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**FREEDOM OF INFORMATION ACT REQUEST,**

**APPEAL No. 05-2411**

Tuesday, September 27, 2005

**VIA USPS CERTIFIED FIRST-CLASS MAIL ONLY**

Mr. Richard L. Huff, Co-Director  
Office of Information and Privacy  
United States Department of Justice  
Flag Building, Suite 570  
Washington, D.C. 20530-0001

**RE: REQUEST FOR FEE WAIVER DECISION OR DATE CERTAIN UPON WHICH  
OIP EXPECTS TO DISPATCH ITS FEE WAIVER DECISION**

Dear Mr. Huff:

Thank you for your letter dated September 15, 2005; I am pleased I can now address this matter directly to an OIP Director. You correctly note the long life of this fee waiver issue, which began on February 18, 2005, and still today prevents any discussion about the actual public records requested. I ask your help to cut to the heart of a yes-or-no decision, whether my submissions merit a public interest fee waiver, so we can move on to questions about records regarding the Bureau of Prisons' commitment to civil rights at FCC Victorville.

I seek records related to credible claims: (1) that DOJ component part Federal Bureau of Prisons ("BOP") abused its discretion after inmate-on-inmate violence at USP Victorville, California (on or about January 1, 2005), with potentially unlawful use of force on or about January 10, 2005; and (2) that BOP continues to abuse discretion by operating an ongoing and unlawful administrative/high-security "control unit" at the medium-security FCI Victorville Medium II. I seek these records as a private attorney general who will report his findings to, among others, the BOP; the non-profit Commission on Safety and Abuse in America's Prisons; and DOJ's Inspector General Glenn A. Fine.

I appreciate the substantial appellate backlog your office faces, but I still hope to resolve this FOIA request's fee waiver issue administratively. The OIP still has not provided "the date on which a determination is expected to be dispatched," however, as required by 5 U.S.C. § 552(a)(6)(B)(i), nor has the OIP offered any indication how long the ancillary fees question will take to resolve. I here make a second express request for your Office's expected date of response, including whatever time the Justice Department expects to need to elicit information from one of its component parts, so we can move past the threshold money question and into the substance of this civil rights investigation.

The OIP conditioned its staff assignment to Appeal No. 05-2411 "[u]pon receipt of the requested information from the BOP." Letter from Priscilla Jones, dated August 26, 2005. First, West Regional Counsel Penn made his responses in this matter on April 12 and May 28, and those are his responses. His omissions from two responses to me, now whispered to Central Justice's ear, reflect poorly on BOP's adherence to "Freedom of Information" ideals, and seem to show Mr. Penn did not respond fully to my substantial fee waiver justification. Any information the BOP now wishes to add seems either irrelevant to, or relevant for notice and disclosure regarding, Appeal No. 05-2411.

Men languish today, reportedly without administrative hearings or medical visits or psychological reviews, at the extra-high-security SHU called Victorville Medium II. BOP's additional information regarding the instant request does not change the date-estimate requirement of 5 U.S.C. § 552(a)(6)(B)(i), and rather seems to show the half-hearted dismissal BOP waved against the Requestor's substantial public interest arguments.

I carry the burden of showing public interest; the documents from the agency below and incorporated by reference from <http://www.victorvillefoia.org> respectfully meet that burden, and the BOP has done nothing in rebuttal but delay. If the BOP wanted to justify its Spartan fee waiver denial, it had two written opportunities to do so (April 12, and May 28). Whatever the BOP now wants to say privately is either irrelevant to this Appeal, or relevant enough for disclosure to the opposing party.

I therefore ask what specific information your Office requires from the BOP that prevents this Appeal's immediate assignment to your staff, and why the need for BOP's additional input was not disclosed until Ms. Jones' second letter, dated August 26. Ms. Jones there wrote that "Upon receipt of the requested information from the BOP, your appeal will be assigned to a staff member of this Office, and completed as quickly thereafter as possible." By implication, though, this appeal seems out of the queue while we await the BOP's untimely answer to an undefined question.

You are correct, Mr. Huff, that an inordinate amount of time has expired just getting the issue of fees before you. At every turn I have asked the DOJ for timeliness, and at every turn BOP agents have thwarted substantial answers. The DOJ obliged my delayed appeal for expedited processing under 5 U.S.C. § 552(a)(6)(E), because it apparently seeks an unlawfully open-ended response time while asking the very agency here challenged to return irrelevant data. The resulting delay merits particularized attention from the OIP.

A FOIA request may not deserve expedited response from the outset, but might later merit expedition for inordinate delays. *See, e.g., Ettlinger v. Federal Bureau of Investigation*, 596 F.Supp. 867, 879 (D. Mass. 1984) (“when the agency’s position on a specific FOIA document production or fee waiver request has been determined to be unjustified . . . the resulting special impact on the particular request warrants some degree of priority attention to that request.”).

We are now over seven months after a substantial FOIA request, and you and I still discuss how long a wait remains for a decision just about fees – the BOP has already estimated needing months more labor-hours to find the requested records after the fees issue resolves, and only after that second-stage wait and decision can we then, thirdly, discuss records production or specific FOI Act exemptions.

At the current rate, we could not fairly expect to discuss this FOIA request’s substance until mid- to late-2006, at the earliest, by which time FCI Victorville Medium II will be approaching its second anniversary. Notwithstanding the Federal Executive’s systemic inability to handle the crush of FOI Act requests, this credible allegation of ongoing and otherwise unstoppable abuse of discretion would now seem to merit *Ettlinger*-style “priority attention.”

Where the BOP has opened and continues to operate a questionable control unit facility, and where the substantial due process rights attending inmate placement and retention in ADX-style conditions have been verifiably ignored, priority attention is merited and public interest release is heavily favored. *See* “Factoring in the ‘Public Interest,’” FOIA Update Vol. III, No. 4 (September 1982) (available at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_III\\_4/page8.htm](http://www.usdoj.gov/oip/foia_updates/Vol_III_4/page8.htm)) (“Some public interest factors are properly taken into consideration and accorded great weight. For example, the courts have found **the public interest in disclosure to be strong when requested information would inform the public about proven violations of public trust** [citations omitted, emphasis added].”). This private attorney general’s investigation into alleged (and allegedly violent) BOP abuse of discretion at FCC Victorville, and the causes underlying a USP Victorville inmate’s murder last April, are exactly the strong public interests Congress created the FOI Act to support.

On January 10, 2005, USP Victorville inmates learned of a "Top-40 List" of prisoners; those inmates were extracted from USP Victorville and its Special Housing Unit ("SHU"), and deposited to lockdown at the previously unopened, medium-security FCI Victorville Medium II. Some of these "Top-40" high-security inmates – including a group the USP staff called "Lompoc's All-Stars" – were reportedly left for days in cells missing electric light. All suffered the elements of high desert winter, moved without their personal belongings to a facility apparently not yet ready for habitation, and ate the cold sandwiches trucked in from operational Victorville kitchens.

Credible reports indicate no kitchen was opened at Victorville's Medium II on January 10, 2005, that no law library was available, and that inmates were locked down in the "hole" of a prison without a defined mission. On some BOP agent's orders, high-security USP inmates were identified as requiring still higher scrutiny, and were locked down at FCI Medium II in administrative-security segregation. Many of those original USP Victorville transferees are now accompanied at Victorville Medium II by over 700 other high-security men from across the West Region.

A "control unit" is "a separate unit [for] those inmates who are unable to function in a less restrictive environment." 28 C.F.R. § 541.40(a). This Regulation continues that "The Bureau of Prisons provides written criteria for the: (1) Referral of an inmate for possible placement within a control unit; (2) Selection of an inmate for placement within a control unit; (3) Regular review of an inmate while housed in a control unit; and, (4) Release of an inmate from a control unit." *Id.* The Bureau of Prisons operates control units in accordance with its written policy, USDOJ-FBOP Program Statement (P.S.) 5212.07, *Control Unit Programs*, (2/20/2001), which applies the mandates of 28 C.F.R. §§ 541.40 to 541.50.

Federal regulations require a reason for control unit placement. See P.S. 5212.07, *Control Unit Programs*, p. 4 (2/20/2001) ("The reason for the control unit referral must be included in this report."). Wardens must refer control unit candidates to the Regional Director for approval of control unit placement. See 28 C.F.R. § 541.41(a). Ordinarily, authorizing Regional Directors must contact the Regional Director of selected control unit placements for final decisions. See 28 C.F.R. § 541.42. In this case, though, West Regional Director Joseph E. Gunja oversees both the originating and receiving (control) units, and his approval alone is expected amidst the records ordaining Victorville Medium II – if anything but institutional authorization was afforded. Regional Director Gunja's imprint will at least be found from his weeks last winter as acting-warden at USP Victorville.

In every event, inmates must receive hearings before placement in control units. See 28 C.F.R. §§ 541.42 to 541.45. Once in control unit custody, the Code of

Federal Regulations requires staff reviews every thirty days, and reviews for return to mainline housing every sixty to ninety days. See 28 C.F.R. §§ 541.49(a) and (d). These mandates are explained in P.S. 5212.07, and ostensibly control any facility where high-supervision inmates are removed from general populations for security reasons.

By its design and title, FCI Victorville Medium II is not an appropriate facility in which to house high-security inmates, let alone the highest-scrutiny high-security inmates from throughout the BOP's West Region. As noted throughout this matter's filings, credible witnesses and documentary evidence show FCI Medium II is in actuality a quasi-lockdown segregation unit for high-risk high-security inmates from, *inter alia*, USPs Atwater, Lompoc, and Victorville, California.

The Bureau of Prisons' operations and activities at FCC Victorville directly contradict its public statements about Victorville's correctional mission. In the meantime, inmates at Victorville's Medium II have been denied notice, hearings, and other due process rights designed to moderate damaging control unit segregation. These potentially hundreds of violations are ongoing for nearly ten months now, and the related FOI Act before you demands review more expeditious than envisioned above.

I seek records possessed by BOP, which agency came into possession of those records in the legitimate conduct of its official duties. See *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-46 (1989). I seek these records to answer whether the BOP facility known as "FCI Victorville Medium II" is actually a medium-security facility, as stated in *State of the Bureau: 2004*, at page 53, or whether the 750 high-security inmates now housed in close supervision are actually held in "control unit" status. As noted above, my report on this question will go to the independent Commission on Safety and Abuse in America's Prisons and to Inspector General Fine.

If the Victorville control unit hypothesis is correct, inmates at Victorville's FCI Medium II suffer ongoing due process violations that were caused, and are continued, by the senior BOP administrator(s) who authorized an illegal prison. Seven hundred fifty men locked into FCI Medium II deserve different notice and hearing rights than they received if that facility is, in fact and law, a control unit, and every day of due process denial is another civil rights violation by the BOP. This records request asks, *inter alia*, for the BOP to demonstrate its penological missions at FCC Victorville, and its activities since December 2004, so 750 affected inmates and the criminal justice community can see exactly what due process protections component BOP has offered its wards during this confusing and unannounced prison expansion.

The public interest and 750 inmates need swift OIP action in this languishing Freedom of Information Act request. This matter is ripe for decision – OIP either

believes I have shown public interest outweighing arguable commercial interests, or it does not. There is no need for new BOP data, and there is no need for these men to wait another ten months for the Government to decide threshold cost issues. There is only need for your decision, Mr. Huff, whether or not my *pro bono* investigative efforts merit fee waiver. Please just waive fees or deny my appeal, or at least give me "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B)(i).

Thank you for your time and consideration, Mr. Huff, and also for bearing the end frustration of an unnecessarily arduous experience. I remain available for your questions and concerns, and look forward to your response.

Respectfully submitted,



EJ Hurst II, Attorney at Law

**NOTICE OF COURTESY COPIES**

Courtesy copies of this "Request for Fee Waiver Decision or Date Certain upon which OIP Expects to Dispatch its Fee Waiver Decision" have been forwarded via USPS Certified First-Class mail to the following persons:

**Mr. Glenn A. Fine**, Inspector General, U. S. Department of Justice, Office of the Inspector General, 950 Pennsylvania Avenue, N.W., Suite 4706, Washington, D.C. 20530-0001

**Mr. Harley G. Lappin**, Director, Federal Bureau of Prisons, Central Office, 320 First Street, N.W., Washington, D.C. 20534