

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES)
UNION,)
)
PLAINTIFF)
) CIVIL ACTION NO. 16-CV-
v.) 00704 (RC)
)
)
DEPARTMENT OF JUSTICE,)
)
DEFENDANT.)
)
)
_____)

DECLARATION OF RONALD L. RODGERS

I, the undersigned, Ronald L. Rodgers, declare the following pursuant to 28 U.S.C. §1746:

1. I am currently employed by the Federal Bureau of Prisons ("BOP") as the Senior Counsel for the Information and Remedies Branch ("IRP") of the Office of General Counsel. The Freedom of Information Act ("FOIA") and Privacy Act Section forms one part of this branch; the Administrative Remedies Section forms the other portion of the branch. From 1977 until 1999, I served as a commissioned officer and, from 1983 until retirement, as a judge advocate in the United States Marine Corps; my final duty assignment from 1995 until 1999 was as a Circuit Military Judge and Deputy Chief Judge, Navy-Marine Corps Trial Judiciary. From

1999 until 2014, I was employed by the U.S. Department of Justice; I joined the BOP Office of General Counsel in June 2014. I have been a member of the Senior Executive Service since 2008; my office is located in Washington, D.C.

2. I make the following statements based on my personal knowledge of the information regarding the FOIA request submitted by plaintiffs and searches for documents responsive to said request that is the subject of the complaint in American Civil Liberties Union v. U.S. Department of Justice, in Civil Action 16-CV-00704 (RC). The specific purpose of this declaration is to provide information regarding the adequacy of the searches conducted for documents responsive to plaintiff's FOIA request of January 13, 2015, hereinafter referred to as FOIA Request 2015-02312. In that request, plaintiff requested (1) Any and all communications relating to Detention Site Cobalt between BOP and any other Federal agency or agencies from January 1, 2002 to January 1, 2005; (2) Any and all communications relating to Detention Site Cobalt between BOP personnel from January 1, 2002 to January 1, 2005; (3) Any and all documents identifying BOP personnel who visited Detention Site Cobalt on or about November 2002; (4) Any and all documents relating to any and all visits, meetings, inspections, assessments, recommendations, or training conducted by BOP personnel relating to Detention Site Cobalt on or about November

2002; (5) Any and all documents relating to any and all briefings or meeting between BOP and Central Intelligence personnel relating to Detention Site Cobalt on or about December 2002; and (6) Any and all documents relating to the death of a detainee at Detention Site Cobalt on or about November 2002.

3. Notwithstanding the date the complaint was filed, I became aware of it on June 3, 2016 and as our single litigation counsel was unavailable, immediately began a review of our actions upon receipt of FOIA request 2015-02312 in January 2015. I located all records retained with the request in our BOP FOIA processing/records management system, which reflected that on January 21, 2015, a request for documents responsive to FOIA Request 2015-02312 had been sent to the following BOP components: the Office of General Counsel; the Human Resources section of the Administrative Division; the Information, Policy, and Public Affairs ("IPPA") Division; the Correctional Programs Division; and the Office of the Director, BOP.

4. On January 22, 2015, the Office of the Director, BOP informed the IPPA Division that the Director had approved an e-mail search of the records of appropriate BOP employees by the Office of Information Services for records that might be responsive to FOIA Request 2015-02312. On February 6, 2015 IPPA replied to the BOP FOIA office that it had conducted a

search of its "computer files [and] Groupwise" utilizing, from the language employed by plaintiff in FOIA Request 2015-02312 the key words "CIA, Afghanistan, and COBALT" and had located no documents responsive to the request. The Office of General Counsel replied on February 18, 2015 that it had no records responsive to FOIA Request 2015-02312. On March 3, 2015, the Human Resources section of the Administrative Division replied that it had "no information" relative to FOIA request 2015-02312, adding that if training was involved, the offices in BOP that should be contacted regarding the FOIA request would be "Correctional Programs/Services or Administration (travel)."

5. On March 20, 2015, the Executive Assistant for the Correctional Programs Division ("EA/CPD") replied that the safes in the offices of the Assistant Director, Senior Deputy Assistant Director, and Executive Assistant of the Division had been physically searched and that no records responsive to the FOIA Request had been located. Also on or about March 20, 2015, BOP FOIA personnel apparently learned that a former member of the Correctional Programs Division (hereinafter identified as "former BOP employee #1") may have traveled internationally in support of a training evolution requested by another federal agency in November 2002 and as a result inquired of the EA/CPD whether any records relating to that effort existed in Correctional Programs Division spaces.

On that same date, the EA/CPD confirmed that former BOP employee #1 "did visit," adding that he "does not have any classified documents. If he did they would be in [sic] safe which I looked through and they are not there."

6. Based on the comments concerning former BOP employee #1, also on March 20, 2015, BOP FOIA personnel inquired of travel and budget officials with the BOP Administrative Division whether a search could be conducted to determine if former BOP employee #1 had traveled internationally in support of a training effort on behalf of another federal agency. On March 22, 2015, an official with the travel office advised that electronic records associated with former BOP employee #1 indicated that in March 2002 he had traveled internationally, but that the records did not specify the location to which he had traveled.

7. As a result of the aforementioned search activity conducted in early 2015 for records responsive to FOIA Request 2015-02312, on April 22, 2015, the BOP FOIA office issued its final reply to plaintiff indicating that no records responsive to request 2015-02312 had been located. After reviewing the complaint filed by plaintiff in this case, as well as plaintiff's administrative appeal of the April 22, 2015 final BOP response, I opted to conduct another search for records

responsive to request 2015-02312. Attached hereto are plaintiff's FOIA request of January 13, 2015; the BOP acknowledgment of receipt of January 15, 2015; the BOP "no records" reply of April 22, 2015; plaintiff's administrative appeal to the Office of Information Policy (OIP), Department of Justice, of June 11, 2015; OIP's acknowledgment of receipt of appeal of July 15, 2015; OIP's denial of the appeal of September 10, 2015; and BOP's release of responsive documents to plaintiff of August 26, 2016 as Exhibits 1 - 7, respectively. The records released to plaintiff as part of BOP's August 26, 2016 correspondence are provided as Exhibits 8 and 10 to this declaration.

Search Efforts of Intelligence and Terrorism Branch, Correctional Programs Division, BOP

8. On June 8, 2016, I contacted the Intelligence and Counter Terrorism Branch, Correctional Programs Division, to determine whether they might possess records that were responsive to FOIA Request 2015-02312. On June 9, 2016, the Administrator of that section advised that employing from the language employed by plaintiff in FOIA Request 2015-02312 the terms "Cobalt," "BOP Afghanistan," "Afghanistan Cobalt," and "BOP Inspection of Site Cobalt," no responsive records had been located in a physical and electronic search of the Branch's records, adding that this Branch had been created only in 2008.

Search Efforts of National Institute of Corrections

9. On June 8, 2016, the National Institute of Corrections ("NIC") was contacted and requested to conduct a search for records that might be responsive to FOIA Request 2015-02312. On June 13, 2016, the Executive Assistant, NIC replied as follows:

- a. That NIC searched its electronic and paper Technical Assistance files and agency financial records for responsive records;
- b. That NIC's records retention requirements require them to retain records for three years, after which they are shipped to the National Archive and Records Administration, which retains the files for four more years until they are destroyed;
- c. That notwithstanding that NIC records within the relevant time periods concerning FOIA Request 2015-02312 may have been already destroyed, NIC also conducted an on-site search of all hard copy and electronic Technical Assistance files utilizing from the language employed by plaintiff in FOIA Request 2015-02312 the keywords "Afghanistan" and "Detention Site Cobalt," which located no responsive documents;
- d. That while the same records retention schedule pertains to fiscal and staff travel records, NIC conducted an electronic and hard-copy search for any such responsive records. In addition to researching financial accounting

information for responsive records, NIC is required to obtain written approval for any international travel from the Director, BOP; this allowed for a separate search of documents that would exist (if not previously destroyed per retention schedules) in cases of international travel. These searches did not result in locating any responsive documents. Additionally, in this regard, the long-time Financial Service Chief was queried as to his personal memory concerning international travel of NIC employees; in the past 15 years, he could only recall two instances of international travel by NIC employees, neither of which was responsive to the request.

e. That no e-mail searches of NIC employees were conducted because of the lack of "leads" from the other searches indicating some awareness of the subject of the search for documents, and because of systemic limitations attendant to the BOP e-mail system (see paragraph 16 and 17, below regarding those limitations), but the individual serving as NIC Director from January 1, 2002 until the end of 2012 was contacted to determine if he had any memory of events that might be linked to the subject of FOIA Request 2015-02312, and the former director recalled only the same two incidents of foreign travel that the Financial Services Chief had recalled.

Search Efforts of Correctional Programs Division, BOP

10. On June 16, 2016, I contacted the EA/CPD and asked for the contact information for former BOP employee #1. The EA/CPD provided me that information and indicated that former BOP employee #1 would "be happy to assist." On June 17 and July 15, 2016, I telephonically interviewed former BOP employee #1; the interview was exclusively focused on records which may have been received, retained or created in the course of the preparation for or in the aftermath of international travel in support of training for another federal agency, and in no way touched on training provided or observations made in the course of said training. During these interviews, former BOP employee #1 indicated the following:

- a. That he had traveled to Guantanamo Bay, Cuba to provide training to DOD personnel operating a detention facility there in March 2002 for a period of approximately three or four days (including travel);
- b. That he and another former BOP employee (hereinafter referred to as "former BOP employee #2) traveled to another international location to provide basic correctional practices training on behalf of the Central Intelligence Agency ("CIA") in November 2002;
- c. That he never saw a written request for such training support by BOP; rather, his supervisor orally tasked him to participate;

d. That former BOP employee #1, who was then attached to the BOP Central Office in Washington, D.C., became aware that former BOP employee #2, who was stationed in a Midwestern state, would also participate in the international training matter; former BOP employee #1 is not aware how former BOP employee #2 was invited to participate;

e. That in advance of the training event, former BOP employee #1 traveled to the supported federal agency to discuss the training on three occasions; that he received notice of such meetings via telephone; that he intended to utilize off-the-shelf BOP training materials not adjusted in any way to teach basic correctional techniques; and that the CIA approved of the instruction to be provided in training;¹

f. That former BOP employees #1 and #2 traveled via government-provided air to the location where training would occur, and that they were present at that location for approximately three weeks;

g. That upon arriving at the training location, he was permitted to communicate with his BOP office, and his wife and children, on a single occasion to simply inform them that he had arrived safely, without reference to anything dealing with the purpose of his visit;

¹At this point in time, it is not possible to locate the materials that were used in this 2002 training event.

h. That at the termination of the training, former BOP employees #1 and #2 were advised that they were not permitted to discuss their participation in this training, or to create or retain any records of the training or their involvement in same, and that upon his return to the United States, former BOP employee #1 honored this requirement;

i. That the only possible record that former BOP employee #1 might have possessed in the aftermath of the training would have been unused portions of the off-the-shelf training materials, but that no reports or after-action reports were created, nor did he discuss his participation in the international training event with anyone else at BOP; and

j. BOP employee #1 confirmed that although he made subsequent statements about the site visit, he did not create or maintain any records. Other than the BOP off-the-shelf training materials, no records in any way related to the 2002 international training in which former BOP employee #1 participated were received, created or retained.

Search efforts of Administrative Division, BOP

11. After concluding my interview of former BOP employee #1, I met with a senior official in the BOP Finance Section (Administrative Division) to review the individual travel histories of former BOP employees #1 and #2. While the travel

history of former BOP employee #1 reflected travel of four days' duration in March 2002 to an international location (consistent with the contents of Exhibit #8; see paragraph 14, below regarding Exhibit #8), the travel histories of both employees reflected no international travel for the rest of 2002. The travel history of former BOP employee #2 did reflect travel in December 2003 for a period seven days to the same international location that he and former BOP employee #1 had traveled to in November 2002.

Search efforts of IPPA Division, BOP and the Office of the BOP Director

12. Notwithstanding IPPA's February 6, 2015 reply indicating that their search had not resulted in locating any records responsive to plaintiff's FOIA request, in response to plaintiff's complaint, they were again asked to conduct a search for responsive documents from its policy and public affairs functions. On June 8, 2016, IPPA again replied that its search had yielded no responsive documents. At that time, because I was not yet certain if all individuals who may have had some knowledge of the 2002 international travel of former BOP employee #1 had been identified, I did not yet request an e-mail search by IPPA's information technology branch for responsive documents. I did request a search for documents responsive to FOIA Request 2015-02312 from the Office of Security Technology component of IPPA; on June 8, 2016 they reported to me

that employing from the language employed by plaintiff in FOIA Request 2015-02312 the search terms "2002, Afghanistan, and CIA," and having searched desktop and laptop Word and existing² Groupwise files for those terms, no records responsive to FOIA request were located.

13. On June 8, 2016, contact was made with the BOP Director's office to request a search of hard copy and electronic files for records responsive to FOIA request 2015-02312. I was informed that no hard-copy files were retained presently at the director's office but that in approximately 2013, some files had been moved from the Director's office to a storage location within the IPPA Division. Thereafter, on June 17, 2016, I made contact with the Chief Records Officer for BOP who advised that 65 boxes of hard-copy records dated between 1987 and 2013 had been moved from the Director's office to the National Records Center in Suitland, Maryland, adding that while the vast majority of those records - labeled, for example, "newspaper clippings," "Bureau facilities," "budgetary matters," "Prison industries," and the "American Corrections Association" - were most unlikely to contain any documents responsive to FOIA Request 2015-02312, a total of six boxes of records might contain responsive documents based on the titles of files contained in those boxes, which included files labeled "FBI,"

²Please see paragraphs 16 and 17, below, regarding systemic limitations on Groupwise (e-mail) searches.

weekly reports of the BOP director in 2002, military matters, "White House," and "DOJ Intelligence Coordination Communication. On July 13, 2016, the Chief Records Officer for BOP reported that she had conducted a hand search of all six boxes of records that had been returned to BOP from Suitland, and that only one possibly relevant document had been located for review. That document, later determined to be non-responsive to FOIA Request 2015-02312, was a four-page travel authorization for former BOP employee #1 to facilitate his travel in March 2002 to assist officials in the Department of Defense regarding the construction of a new detainee facility at the U.S. Navy facility in Guantanamo Bay, Cuba.

14. At the same time, the Director's office personnel conducted a search of the Correspondence Tracking System, which is a database utilized to ensure that important correspondence from external agencies is properly staffed and answered, to determine if any responsive records were indicated therein. As indicated in Exhibit #8, released without redaction to plaintiff on August 26, 2016, and attached hereto, in June 2005, the Department of Justice Office of the Inspector General ("OIG") made a written request to BOP for "any and all documents, created after September 11, 2001, relating to FBI observations of or concerns about treatment or interrogation of detainees, or any individual detainee, held in Guantanamo Bay, Cuba; Iraq;

Afghanistan; or any other venue controlled by the U.S. military." The record reflects that the request from OIG was closed on June 24, 2005 with a "[n]egative response per Correctional Programs Division."

15. Finally, after being satisfied that I knew the identities of all BOP personnel who participated in or, because of supervisory assignment, were aware of the 2002 international training event concerning basic correctional techniques, I sought from the BOP Office of Information Services an e-mail search for the following terms from the language employed by plaintiff in FOIA Request 2015-02312: "CIA," "Cobalt," "BOP Afghanistan," "Afghanistan" "Cobalt," and "BOP Inspection of Site Cobalt" for the following individuals: former BOP employees #1 and #2; all BOP directors since 2002; the Deputy Director of BOP from 2012 until 2015 (who was the first, and only, individual to hold that position); and senior leadership in the Correctional Programs Division (three individuals, whose names were provided to me by former BOP employee #1) in the 2002 time frame.

16. Two systemic limitations on the recovery of e-mail of the individuals identified above made it "highly unlikely," in the words of the Chief of the National Network Support Section, BOP that any e-mail dating to 2002 would be recovered from such a

search. The first limitation is attendant to the BOP adoption of Netmail as its archival system in 2010. Before then, there was no automatic retention feature, meaning that staff members could delete e-mails and they would not be retained for archiving. Additionally, for individuals who retired from BOP prior to the adoption of Netmail (so that they did not then have "live" accounts), their e-mail histories (less anything that they had deleted) would not have been made part of the Netmail archives. It is my belief that this would have adversely impacted on the recovery of e-mail of the former BOP employees serving as Director in 2002, those serving in senior leadership positions in the Correctional Programs Division in 2002, and former BOP employee #2, all of whom appear to have retired before the Netmail conversion in 2010. However, since the Netmail conversion, no content of accounts that made that transition has been purged.

17. Perhaps even more noteworthy, at least for those individuals whose e-mail accounts survived the Netmail adoption in 2010, the Chief of the National Network Support Section, BOP advised that on Monday, January 25, 2016, a storage area network ("SAN") in the BOP's Network Control Center in Washington, DC suffered a critical failure. This system is used by several BOP enterprise computer applications and network services to store data, including the various components that make up the Netmail

e-mail archive system. As a result of this failure, and continuing until October 13, 2016, the index data used by the Netmail system to search for responsive email was inaccessible because it could not be recovered by BOP and the SAN hardware manufacturer from the failed SAN. BOP worked with the Netmail vendor to rebuild the index files, a process that continued until October 13, 2016, at which point the BOP Network Support section published a notice that the Netmail Archive system was now accessible, noting however that there was no guarantee that 100% of archived e-mail was now accessible. A copy of the October 13, 2016 notice from the BOP Network Support section is provided as Exhibit 9 to this declaration. Upon receipt of this notice, I immediately requested that the same authorities who conducted the earlier search (see paragraph 18, below) conduct a renewed search consistent with the parameters of the search that was conducted earlier in 2016. The results of the updated keyword search conducted with the same parameters as the search previously conducted were provided to me for review on October 24, 2016 and after review of those results, no additional documents responsive to plaintiff's FOIA request were located.

18. Notwithstanding these systemic limitations, and the ongoing effort to rebuild the Netmail archives, a search resulted in the location of 10 pages of e-mail communications of

former and current BOP employees which are arguably within the scope of FOIA Request 2015-02312, which were released with redactions to plaintiff on August 26, 2016, and are attached hereto as Exhibit #10.³ They are as follows⁴:

a. E-mail chain of March 31, 2011, subject "Question" (three pages). The names of several former and present BOP members, including former BOP employees #1 and #2, and the office phone number of another (identified) former BOP member, have been redacted from these records pursuant to exemption b(6) of the FOIA; additional information was redacted pursuant to exemptions b(1) and b(3) of the FOIA at the request of another government agency, which I understand will submit its own declaration in this matter if this matter proceeds to summary judgment;⁵

b. E-mail chain from July 30 through October 18, 2011 (six pages). The names of former BOP employees #1 and #2; the e-mail address and present physical location of former BOP employee #2; the identification of a duty assignment, and the location of that assignment, of former BOP employee

³Exhibits #8 and #10 to this declaration were provided to plaintiff as part of Exhibit #7, which was sent to plaintiff on August 16, 2016.

⁴While some of these e-mail messages may indicate the presence of a "TEXT" attachment, per the Chief of the National Network Support Section, BOP, there is no actual attachment with any different content than the e-mail message itself.

⁵At the time of this correspondence, Charles Samuels was the Assistant Director for the BOP Correctional Programs Division; in December 2011, he was appointed the Director of BOP.

#1; and the name and e-mail address of an employee of another federal agency, have been redacted from these records pursuant to exemption (b)(6) of the FOI; additional information was redacted pursuant to exemptions b(1) and b(3) of the FOIA at the request of the other government agency; and

c. E-mail chain of June 19, 2015 (one page). The names of former BOP employee #1 and various other present or former BOP employees have been redacted pursuant to exemption (b)(6) of the FOIA.

d. Finally, two pages of e-mail communications involving former BOP employee #1 were withheld in their entirety as a result of the application of exemptions b(1) and b(3) of the FOIA. The Government expects that these two pages will be provided to the Court *ex parte* for *in camera* examination if this matter proceeds to summary judgment.

19. As noted above, the matters described in paragraph 18 a - c as redacted from the 10 pages of e-mail communications resulted in part from the application of exemption b(6) of the FOIA, which protects from disclosure information that would constitute a clearly unwarranted invasion of personal privacy of those individuals that are the subject of the redacted information. The information redacted clearly relates to a governmental function - in this case, the involvement of BOP

employees in a 2002 international training evolution sponsored by another federal agency. Paragraphs 5 - 10 of plaintiff's complaint in this action, as well as plaintiff's original FOIA request (attached hereto as Exhibit #3), appear to attempt to link the involvement of BOP employees in this training event to far darker allegations which do not directly involve these employees and demonstrate the extreme controversy still attendant to the involvement, or with regard to the former or present BOP employees other than employees #1 and #2 as well as the employee of another federal agency, awareness of the involvement, of BOP employees in this event, even after the passage of 14 years. This controversy clearly raises the possibility that the individuals whose identifying information has been redacted from the aforementioned records - and about whom no allegation of misconduct has ever been raised - would be subjected to unfair scrutiny were their identities revealed. Indeed, the coupling of the release of their identities and plaintiff's assertion purporting to link these individuals - either as participants, or individuals with knowledge of the events - to the overall conduct described by plaintiff in his complaint and FOIA request could even reasonably subject them to threats and other violations of their personal security.

20. The redactions employed have been narrowly tailored to protect the privacy - and safety - of the present and former

BOP employees and the employee of another governmental agency, otherwise directly or indirectly (by location or previous job assignment) identified in these 10 pages of e-mail communications. The essence of the communications have not been denied to requester and as a result, the public's interest in the operations or activities of the government are fully described in the unredacted portions of the records, and would not be made more fulsome by adding the identifying information that has been redacted. Under those circumstances, it is difficult to appreciate any interest that might exist in publicly identifying these blameless current or former BOP employees, and hence their interests in privacy and security should be protected.

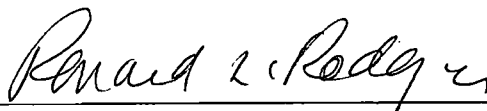
21. BOP searched all locations and files reasonably likely to contain records responsive to plaintiff's FOIA request, and has produced all responsive, non-exempt material subject to the FOIA. In my opinion, based on my investigation of this matter, I do not believe that further responsive records or information exist beyond that discussed herein or attached hereto.

Additionally, I have carefully reviewed former Attorney General Holder's memo dated March 19, 2009, which encourages agencies to make discretionary disclosures and directs agencies to segregate and release nonexempt information. The documents were carefully reviewed for reasonably segregable information. I have

determined that with regard to those matters redacted as a result of the application of exemption b(6) of the FOIA, there is no additional reasonably segregable information that can be released to the plaintiff.

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

Executed this 17th day of November 2016.



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