

Prosecutors Are Reading Emails From Inmates To Lawyers

By Stephanie Clifford, New York Times

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The extortion case against Thomas DiFiore, a reputed boss in the Bonanno crime family, encompassed thousands of pages of evidence, including surveillance photographs, cellphone and property records, and hundreds of hours of audio recordings.

But even as Mr. DiFiore sat in a jail cell, sending nearly daily emails to his lawyers on his case and his deteriorating health, federal prosecutors in Brooklyn sought to add another layer of evidence: those very emails. The prosecutors informed Mr. DiFiore last month that they would be reading the emails sent to his lawyers from jail, potentially using his own words against him.

Jailhouse conversations have been many a defendant's downfall through incriminating words spoken to inmates or visitors, or in phone calls to friends or relatives. Inmates' calls to or from lawyers, however, are generally exempt from such monitoring. But across the country, federal prosecutors have begun reading prisoners' emails to lawyers — a practice wholly embraced in Brooklyn, where prosecutors have said they intend to read such emails in almost every case.

The issue has spurred court battles over whether inmates have a right to confidential email communications with their lawyers — a question on which federal judges have been divided.

An incarcerated former Pennsylvania state senator got into further trouble in 2011 when prosecutors seized his prison emails. In Georgia, officials built a contempt case against a man already in federal prison in part by using emails between him and his lawyers obtained in 2011. And in Austin, Tex., defense lawyers have accused members of law enforcement of recording attorney-client calls from jails, then using that information to tighten their cases.

"It's very troubling that the government's pushing to the margins of the attorney-client relationship," said Ellen C. Yaroshefsky, a professor at the Cardozo School of Law.

Defense lawyers say the government is overstepping its authority and taking away a necessary tool for an adequate defense. Some of them have refused to admit even the existence of sensitive emails — which, they say, perhaps predictably, are privileged.

All defendants using the federal prison email system, Trulincs, have to read and accept a notice that communications are monitored, prosecutors in Brooklyn pointed out. Prosecutors once had a "filter team" to set aside defendants' emails to and from lawyers, but budget cuts no longer allow for that, they said.

While prosecutors say there are other ways for defense lawyers to communicate with clients, defense lawyers say those are absurdly inefficient.

A scheduled visit to see Syed Imran Ahmed, a surgeon accused of Medicare fraud who is being held at the Metropolitan Detention Center in Sunset Park, Brooklyn, took lawyers five hours, according to court documents filed by one of Dr. Ahmed's lawyers, Morris J. Fodeman. The trip included travel time from Manhattan and waiting for jail personnel to retrieve Dr. Ahmed.

Getting confidential postal mail to inmates takes up to two weeks, Mr. Fodeman wrote. The detention center, like all federal jails, is supposed to allow inmates or lawyers to arrange unmonitored phone calls. But a paralegal spent four days and left eight messages requesting such a call and got nowhere, Mr. Fodeman wrote.

Dr. Ahmed's case includes 50,000 pages of documents so far, including "Medicare claim data and patient information that we need Dr. Ahmed's assistance to understand," Mr. Fodeman wrote. Especially since he is acting as a public defender in this case — meaning the government pays him at \$125 per hour — Mr. Fodeman argued that having to arrange an in-person visit or unmonitored phone call for every small question on the case was a waste of money and time.

In Brooklyn and across the country, the issue is being decided case by case. A spokesman for the Bureau of Prisons declined to comment, citing the continuing litigation.

In Georgia, a man named Jared Wheat, in prison for conspiring to import fake prescription drugs, used Trulincs email to work on ads for weight-loss products. The Federal Trade Commission used the emails as part of

a successful contempt case, arguing he violated a permanent injunction barring him from making unsubstantiated weight-loss claims.

Mr. Wheat's lawyers said the trade commission's request for the emails was illegal. Federal regulations allow mail sent to prisons to be marked as privileged, and "email, particularly in the 21st century, has effectively replaced U.S. Postal Service mail for most communications, and this court should not treat it differently than traditional mail," his lawyers wrote.

But a judge, Charles A. Pannell Jr. of the United States District Court in Atlanta, ruled in 2012 that by using Trulincs, Mr. Wheat "consented to the monitoring and thus had no reasonable expectation of privacy."

A defense lawyer for the former Pennsylvania senator, Vincent J. Fumo, futilely tried to get Mr. Fumo to stop sending him emails from prison, such as a 2011 email about his plans to write a book about his experience.

"Please try to keep in mind that CorrLinks email is monitored and unprivileged," the lawyer, Peter Goldberger, wrote, using another name for the email system. "I think this line of messages is a good example of a topic that is not suitable for discussion in this medium."

Later that day, Mr. Fumo contacted Mr. Goldberger about his analysis of a Court of Appeals hearing on his case. "I look forward to reading your further analysis, but NOT on the email system," Mr. Goldberger wrote.

The government collected Mr. Fumo's emails from prison — more than 12,000 pages' worth over six months — for inclusion in its argument for a harsh resentencing. Mr. Fumo received six additional months; he has since been released on probation.

In Brooklyn, Steve Zissou, a lawyer for Mr. DiFiore, tried to persuade a judge to stop prosecutors from monitoring his client's emails. Prosecutors had confirmed that they "intended to read my communications with Mr. DiFiore over Trulincs," he wrote. "Regardless of whether such communications qualify for protection under the attorney-client privilege, the government's decision to read our communications with our client is entirely inappropriate."

The judge overseeing that case, Allyne R. Ross, ruled on Thursday that the government was allowed to review the emails. "The government's policy does not 'unreasonably interfere' with Mr. DiFiore's ability to consult his counsel," she wrote.

In Dr. Ahmed's case, the judge, Dora L. Irizarry, ruled against the government last month, barring it "from looking at any of the attorney-client emails, period."

She seemed to take particular offense at an argument by a prosecutor, F. Turner Buford, who suggested that prosecutors merely wanted to avoid the expense and hassle of having to separate attorney-client emails from other emails sent via Trulincs. The government was not otherwise interested in the contents of those messages, he said.

"That's hogwash," Judge Irizarry said. "You're going to tell me you don't want to know what your adversary's strategy is? What kind of a litigator are you then? Give me a break."