internal Revenue Service*, 562 F.3d 1190, 1194) (D.C. Cir. 2009)). Later in *Skinner v. Department of Justice*, the Circuit Court would rule that there is a "low bar" for withholding under Exemption 7(E). 893 F. Supp. 2d 109, 114 (D.D.C. 2012) (quoting *Blackwell*, 646 F.3d at 42).

Here, BOP has stated that the SIS Manual 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. Lilly Suppl. Decl. ¶ 11. Specifically, it explains how BOP monitors emails to discover any potentially criminal activity being conducted through email. *Id.* Revealing the actual information within the SIS Manual would provide inmates with counter-intelligence information that would instruct them on how to use manipulative tactics to avoid detection of criminal conduct and circumvent the law. Secondly, if the methods regarding confidential informants were disclosed, then inmates who cooperate with staff in reporting potential disturbances, food strikes, drug introductions, weapons introductions, and other potential harmful or criminal activities would believe that their identities would not be protected. *Id.* ¶ 12. This would create a chilling effect on any cooperation from the inmate population and also undermine the security of federal correctional facilities. *Id.* In summary, the SIS Manual is a BOP-only document that contains law enforcement sensitive materials that should be shielded from disclosure, and thus BOP meets the threshold for asserting FOIA Exemption 7(E).

CONCLUSION

For the reasons set forth above and in their original motion for summary judgment, Defendants respectfully request that this Court grant summary judgment in favor of Defendants as to all claims in this case.

* * *

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Respectfully submitted,

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