

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
1660 L St., NW, 12th Floor
Washington, DC 20036

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS
320 First St., NW
Washington, DC 20534

and

DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., NW
Washington, DC 20530

Defendants.

Civil Action No. 18-cv-2399

COMPLAINT FOR INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Plaintiff the National Association of Criminal Defense Lawyers (“NACDL”) seeks injunctive and other appropriate relief to compel the release of agency records related to the federal government’s collection and monitoring of emails between inmates held in Federal Bureau of Prisons (“BOP”) facilities and their attorneys. NACDL filed two FOIA requests with Department of Justice (“DOJ”) components, the first to the BOP (the “BOP Request”) and the

second to the Criminal Division, the Office of Information Policy (“OIP”), and the Office of Legal Counsel (“OLC”) (collectively, the “Main Justice Request”).¹

2. Among other things, NACDL requested records from the BOP regarding the technical features of the inmate email system, and policies and guidance from Main Justice regarding the circumstances under which prosecutors may access emails between inmates and their attorneys.

3. There are currently over 150,000 inmates held in BOP facilities. Approved inmates at BOP facilities have access to an email system called TRULINCS. This system allows inmates to send short messages without attachments to approved individuals outside of BOP custody. Inmates can use TRULINCS to send emails to friends, loved ones, and, relevant to this litigation, their attorneys. Recipients can then access those messages using the website Corrlinks.com.

4. To use TRULINCS, inmates are required to click on an agreement stating that their communications—including messages to or from their attorneys—will be monitored and that communications with their counsel will not be treated as privileged. If inmates and their attorneys choose to communicate via email, the BOP may on its own supply the contents of the messages to prosecutors for use against the inmates in court or prosecutors may request inmates’ emails from the BOP.

5. The possibility that prosecutors could use an inmate’s TRULINCS messages against him in criminal proceedings is not merely theoretical. For example, in *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011), Vincent Fumo, a well-known Pennsylvania state senator, was

¹ In addition, NACDL filed a FOIA request with the Executive Office for United States Attorneys (“EOUSA”). The EOUSA claimed the FOIA request was overly burdensome and produced no records. NACDL has filed an administrative appeal, and may move to amend the Complaint to add the EOUSA once administrative remedies have been exhausted.

convicted of fraud, tax evasion, and obstruction of justice. Following Mr. Fumo's trial, the Government appealed his sentence. The United States Court of Appeals for the Third Circuit vacated the sentence and remanded the case to the district court for resentencing. As part of its argument at resentencing, the prosecutors introduced over 12,000 pages of Mr. Fumo's prison emails, including communications with his attorneys, to show that Mr. Fumo lacked remorse and had not accepted responsibility for his crimes.

6. Email has largely supplanted traditional modes of communication. Inmates are often incarcerated a great distance from where their counsel is located. In some cases, email may be the only reasonable way for an inmate to engage in strategic discussions or confer on time-sensitive matters with his or her attorney.

7. BOP's policy of monitoring attorney-client communications over TRULINCS makes it excessively difficult for inmates to communicate confidentially with their defense attorneys. This places a burden on inmates' constitutional rights, including their Sixth Amendment right to effective assistance of counsel and their First Amendment right to freedom of expression. The policy also implicates Due Process because it puts inmates at a distinct disadvantage compared to federal prosecutors, who do not have to reveal the contents of their email communications to their litigation adversaries.

8. As a result of the BOP's policies, inmates who wish to avoid government review of their attorney-client communications must rely on slower and costlier forms of communication, such as postal mail, unmonitored phone calls, and in-person visits. It can take two or more weeks for inmates to receive postal mail. Unmonitored calls can take weeks to schedule, correspondence to schedule these calls must sometimes be done via postal mail, and

the calls themselves are typically expensive. For in-person visits, it can take defense attorneys hours in travel, processing, and waiting time before they can speak with their clients.

9. Reliance on these outdated forms of communication is particularly harmful given that the majority of inmates in BOP custody are represented by publicly funded counsel who already struggle with limited resources. Correspondingly, the additional time and expense related to client communication restricts the affordability of privately retained counsel.

10. NACDL seeks to inform the public and criminal defense attorneys about TRULINCS and the federal government's policies regarding monitoring and use of attorney-client emails in criminal proceedings. It also seeks this information to inform policy makers and to allow the public to better participate in recurrent debates in Congress about whether and how Congress should legislate changes to the BOP's and DOJ's policies.

PARTIES

11. Plaintiff National Association of Criminal Defense Lawyers is the nation's preeminent criminal defense bar association. Founded in 1958, NACDL seeks to ensure justice and due process for persons accused of crime; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of criminal justice. NACDL has thousands of direct members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges. NACDL also has tens of thousands of indirect members through NACDL's state and local affiliates. NACDL publishes *The Champion*, an award winning and often cited monthly publication, which is broadly distributed to members, judges, law libraries, and other members of the public.

12. Defendant the Department of Justice is a department of the Executive Branch of the United States Government. The DOJ is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). The BOP, Criminal Division, OIP, and OLC are all components of Defendant DOJ.

13. Defendant the Federal Bureau of Prisons is a component of the DOJ. The BOP is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

JURISDICTION AND VENUE

14. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

15. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

NACDL’S FOIA REQUESTS AND AGENCY RESPONSES

The BOP Request and Response

16. On August 2, 2018, NACDL sent an email to the BOP requesting the following agency records made on or after January 1, 2016, by the BOP:²

- a. All records containing the BOP’s policies, practices, or procedures governing the collection, retention, use, or sharing of inmates’ attorney-client emails.
- b. All records containing the BOP’s policies, practices, or procedures governing the collection, retention, use, or sharing of inmates’ emails, including non-attorney-client emails.
- c. All external guidance, including directives, emails, or other communications sent to the BOP, regarding policies, practices, or procedures governing the collection, retention, use, or sharing of inmates’ attorney-client emails.
- d. All external guidance, including directives, emails, or other communications sent to the BOP, regarding policies, practices, or procedures governing the collection, retention, use, or sharing of inmates’ emails, including non-attorney-client emails.

² A copy of the BOP Request is attached hereto as Exhibit A.

- e. All records containing descriptions of any technology capable of filtering emails to or from particular individuals out of BOP productions of inmates' emails to third parties.
- f. All records containing descriptions of any technology capable of filtering emails to or from particular individuals out of emails retained by BOP.
- g. All records containing the BOP's policies, practices, or procedures for the use of any filtering technology for inmate email. Such records would include any policies, practices, or procedures for the use of filtering technology for inmate email within the BOP, in response to government requests for production of inmates' emails, or under any other circumstances.
- h. All documentation provided to the BOP by any company providing inmate email access technology or technology to filter inmate email, including any contracts, agreements, technical specifications, or proposals.
- i. All records containing the BOP's policies, practices, or procedures for reviewing and processing inmates' email communications. Such records would include any policies, practices, or procedures directing BOP staff with respect to when and how inmates' emails should be reviewed, as well as any information concerning the use of algorithms or other electronic data processing techniques to monitor the content of inmates' emails.

17. In the BOP Request, NACDL also formally requested that it not be charged search or review fees because NACDL qualifies as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1). NACDL further requested that it be granted a waiver of all fees related to its request because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

18. On August 6, 2018, the BOP acknowledged receipt of the BOP Request, indicating it was received on August 2, 2018. The BOP, citing "unusual circumstances" as defined in 5 U.S.C. § 552(a)(6)(B)(i)–(iii), extended the time for its reply to the BOP Request by ten working days.

19. Although the BOP's deadline has long since passed, to date, the BOP has not produced any records responsive to the BOP Request, cited any exemption under FOIA for its failure to produce the records requested, or issued a determination regarding NACDL's request for records or waiver of fees.

The Main Justice Request and Responses

20. On August 2, 2018, NACDL sent identical requests by email or certified mail to three components of Main Justice: the Criminal Division, the OIP, and the OLC. NACDL requested the following agency records made on or after January 1, 2006, by the Office of the Attorney General, Office of the Deputy Attorney General, Office of the Associate Attorney General, Office of Legal Policy, Office of Legal Counsel, and DOJ Criminal Division:³

- a. All guidance, directives, emails, or other communications sent to any U.S. Attorney's Office(s) regarding policies, practices, or procedures for requesting copies of inmates' attorney-client emails from the BOP.
- b. All guidance, directives, emails, or other communications sent to any U.S. Attorney's Office(s) regarding policies, practices, or procedures for requesting copies of inmates' emails from the BOP, including non-attorney-client emails.
- c. All legal or policy memoranda concerning any decision to enact or change DOJ policies, practices, or procedures for requesting inmates' emails from the BOP, including any policies, practices, or procedures for requesting that the BOP exclude from production any emails between an inmate and their attorney, as well as any policies, practices, or procedures concerning the circumstances under which the government does not request such exclusions.

21. In the Main Justice Request, NACDL also formally requested that it not be charged search or review fees because NACDL qualifies as a representative of the news media pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1). NACDL further requested that it be granted a waiver of all fees related to its request because disclosure of the

³ A copy of the Main Justice Request is attached hereto as Exhibit B.

requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

22. On August 24, 2018, the Criminal Division acknowledged receipt of the Main Justice Request, indicating it was received on August 3, 2018. The Criminal Division, citing “unusual circumstances” as defined by 5 U.S.C. § 552(a)(6)(B)(i)–(iii), extended the time limit for its reply. During a call to clarify the length of the extension, a representative for the FOIA unit of the Criminal Division said the extension was for ten working days.

23. Although that deadline has long since passed, to date, the Criminal Division has not produced any records responsive to the Main Justice Request, cited any exemption under FOIA for its failure to produce the records requested, or issued a determination regarding NACDL’s request for records or waiver of fees.

24. On September 6, 2018, the OIP acknowledged receipt of the Main Justice Request, indicating it was received on August 9, 2018. The OIP, citing “unusual circumstances” as defined by 5 U.S.C. § 552(a)(6)(B)(i)–(iii), extended the time for its reply to the Main Justice Request by ten working days.

25. Although that deadline has long since passed, to date, the OIP has not produced any records responsive to the Main Justice Request, cited any exemption under FOIA for its failure to produce the records requested, or issued a determination regarding NACDL’s request for records or waiver of fees.

26. On September 12, 2018, the OLC acknowledged receipt of the Main Justice Request, indicating it was received on August 2, 2018.

27. Although the deadline has long since passed, to date, the OLC has not produced any records responsive to the Main Justice Request, cited any exemption under FOIA for its

failure to produce the records requested, or issued a determination regarding NACDL's request for records or waiver of fees.

CAUSES OF ACTION

28. NACDL repeats and incorporates herein by reference the allegations of Paragraphs 1 through 27.

BOP Request

29. The BOP's failure to make the records sought by the BOP Request promptly available violates the FOIA, 5 U.S.C. § 552(a)(3), and the BOP's corresponding regulations, and constitutes wrongful withholding of agency records.

30. The BOP's failure to grant NACDL's request for treatment as a news media representative violates 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1).

31. The BOP's failure to grant NACDL's request for a public interest fee waiver violates 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

32. NACDL is entitled to injunctive relief with respect to the release and disclosure of the records sought in the BOP Request.

Main Justice Request

33. The DOJ's failure to make the records sought by the Main Justice Request promptly available violates the FOIA, 5 U.S.C. § 552(a)(3), and the DOJ's corresponding regulations, and constitutes wrongful withholding of agency records.

34. The DOJ's failure to grant NACDL's request for treatment as a news media representative violates 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1).

35. The DOJ's failure to grant NACDL's request for a public interest fee waiver violates 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2).

36. NACDL is entitled to injunctive relief with respect to the release and disclosure of the records sought in the Main Justice Request.

PRAYER FOR RELIEF

WHEREFORE, NACDL requests that this Court:

- a. Order Defendants BOP and DOJ to conduct a thorough search for responsive records;
- b. Order Defendants BOP and DOJ to immediately process and release any responsive records;
- c. Enjoin Defendants BOP and DOJ from charging NACDL search, review, or duplication fees in connection with the requests;
- d. Award NACDL its reasonable costs and attorneys' fees incurred in this action;
- e. Grant such other relief as the Court may deem just and proper.

DATED: October 18, 2018

Respectfully submitted,

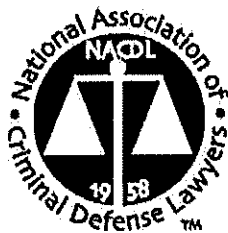
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Counsel for Plaintiff

APPENDIX A

National Association of Criminal Defense Lawyers



August 2, 2018

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Re: Freedom of Information Act Request

To Whom It May Concern:

The National Association of Criminal Defense Lawyers (“NACDL”)¹ submits this request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records concerning federal prosecutors’ access to emails between individuals held at Bureau of Prisons (“BOP”) facilities and their legal counsel.

I. Background

To use the email system at BOP facilities, inmates must consent to having their email monitored, including email to and from their attorneys.² If inmates and their attorneys choose to communicate via email, the BOP may supply the contents of the emails to prosecutors for use against the inmates in court,³ and indeed prosecutors assert the right to request inmates’ emails

¹ Founded in 1958 as a professional bar association, NACDL is the preeminent organization in the United States dedicated to defense attorneys’ mission of ensuring fairness in the criminal justice system. NACDL has thousands of direct members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges.

² In relevant part, the BOP email system’s “Consent to Monitoring” agreement states: “I am notified of, acknowledge, and voluntarily consent to having my messages and transactional data (incoming and outgoing) monitored, read, [and] retained by Bureau staff I am notified of, acknowledge, and voluntarily consent that this provision applies to messages both to and from my attorney or other legal representative, and that such messages will not be treated as privileged communications.” U.S. Dep’t. of Justice, Fed. Bureau of Prisons, “Inmate Agreement for Participating in TRULINCS Electronic Messaging Program,” https://www.bop.gov/policy/forms/BP_A0934.pdf.

³ See, e.g., *United States v. Walia*, No. 14-CR-213-MKB, 2014 WL 3734522, at *16 (E.D.N.Y. Jul. 25, 2014) (denying defendant’s pre-trial motion to prevent prosecutors from reviewing emails with his attorneys).

from the BOP.⁴ As a result, inmates who wish to avoid government review of their attorney-client communications must rely on slower and costlier forms of communication, such as postal mail and in-person visits.

A recent letter from the United States Attorney's Office for the Eastern District of New York indicates that the BOP "now has the technical capability to filter out of its production of BOP email communications emails to and from a particular email address."⁵ The letter further states that "the government now agrees to request that the BOP exclude from most productions communications between a defendant and his or her attorneys and other legal assistants and paralegals on their staff."⁶ It is unclear what "most productions" encompasses, and it is also unclear whether other U.S. Attorneys' Offices have adopted similar policies concerning emails exchanged between inmates and their attorneys.

The Supreme Court has consistently recognized the foundational importance of the attorney-client privilege as a means to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."⁷ The American Bar Association has also emphasized the importance of the privilege, and recently adopted a resolution urging "the Department of Justice and the Federal Bureau of Prisons to amend their policies . . . to permit attorneys and their incarcerated clients to communicate confidentially via email and thereby maintain the attorney-client privilege."⁸

NACDL seeks to inform the public about the extent to which United States Attorneys' Offices obtain attorney-client emails from the BOP. As email has largely supplanted traditional modes of communication, access to email may be the only way for inmates to engage in strategic discussions or confer on time-sensitive matters with their attorneys. This is especially true for the majority of inmates represented by publicly funded counsel that already strain to provide adequate representation with limited resources.⁹ Indeed, for inmates, access to confidential email can be the difference between a successful and failed defense.

⁴ Letter from James D. Gatta, Criminal Division Chief, U.S. Attorney's Office for the Eastern District of New York, to Deirdre D. von Dornum, Attorney-in-Charge, Federal Defenders of New York, at 1 (Oct. 17, 2017) (attached hereto as Exhibit 1) ("The Office frequently requests that the BOP produce to the government BOP email communications and has taken the position that BOP email communications, including those between a defendant and his or her attorney, are not privileged communications.").

⁵ *Id.*

⁶ *Id.*

⁷ *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); see also *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009).

⁸ Am. Bar Ass'n, Resolution 10A (adopted Feb. 2016), <https://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/10a.pdf>.

⁹ See Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics Special Report (Nov. 2000), available at <https://www.bjs.gov/content/pub/pdf/dccc.pdf> (noting that over eighty percent of felony defendants charged with violent crime in the nation's seventy-

II. Records Requested

NACDL requests the following records made on or after January 1, 2016 by the BOP:

1. All records containing the BOP's policies, practices, or procedures governing the collection, retention, use, or sharing of inmates' attorney-client emails.
2. All records containing the BOP's policies, practices, or procedures governing the collection, retention, use, or sharing of inmates' emails, including non-attorney-client emails.
3. All external guidance, including directives, emails, or other communications sent to the BOP, regarding policies, practices, or procedures governing the collection, retention, use, or sharing of inmates' attorney-client emails.
4. All external guidance, including directives, emails, or other communications sent to the BOP, regarding policies, practices, or procedures governing the collection, retention, use, or sharing of inmates' emails, including non-attorney-client emails.
5. All records containing descriptions of any technology capable of filtering emails to or from particular individuals out of BOP productions of inmates' emails to third parties.
6. All records containing descriptions of any technology capable of filtering emails to or from particular individuals out of emails retained by BOP.
7. All records containing the BOP's policies, practices, or procedures for the use of any filtering technology for inmate email. Such records would include any policies, practices, or procedures for the use of filtering technology for inmate email within the BOP, in response to government requests for production of inmates' emails, or under any other circumstances.
8. All documentation provided to the BOP by any company providing inmate email access technology or technology to filter inmate email, including any contracts, agreements, technical specifications, or proposals.
9. All records containing the BOP's policies, practices, or procedures for reviewing and processing inmates' email communications. Such records would include any policies, practices, or procedures directing BOP staff with respect to when and how inmates' emails should be reviewed, as well as any information concerning

five largest counties relied on publicly financed attorneys); Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES (Aug. 23, 2013), available at <https://nyti.ms/2GOiMWc> (explaining that federal budget cuts in the 2014 fiscal year caused federal defender offices around the country to reduce staff and spend less on things like expert witnesses).

the use of algorithms or other electronic data processing techniques to monitor the content of inmates' emails.

Where a document contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unusually burdensome, we ask that you give us an opportunity to narrow our request. Please disclose all segregable portions of otherwise exempt records. *See* 5 U.S.C. § 552(b).

We also ask that you provide responsive electronic records in their native file format or a generally accessible electronic format (e.g., for tabular data, XLS or CSV). *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, please provide the records electronically in a text-searchable, static-image format (e.g., PDF), in the best image quality in the agency's possession, and in separate Bates-stamped files.

III. Application for Waiver or Limitation of Fees

NACDL requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and that disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). For the reasons explained above, disclosure of the records would be in the public interest. Moreover, disclosure would not further NACDL's commercial interest. NACDL will make any disclosed information available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA to ensure "that it be liberally construed in favor of waivers for noncommercial requesters." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (citation omitted).

In addition, NACDL requests a waiver of search and review fees on the ground that it is a "representative of the news media" within the meaning of FOIA and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). NACDL qualifies as a "representative of the news media" because, as explained above, it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of FOIA); *Serv. Women's Action Network v. U.S. Dep't of Defense*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012); *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004). Courts have found other non-profit organizations with research and public education missions similar to that of NACDL to be representatives of the news media. *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133

F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” qualified as a news media requester).

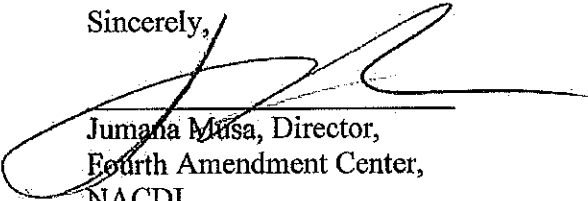
For these reasons, NACDL is entitled to a fee waiver.

* * *

Thank you for your attention to our request. We would be happy to discuss its terms with you over the phone or via email to clarify any aspect of the request or, where reasonable, to narrow it.

I certify that the foregoing is true and correct.

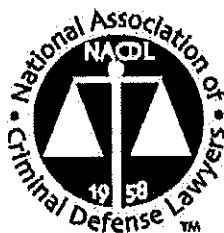
Sincerely,



Jumana Musa, Director,
Fourth Amendment Center,
NACDL

APPENDIX B

National Association of Criminal Defense Lawyers



August 2, 2018

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Re: Freedom of Information Act Request

To Whom It May Concern:

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¹ Founded in 1958 as a professional bar association, NACDL is the preeminent organization in the United States dedicated to defense attorneys’ mission of ensuring fairness in the criminal justice system. NACDL has thousands of direct members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges.

I. Background

To use the email system at BOP facilities, inmates must consent to having their email monitored, including email to and from their attorneys.² If inmates and their attorneys choose to communicate via email, the BOP may supply the contents of the emails to prosecutors for use against the inmates in court,³ and indeed prosecutors assert the right to request inmates' emails from the BOP.⁴ As a result, inmates who wish to avoid government review of their attorney-client communications must rely on slower and costlier forms of communication, such as postal mail and in-person visits.

A recent letter from the United States Attorney's Office for the Eastern District of New York indicates that the BOP "now has the technical capability to filter out of its production of BOP email communications emails to and from a particular email address."⁵ The letter further states that "the government now agrees to request that the BOP exclude from most productions communications between a defendant and his or her attorneys and other legal assistants and paralegals on their staff."⁶ It is unclear what "most productions" encompasses, and it is also unclear whether other U.S. Attorneys' Offices have adopted similar policies concerning emails exchanged between inmates and their attorneys.

The Supreme Court has consistently recognized the foundational importance of the attorney-client privilege as a means to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law

² In relevant part, the BOP email system's "Consent to Monitoring" agreement states: "I am notified of, acknowledge, and voluntarily consent to having my messages and transactional data (incoming and outgoing) monitored, read, [and] retained by Bureau staff. . . . I am notified of, acknowledge, and voluntarily consent that this provision applies to messages both to and from my attorney or other legal representative, and that such messages will not be treated as privileged communications." U.S. Dep't. of Justice, Fed. Bureau of Prisons, "Inmate Agreement for Participating in TRULINCS Electronic Messaging Program," https://www.bop.gov/policy/forms/BP_A0934.pdf.

³ See, e.g., *United States v. Walla*, No. 14-CR-213-MKB, 2014 WL 3734522, at *16 (E.D.N.Y. Jul. 25, 2014) (denying defendant's pre-trial motion to prevent prosecutors from reviewing emails with his attorneys).

⁴ Letter from James D. Gatta, Criminal Division Chief, U.S. Attorney's Office for the Eastern District of New York, to Deirdre D. von Dornum, Attorney-in-Charge, Federal Defenders of New York, at 1 (Oct. 17, 2017) (attached hereto as Exhibit 1) ("The Office frequently requests that the BOP produce to the government BOP email communications and has taken the position that BOP email communications, including those between a defendant and his or her attorney, are not privileged communications.").

⁵ *Id.*

⁶ *Id.*

and the administration of justice.”⁷ The American Bar Association has also emphasized the importance of the privilege, and recently adopted a resolution urging “the Department of Justice and the Federal Bureau of Prisons to amend their policies . . . to permit attorneys and their incarcerated clients to communicate confidentially via email and thereby maintain the attorney-client privilege.”⁸

NACDL seeks to inform the public about the extent to which United States Attorneys’ Offices obtain attorney-client emails from the BOP. As email has largely supplanted traditional modes of communications, access to email may be the only way for inmates to engage in strategic discussions or confer on time-sensitive matters with their attorneys. This is especially true for the majority of inmates represented by publicly funded counsel that already strain to provide adequate representation with limited resources.⁹ Indeed, for inmates, access to confidential email can be the difference between a successful and failed defense.

II. Records Requested

NACDL requests the following records made on or after January 1, 2006, by the Office of the Attorney General, Office of the Deputy Attorney General, Office of the Associate Attorney General, Office of Legal Policy, Office of Legal Counsel, and DOJ Criminal Division:

1. All guidance, directives, emails, or other communications sent to any U.S. Attorney’s Office(s) regarding policies, practices, or procedures for requesting copies of inmates’ attorney-client emails from the BOP.
2. All guidance, directives, emails, or other communications sent to any U.S. Attorney’s Office(s) regarding policies, practices, or procedures for requesting copies of inmates’ emails from the BOP, including non-attorney-client emails.
3. All legal or policy memoranda concerning any decision to enact or change DOJ policies, practices, or procedures for requesting inmates’ emails from the BOP, including any policies, practices, or procedures for requesting that the BOP exclude from production any emails between an inmate and their attorney, as well as any

⁷ *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); see also *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009).

⁸ Am. Bar Ass’n, Resolution 10A (adopted Feb. 2016), <https://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/10a.pdf>.

⁹ See Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics Special Report (Nov. 2000), available at <https://www.bjs.gov/content/pub/pdf/dccc.pdf> (noting that over eighty percent of felony defendants charged with violent crime in the nation’s seventy-five largest counties relied on publicly financed attorneys); Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES (Aug. 23, 2013), available at <https://nyti.ms/2GOiMwC> (explaining that federal budget cuts in the 2014 fiscal year caused federal defender offices around the country to reduce staff and spend less on things like expert witnesses).

policies, practices, or procedures concerning the circumstances under which the government does not request such exclusions.

Where a document contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unusually burdensome, we ask that you give us an opportunity to narrow our request. Please disclose all segregable portions of otherwise exempt records. *See* 5 U.S.C. § 552(b).

We also ask that you provide responsive electronic records in their native file format or a generally accessible electronic format (e.g., for tabular data, XLS or CSV). *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, please provide the records electronically in a text-searchable, static-image format (e.g., PDF), in the best image quality in the agency's possession, and in separate Bates-stamped files.

III. Application for Waiver or Limitation of Fees

NACDL requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and that disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). For the reasons explained above, disclosure of the records would be in the public interest. Moreover, disclosure would not further NACDL's commercial interest. NACDL will make any disclosed information available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA to ensure "that it be liberally construed in favor of waivers for noncommercial requesters." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (citation omitted).

In addition, NACDL requests a waiver of search and review fees on the ground that it is a "representative of the news media" within the meaning of FOIA and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(I). NACDL qualifies as a "representative of the news media" because, as explained above, it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of FOIA); *Serv. Women's Action Network v. U.S. Dep't of Defense*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012); *ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004). Courts have found other non-profit organizations with research and public education missions similar to that of NACDL to be representatives of the news media. *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dep't of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133

F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” qualified as a news media requester).

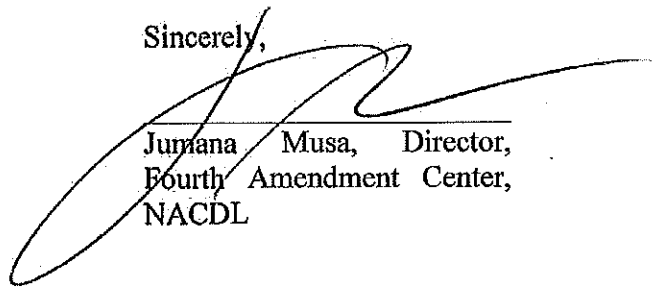
For these reasons, NACDL is entitled to a fee waiver.

* * *

Thank you for your attention to our request. We would be happy to discuss its terms with you over the phone or via email to clarify any aspect of the request or, where reasonable, to narrow it.

I certify that the foregoing is true and correct.

Sincerely,



Jumana Musa, Director,
Fourth Amendment Center,
NACDL