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FREEDOM OF INFORMATION ACT REQUEST – APPEAL

FOIA REQUEST No. 2006-05569

Monday, July 24, 2006

VIA USPS EXPRESS MAIL ONLY

Office of Information and Privacy
United States Department of Justice
Flag Building, Suite 570
Washington, D.C. 20530-0001

**RE: APPEAL OF DENIAL OF EXPEDITED PROCESS AND
PUBLIC INTEREST FEE WAIVER**

**REQUEST FOR MERGING WITH, AND RECONSIDERATION OF,
FOIA APPEALS 06-1604 AND 06-1605, AS UNIFIED MATTER**

Dear FOIA Appeals Administrator:

This Requestor respectfully appeals decisions taken by Federal Bureau of Prisons (“BOP”) South-Central Regional Counsel Michael D. Hood in Request No. 2006-05569. In accordance with 28 C.F.R. § 16.10, the Requestor expects that all records related to this and other active requests of FCI La Tuna are being preserved exactly by the Department of Justice. As the Agency Office currently responsible for the decisions regarding FOIA access to these requested records, I am sure your Office understands the burdens it would carry if such records, upon court-ordered release, are altered or missing.

I first **OBJECT AND APPEAL** that Mr. Hood’s “Response” carries no date on any page, and therefore fails to demonstrate any date of compliance with the FOIA’s response times – the BOP has not yet “responded” under law. For argument’s sake – though without conceding the “response” and “appellate deadline” dates – I have used the postmark on the envelope to Mr. Hood’s letter, (Thursday) May 25, 2006, as a date of response; if such is eventually deemed the response date, I hereby further **OBJECT AND APPEAL** that my request for expedited processing was unlawfully answered **40 business days** (56 calendar days) after the Request dated March 30, 2006. The BOP unlawfully

decided this request's expedited processing aspect *grossly* outside the ten days' demanded by 5 U.S.C. § 552(a)(6)(E)(ii)(I), and the BOP even failed to comply with general FOIA requirements for response within twenty days and for Notice of (ten-day) Time Extension. *See* 5 U.S.C. § 552(a)(6).¹

The BOP has demonstrated no "unusual circumstances" to justify its willful and flagrant abuse of FOIA response procedures, in this request or in Requests Numbered 2006-02285 or 2006-02289. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I). In fact, the BOP pleads again the very agency backlog that Congress expressly exempted from the "exceptional circumstances" that might justify untimely FOIA replies. *See* 5 U.S.C. § 552(a)(6)(C). Both BOP acts are overtly unlawful, and I therefore further **OBJECT AND APPEAL**.

Mr. Hood has, for the third time in as many requests, ignored substantial legal and factual arguments with the tracking of statutory text, and an unjustified conclusion that, in ten pages of fact and law, "[t]here is no indication that your request meets the above identified criteria." Without an apparent scintilla of consideration, the BOP has held this request will languish with the others for an indeterminate time, in an indeterminately-long queue, with the unwritten hope that I might hear back from the Government someday. Unwritten hopes are not what Congress demands with the FOIA, however.

Counselor Hood's untimely reply to Request No. 2006-05569 failed to provide "the date on which a determination is expected to be dispatched," as required by 5 U.S.C. § 552(a)(6)(B)(i); it therefore plainly violates the United States Code. This is the third reply from Mr. Hood that relies not on Congress' "date certain" mandate, in fact, but rather on the BOP's own nebulous standard of "as expeditiously as possible when it is assigned for processing." I **OBJECT AND APPEAL** the BOP has here erroneously withheld the date certain on which it expects to offer its response, and that three repetitive failures of this affirmative Federal duty also (1) demonstrate a pattern of arbitrary and capricious decision-making by the BOP and its agents in this matter; and (2) merit your Office's **full** re-consideration, with a detailed Statement of Reasons, on this matter's Expedited Process and Fee Waiver merits, and as regards all my three La Tuna requests.

The BOP's pattern of willful neglect of duties is thrice again demonstrated by its grossly untimely replies to this Request and to FOIA Requests Numbered 2006-02285 (postmarked 41 business days after request, and 31 days beyond lawful time limits) and 2006-02289 (postmarked 40 business days after request, and 30 business days beyond lawful time limits). The BOP's South-Central Regional Counsel's Office is clearly and willfully indifferent to the mandates of Federal FOIA law, and to the legitimate concerns about confinement conditions, staff-on-inmate and staff-on-staff retaliation, and safe sanitation and industrial foodstuffs at FCI La Tuna. I **OBJECT TO AND APPEAL** this pattern of willful Federal law violations by BOP FOIA responders.

¹ This appeal will be delivered to the Department of Justice within sixty calendar days after postmark, however, and so stands timely even if the undated letter's postmark creates an affirmative response date.

Should the requested records confirm the alleged patterns of, *inter alia*, willful false statements and criminally-negligent medical treatment and record-keeping by BOP agents, Mr. Hood's pattern of willful indifference might fairly stand as one indicum of criminal co-conspiracy. The BOP's South-Central Office would certainly be tainted by appearances of "cover-up" impropriety – provided the public is granted access to these records for review, that is. At the least, then, the BOP's repetitive procedural violations merit your Office's written finding (a) whether such violations are acceptable FOIA practice within the Department of Justice ("DOJ"); and (b) if not, what steps your Office has taken to remedy the BOP's pattern of violations, in its South-Central Region and elsewhere. Your written responses to these questions are separately and expressly requested.

The Requestor appreciates your Office's indulgence for the repetition necessary in this Administrative Appeal Three, La Tuna. This Appeal re-addresses the grounds your Office gave for Expedited Process denials dated April 12, 2006. Courtesy copies of this correspondence include all journalists who have reported regarding FCI La Tuna since November 2005, and also the Office of United States Senator Jeff Bingaman of New Mexico. As an additional courtesy, I provide a copy of this appeal to the Office of BOP Director Harley Lappin.

This appeal's merits challenge that: (1) the need for expedited process is adequately demonstrated under 5 U.S.C. §§ 552(a)(6)(E) and 28 C.F.R. § 16.5(d); and (2) full, public interest fee waiver is merited under 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.11(k). In support of this appeal, the Requestor adopts and incorporates by reference, as if fully set forth herein, the original Request No. 2006-05569, dated Thursday, March 30, 2006. He also adopts and incorporates by reference, as if fully set forth herein, all documents, hyperlinks, rolling counters, the Guestbook, and other items published at <http://www.victorvillefoia.org/>, and <http://www.victorvillefoia.org/La%20Tuna.html/>.

Expedited Process

Under 28 C.F.R. § 16.5(d), a request can be expedited if:

- (1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;*
- (2) An urgent need to inform the public about an actual or alleged federal government activity exists;*
- (3) A loss of substantial due process exists;*
- (4) The matter is of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects public confidence;*

The instant Request meets each of these grounds for expedited process.

The “La Tuna FOIA Requests,” all three, address records that relate to (a) serial inmate-on-inmate violence, allegedly related to alien inmates seizing control over FCI La Tuna, its staff, and about two score New Mexican prisoners, where (b) inadequate staffing levels apparently allowed – and continue to allow – (c) gang-member inmates to dictate to Justice Department agents which inmates can survive mainline housing. These records also directly relate to whether the BOP has appropriately and safely staffed FCI La Tuna, and what ongoing security measures against future gang control exist. The Instant Request also addresses credible, multiple, first-hand allegations of La Tuna staff remaining deliberately indifferent to serious inmate medical needs.² Additional questions about the availability of medical care – and the availability of administrative remedy forms upon which medical call-out must be requested – stand even as the BOP hides behind prisoner transfers and apparent transition by FCI La Tuna to an alien detention facility. The requested records will prove or refute these independent claims of constitutional and public policy violations, even as the BOP again tries to dim the public’s view of its operations and activities at FCI La Tuna.

Request No. 2006-05569, like its predecessor requests, also pursues records to confirm or deny multiple, independent reports of La Tuna staff unlawfully retaliating against some or all New Mexican prisoners through (a) extended detention in the Special Housing Unit (“SHU,” or “the Hole”); (b) unjustified restrictions on inmate communications and family relationships, through restrictions on mails, telephone use, and visitation; and (c) credible allegations of La Tuna staff using unnecessary – and so excessive – force against compliant New Mexican inmates. Staff Retaliation is also alleged to include the false swearing of BOP/DOJ disciplinary complaints against inmates, and the unlawful withholding of medical care. Each and all these allegations, if true as a composite, would tend to support claims of criminal racketeering by BOP staff with the help of information suppression by superiors. Only access to the records here requested can show the public whether the BOP is as faultless as Law Enforcement claims, or if serious improprieties might in fact exist on another DOJ reservation.³

Moreover, the removal of citizen-inmates en masse from La Tuna and recent contract announcements for privatized “alien-only” Border facilities indicate FCI La Tuna is changing mission, to oversee prisoners without any idea of their even-more limited constitutional rights. If the allegations against these BOP staff were true in the past,

² As late as ten days ago, a La Tuna inmate in direct contact with the Requestor alleged repeated pleas for help for grave medical symptoms, only to receive a consult and medication he needed on the day he was finally transferred from FCI La Tuna.

³ The recent contraband-for-sex conspiracy originating at FCI Tallahassee, Florida, requires mention in this record. As you know too well, five surviving BOP employees stand indicted with, *inter alia*, sex abuse and witness intimidation, while a sixth former-BOP guard died June 21 after murdering another Justice Department agent, in lieu of arrest. The complaints open for test in these requests, alleging similar patterns of overt acts against FCI La Tuna staff, have a documented basis in the national forum, and merit expedited processing with a full public interest fee waiver.

against U.S. citizens, then La Tuna's transition to an "alien-only" facility – where foreign-born prisoners have no idea of the United States' legal customs – would tend to suggest unrestrained authority will only grow worse.

The instant records request, and its predecessors, all seek direct evidence about the BOP's activities and operations inside an allegedly out-of-control facility. These records will confirm or deny whether Department of Justice employees ran – and run – their own private Guantanamo on the Texas/New Mexico border desert. While the BOP will typically allege that no current evidence indicates civil rights violations, at La Tuna or anywhere else, this disingenuous and circular argument presupposes the requested records actually exist in the public domain, for the public's understanding. No BOP records exist publicly – and the public knows nothing beyond interstate newspaper reports – because the BOP will not let us see how it conducts Federal business, and vouches that alone is evidence that nothing is wrong. The absence of evidence, when withheld by a suspect, is not evidence of innocence; for law enforcement personnel, such withheld evidence is affirmative evidence of guilt.

No less a standard should apply to the United States Department of Justice than applies to the average United States citizen. Under the FOIA, in fact, it is now the Justice Department's burden to refute this Requestor's many, credible allegations and reasonable social-scientific methodologies for examination. So far, no Justice Department agent has refuted anything – including your Office's April 12 response – but rather has only told the requestor, in pertinent part, "sorry, you didn't prove to us our need to comply."

Besides the inmates who reported to the Requestor – most of whom the BOP has removed from La Tuna, thus again darkening inside information about the facility's operations and activities – only the BOP knows what the BOP is up to inside FCI La Tuna. Correctional Executive discretion simply does not extend to an utter lack of oversight; the FOIA exists to cease the very information black-out now imposed by the BOP, and your Office's prior decisions.

As of this filing, credible allegations remain about worms, feces, and other pests in the food presented to La Tuna inmates; of cockroach, rat, and other rodent infestations; of filth throughout the Special Housing Unit ("SHU"); of inadequate cleaning supplies; and, of failure of BOP staff to allow inmates their rights to administrative remedy. In the confined space of the SHU, inmates still commonly sit three and four-deep in a 9'-x-6' cement rectangle. The filth, infestation, malnourishment, and lack of essential medical and psychological care credibly alleged against BOP/DOJ Staff present an entirely separate health and safety ground for expedited process. If true – as only the requested records can confirm or deny – these health and safety abrogations may also constitute criminal violations on the parts of BOP staff. The Republic's citizens need to know now, through the challenged agency's records, whether systematic abuse and willful malfeasance – including the gravest, most tortuous of unconstitutional punishments – is used to operate Federal prison FCI La Tuna. Until then, **the threats to health and safety are imminent to both current inmates – citizen and alien alike – and to the BOP agents who oversee these men.**

Besides the television and internet news stories from KFOX-TV 14, the allegations against FCI La Tuna for inhumane conditions and staff retaliation have been recently examined in the *Albuquerque Journal* and the *El Paso Times*. See Rene Romo, "Prison Fight Raises Safety Questions," *Albuquerque Journal*, May 22, 2006; and Chris Roberts, "La Tuna inmates say prison doesn't follow procedures," *El Paso Times*, July 2, 2006. The Requestor has personally spoken to each reporter, and has promised to keep those and other journalists abreast of the Justice Department's instant and other decisions. While the Requestor appreciates your Office's suggestion that he could "indirectly involve[-]" KFOX-TV 14, he promises the Justice Department from experience that only news-worthiness – not the Requestor, nor his best wishes – can lead a news outlet to write about FCI La Tuna.⁴ Three news dailies have now published online – internationally – about La Tuna's alleged violations, and a matter of widespread media interest – to both the general public and to the criminal justice community – now lie. Qualifying "national interest," if a "national" interest even be needed, stands.

As always, of course, these administrative challenges remain the centerpiece of the Requestor's website, <http://www.victorvillefoia.org/>. This nationally (and internationally) available website currently stands with over 5,885 unique visitors and roughly 140 unique Guestbook entries, all from members of the public expressing their interest in reviewing BOP operations and activities. The primary purpose of this project is to disseminate otherwise unavailable information to the public, with a particular interest in examining heretofore anonymous BOP operations and activities.

Finally, thanks to the families of La Tuna inmates who persisted in contacting Washington, this matter now stands as active business in the Office of United States Senator Jeff Bingaman. The Requestor is assured additional submissions to Senator Bingaman will become part of that Office's growing file regarding FCI La Tuna.

The La Tuna FOIA Requests, and the instant Request No. 2006-05569, seek Federal agency records to confirm or deny credible reports of unconstitutional and abusive Justice Department practices within and surrounding FCI La Tuna, New Mexico/Texas. In all respects, the La Tuna FOIA Requests now stand a matter of imminent and public national concern. For all these reasons, we respectfully submit every regulatory reason to offer expedited processing here exists.

Public Interest Fee Waiver

The Requestor has been in regular contact with the Office of Senator Jeff Bingaman (D-NM) regarding the allegations (from over a half-dozen inmates) that drove the instant Request. Through Aide Jorge Silva, Senator Bingaman's Office has directly addressed

⁴ Similarly, the Requestor finds it odd that the murder and rape allegations at FCI Tallahassee generated media interest for only a few hours, until Attorney General Gonzalez announced the arrest of alleged "militants," also in Florida, who, literally, hadn't a weapon to use.

some concerns of numerous New Mexico citizens with family members imprisoned at La Tuna. Mr. Silva has further authorized the Requestor to report the Senator's Office will personally review this Appeal. Given Mr. Silva's interactions, conduct, and consideration of all prior submissions, the Requestor affirms that Senatorial review will also extend to all documents subsequently filed regarding La Tuna. In as much as Request No. 2006-05569 now directly affects particular business before a Member of the United States Senate, this matter seems entitled to public interest fee waiver as a matter of right.

A fee waiver or reduction is justified where "public interest" is identified, and public interest in disclosure is greater in magnitude than any identified commercial interest; commercial interests themselves do not proscribe public interest fee waivers, but rather must be weighed against the public's interests. The public interest benefits flowing from disclosure of the requested public records, which BOP keeps in the regular course of its government activities, are directly and clearly connected to understanding how DOJ-BOP operates FCI La Tuna. See 28 C.F.R. § 16.11(k)(2)(i)-(iv); *Brown v. Federal Bureau of Investigation*, 658 F.2d 71, 73 (2d Cir. 1981) ("The Freedom of Information Act, and the judicial decisions which interpret and apply it, evidence a strong public policy in favor of public access to information in the possession of federal agencies").

This matter alleges that FCI La Tuna is understaffed; that alien inmates control important aspects of La Tuna's operations; that inmates are being denied critical medical care; and that the BOP is willfully disregarding the disease-bearing Petri dish that is its SHU. Free professional services offered to document or deny these allegations seem the antithesis of "commercial use," and also the very reason Congress enacted the Freedom of Information Act in the first place – to protect the People from its Executive's un-republican secrecy. See *U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 (1991) ("FOIA's basic policy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . focuses on the citizens' right to be informed about what their government is up to [internal quotations omitted]."); accord *Brown v. FBI*, 658 F.2d at 73.

The Justice Department, at 28 C.F.R. § 16.11(k), allows reduction or full waiver of fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor." Under 28 C.F.R. § 16.11(k)(2), your Office will determine whether Request No. 2006-05569 "is likely to contribute significantly to the public understanding of the operations or activities of the government" by considering the following factors:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." . . .*

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. . . .*

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Request No. 2006-05569 concerns identifiable operations and activities of the Federal Government's Executive agencies and agents. The connection between FCI La Tuna's activities and operations and the requested records is direct and clear, not remote or attenuated. Request No. 2006-05569 seeks records created by and involving BOP staff during their activities in operation of FCI La Tuna, as regards, *inter alia*: (1) Staff's non-classified identities and law enforcement qualifications; (2) its official and extra-official conduct in operating FCI La Tuna; (3) how BOP staff actually operates FCI La Tuna, such as (a) the level of medical care BOP provides La Tuna inmates, (b) the food quality offered to inmates, (c) the numbers, training, and experience of staffing provided by the BOP, compared to levels demanded for safe correctional operations, and (d) the sanitation and hygiene allowed by BOP/DOJ; and (4) whether members of BOP's La Tuna staff are currently engaged in a criminal conspiracy regarding unlawful use of violence and intimidation, false swearing, and other civil rights felonies.

The disclosable portions of these requested records, which information is not currently in the public domain, will be meaningfully informative about Bureau of Prisons and other DOJ operations and activities, and stand certain to significantly contribute to an increased public understanding of FCI La Tuna's operations and activities. Request No. 2006-05569 seeks records that show who is operating FCI La Tuna, and how those daily operations have been recorded in the BOP's mandatory paperwork. That is, laypersons and criminal justice professionals alike will be able to see for themselves what activities and operations La Tuna's staff has engaged throughout targeted time periods.

The Requestor appreciates a limited number of specific inmate records will require segregation or an inmate's release authorization. The remaining, disclosable portion of those records will still provide a reasonably broad audience of laypersons interested in Federal corrections a glimpse of (a) what BOP records look like; (b) what substance those records contain; (c) what offices hold records that might be relevant to their own or their loved ones' cases; and (d) whether loved ones at La Tuna are suffering constitutional and physical abuses. Such records will also allow criminal justice professionals to analyze the records themselves – as made available through <http://www.victorvillefoia.org/> – and compare their professional conclusions to the series of analyses the Requestor will offer.

A requestor's expertise in the subject area, and his ability and intention to effectively convey information to the public, shall be considered. This Requestor holds a Bachelor of Arts degree in Political Science, a social science devoted to statistical, empirical, historical, and anecdotal analyses of, among other things, U.S. Government records and

operations. He also earned a *Juris Doctor* and authority from the State of Maryland to practice law. The Requestor is an experienced Federal criminal sentence mitigator with particular representational experience on behalf of BOP inmates – such inmate representation indeed led to the instant Request. As a result of these professional activities, the Requestor regularly disseminates news and other information to criminal justice professionals and inmate families through the online Yahoo.com groups BOP Watch (<http://groups.yahoo.com/group/BOPWatch/>) and FedCURE (<http://groups.yahoo.com/group/FedCURE-org/>).

The Requestor is thus shown competent to interpret the data here sought, and capable of reducing it to a format usable by relevant, interested communities. As noted, those communities will include Members of all three constitutional branches of National Government; State and Federal attorneys, both Government and defense; and BOP inmates and their loved ones.

All administrative processes and all records produced regarding La Tuna are, and will remain, published in full at a website established specifically to illustrate these matters' public interest, <http://www.victorvillefoia.org/>. As of this writing, over 4,250 unique internet addresses (URLs) have accessed <http://www.victorvillefoia.org/>. Over 120 persons have registered their support for full fee waiver, regarding records from FCC Victorville, California as well as FCI La Tuna, in <http://www.victorvillefoia.org/>'s Guestbook. Those signers include California Federal defenders and other criminal defense attorneys; retired Justice Department attorneys now engaged in private law practice; a barrister in Manchester, England; post-secondary academicians; and an assortment of interested citizens (generally, inmates' family members) demonstrably spanning the globe.

The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced to a significant extent by instant FOIA disclosures. Your Office shall not make value judgments about whether the information here sought is important enough to be made public. Your Office should consider, however, that these records are particularly relevant to immediate public discourse on several grounds.

First, as military actions abroad include an increasing number of citizen-soldiers (National Guard and Reservists) activated to multiple combat tours, we are now left to ask what effects are now returned to the U.S. workplace – particularly including law enforcement officers (“LEOs”), and a subset of LEOs employed by the Federal Bureau of Prisons. The Requestor hypothesizes a disparate number of military activations have come from law enforcement ranks, rather than other American industries, and that the already stressed law enforcement workforce is now also struggling to readjust from war service where, apparently, conduct similar to that here alleged was authorized by senior Defense Department field officers.

If this hypothesis is correct, then (a) the BOP may be suffering from staff shortages caused by military activation and retention policies; and (b) BOP staff returning from

overseas tours – all presumptively combat tours in a front-less war on terror, where most casualties arise from booby traps – those veterans may be returning with diminished capacities like Post-Traumatic Stress Disorder (“PTSD”). We know from media accounts that USP Leavenworth has experienced recent protests related to staff shortages, and the dangers short-staffing entails.

Mainstream U.S. news media and other public interest attorneys also currently scrutinize maltreatment of prisoners by another Executive administrator, the Department of Defense (“DOD”), based largely on documents produced under the FOIA. See <http://www.aclu.org/torturefoia/>. The documents requested under Request No. 2006-05569 will show or refute credible allegations of similar maltreatment of domestic prisoners by BOP/DOJ agents. Congress and the public deserve open proof, through public records, that BOP officers are not responsible for credible allegations of similar crimes against United States citizens at FCI La Tuna. If these allegations are true, then justice demands the BOP cull the corrupt from its ranks. In either case, the public interest **demands** these records’ publication.

Additionally, the landmark case of *United States v. Booker*, 543 U.S. --, 125 S.Ct. 738 (2005) has led some members of Congress to introduce – and Attorney General Alberto Gonzalez to support – additional mandatory minimum sentences to Federal imprisonment. See, e.g., H.R. 1528, “Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005.” If the seachange in Federal criminal justice policy is to include additional, mandatory BOP custody, then the documents showing how BOP and the Justice Department operate FCI La Tuna with Mexican Mafia duress take on unique public policy relevance. FOIA Request No. 2006-05569 bears directly on public discussions about an imminent series of Congressional decisions on criminal justice policies.

If a subordinate to AG Gonzalez is to deny records clearly relevant to legislative discussions and imminent Congressional policy decisions, then such subordinate also stands required to detail every ground for withholding and to refute these arguments favoring expedited public interest release. Conclusory denials, on the other hand, are unlawful, and they would lend credence to a claim that Central Justice is covering data that potentially opposes its policy positions – even when to withhold such data means possible complicity to Federal felonies committed under color of law.

All these specific facts demonstrate that Request No. 2006-05569 “is likely to contribute significantly to the public understanding of the operations or activities of the government” under the analysis required of your Office. No understanding of BOP operations currently exist, because the BOP refuses all oversight and withholds records – including those now unlawfully held and here appealed for release.

Under 28 C.F.R. § 16.11(k)(3), your Office will determine whether Request No. 2006-05569 “is . . . primarily in the commercial interest of the requestor” by considering the following factors:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.*

(ii) *The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester.'*

The Requestor has now offered extensive *pro bono* hours expressly to these FOIA Requests of FCI La Tuna, exclusive of time offered his primary client and a group of similarly-situated inmates and their families in consideration of civil rights litigation. He has personally paid all photocopying, postage, and other expenses, and has declined other, paying clients to devote time to this free professional service. He has received no compensation for any professional services related to La Tuna and, outside the pipe dream of attorneys' fees some hypothetical court might later award and an appellate court affirm, the Requestor will receive no compensation or recompense for these efforts.

The Requestor acknowledges his commercial interests of goodwill and publicity associated with this denied *pro bono* FOIA efforts. As often attributed, though, to then-future Supreme Court Justice Louis D. Brandeis:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

Louis D. Brandeis, "What Publicity Can Do," *Other People's Money*, chapter 5, p. 92 (1932) (first published in *Harper's Weekly*, December 20, 1913). While personal benefits might derive from the publicity following free service, that same publicity is the very panacea for Executive abuses our Congress passed with the FOIA.

Similarly, Mr. Brandeis spoke to the public interest service each citizen owes, according to their means:

Loyalty demands of every citizen active participation in government. Of him who has most in ability and intelligence, most is required, as the rich should contribute most in money to the expense of government.

Louis D. Brandeis, "An address delivered before the New Century Club on the occasion of the 250th Anniversary of the settlement of the Jews in the United States," November 28, 1905. Justice Brandeis there spoke to the public service owed by America's most privileged, including attorneys. The goodwill that comes from fulfilling these lofty suggestions, *see* Maryland Rule of Professional Conduct 6.1, should not work against a lawyer's ability to serve as Private Attorney General under the FOIA.

The Requestor further acknowledges legal representation of one La Tuna inmate who will pursue civil rights claims, though we do not yet know whether the Requestor will be counsel to that action. These records will figure into that client's future legal interests, though, and so impact the Requestor's separate (also uncompensated) professional duties.

The Requestor further acknowledges a separate, emergency representation of La Tuna's remaining, undefended New Mexican inmates. A separate or joined civil suit on these inmates' behalves also seems imminent. To the extent the Requestor would seek separate attorneys' fees if he accepts and then successfully prosecutes those prospective prisoner rights actions, BOP/DOJ can weigh the enumerated and other public needs against these attenuated, unrealized, and potentially fictional commercial interests.

Conversely, these regularly kept Federal records will allow open public inspection of otherwise secreted BOP activities and operations within FCI La Tuna, and will allow over 1,300 inmates and guards directly affected by La Tuna's operations to understand their actual health and safety status. BOP activities at FCI La Tuna are credibly alleged to involve BOP medical negligence, and perhaps even felonious malfeasance by Staff members.

The private attorney general seeking these records does so without compensation or any promise of reward, as a legally-trained citizen who has refused other, income-producing professional activities and diverted needed commercial resources to pursue FOIA Request No. 2006-05569 . *See Crooker v. U. S. Dep't of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980) ("we do not believe that Congress intended to permit an award of attorney's fees to *pro se* litigants like Crooker who have made no showing that prosecuting their lawsuits caused them to divert any of their time from income-producing activity."). He has done so because, after a due diligence investigation, he affirms credible evidence of civil rights abuses by DOJ employees. These requested records will, in part, confirm or refute preliminary evidence.

A controlling public interest exists when a trained professional rejects paying cases to work without compensation in matters where no similar professional offers free services to inmates alleging imminent physical and constitutional harms. To argue otherwise defeats the public policy of asking attorneys to give services for free, *for the public's good*. To say the many public interests here at play are outweighed by the "maybe" of future court fee-awards, after an unknown number of assured appellate challenges and award reductions, would go beyond disingenuous. It would suggest complicity to whatever these records show is happening today, and for months, inside La Tuna's wires.

Conclusion

"The mandate of the FOIA calls for broad disclosure of Government records." *Central Intelligence Agency v. Sims*, 471 U.S. 159, 166 (1985). As Justice Stevens wrote for seven members of the U.S. Supreme Court (with Justices Blackmun and Brennan concurring in the unanimous judgment):

[W]e note that Congress has provided that the standard fees for production of documents under the FOIA shall be waived or reduced 'if disclosure of the information is in the public interest because it 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) (1982 ed., Supp. V). Although such a provision obviously implies that there will be requests that do not meet such a 'public interest' standard, we think it relevant to today's inquiry regarding the public interest in release of rap sheets on private citizens that Congress once again expressed the core purpose of the FOIA as 'contribut[ing] significantly to public understanding of the operations or activities of the government.' [emphasis in original].

U.S. Dep't of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 775 (1989).

Moreover, records documenting whether La Tuna Staff abused its authority stand an "obvious public interest" that require "a full and thorough airing . . . in the hope that such abuses will not occur in the future." *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 418 (D.D.C. 1976). Where a lawful FOIA request is based upon demonstrations of *per se* Federal abuse of discretion, including willful medical neglect and Due Process abuses, the public interest in requested, demonstrative Executive records is accorded great weight. 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) ("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].").

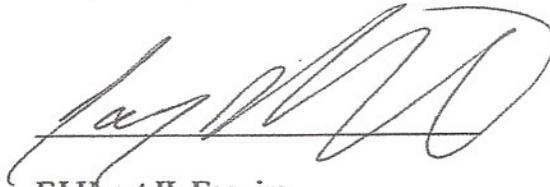
The Requestor made a preliminary showing for expedited process and public interest fee waiver in his March 30 Request. This Appeal develops multiple, independent grounds for both rights under the FOIA. The burdens of rebutting the Requestor's specific support for expedited process and public interest fee waiver are the Government's, and these many, legally-supported justifications represent a heavy Government burden that cannot be met by regurgitating text – only a detailed Statement of Reasons will suffice. The Requestor respectfully submits the Justice Department cannot show the requestor's out-of-pocket service *pro bono publico*, to his financial detriment, is an active commercial use outweighing these many, enumerated public interests. Expedited Processing and Full Public Interest Fee Waiver are therefore justified in FOIA Request No. 2006-05569.

We respectfully further request BOP's immediate production of all records here requested or, in the case of withheld records, immediate production of an index of such records prepared in accordance with *Vaughn v. Rosen* (I), 484 F.2d 820, 826-28 (D.C.

Cir. 1973). A *Vaughn* Index will facilitate this lawful FOIA request already delayed by unsupported conclusions, as we exhaust the administrative FOIA process. See *Ettlinger v. FBI*, 596 F.Supp. at 879. Preparing this lawfully requested *Vaughn* Index will not excuse BOP from timely response to this Appeal, though BOP's timely response will presumptively include some statement regarding the *Vaughn* Index.

The Requestor looks forward to a response within the statutory and regulatory mandates, and thanks the DOJ/OIP for its time.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "EJ Hurst II", written over a horizontal line.

EJ Hurst II, Esquire