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**FREEDOM OF INFORMATION ACT REQUEST**  
**REVISION**

Monday, May 9, 2005

**VIA USPS CERTIFIED FIRST-CLASS MAIL, RETURN RECEIPT REQUESTED**

Mr. Harlan Penn, Western Regional Counsel  
Federal Bureau of Prisons  
Western Regional Office  
7950 Dublin Boulevard, 3d Floor  
Dublin, California 94568

**RE: FOIA REQUEST NO. 2005-03244**  
**REVISION**

Dear Mr. Penn:

I am in receipt of your April 12 response to my February 18 FOIA request. The U.S. Postal Service confirms your Office received, the afternoon of Tuesday, April 26, my first analysis as presented in a report filed with the Commission on Safety and Abuse in America's Prisons.

This letter means (a) to clarify the request's public service goals and documentary needs by limiting the records requested to only two of FCC Victorville's four facilities, the United States Penitentiary ("USP") and the Federal Correctional Institution ("FCI") Medium II (which have operated for a combined approximate total of fourteen months), to always include (unless expressly, otherwise limited) the enumerated target dates (12/29/2004 to 1/15/2005) and dates of response to the request; and (b) to reiterate the propriety of non-commercial full fee waiver and otherwise full production of records here requested. See 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.11(k); *Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."). I adopt and incorporate by reference to this Revision the entirety of original FOIA Request No. 2005-03244, as dated February 18, 2005.

I respectfully urge reconsideration of prior decisions regarding FOIA Request No. 2005-03244 on the grounds that DOJ-BOP's Office of West Region Counsel: (1) unlawfully categorizes the Request as serving a "commercial use" without satisfying Federal FOIA obligations to investigate, and without applying DOJ's own mandated standards for lawfully categorizing requests under 5 U.S.C. § 552(a)(4)(A) and 28 C.F.R. §§ 16.11(k); (2) unlawfully seeks "review" fees from a non-commercial requestor, contrary to 5 U.S.C. § 552(a)(4)(A) and 28 C.F.R. § 16.11(c)(3); (3) inappropriately threatens to close its Request file thirty days before the time for administrative appeal expires, *see* 5 U.S.C. § 552(a)(4)(B) (even after denied administrative appeal, FOIA request survives until expiration of appropriate court jurisdiction); *accord* 28 C.F.R. § 16.10 (requiring records preservation while subject to "pending request, appeal, or lawsuit"); (4) seeks an unreasonable review fee that, without demonstrating factual accuracy or lawfulness, arguably rises to arbitrary and capricious Executive decision-making, *see, e.g.*, 5 U.S.C. § 552(a)(4)(A); and (5) wholly failed to respond to express requests for expedited process under 5 U.S.C. § 552(a)(6)(A)(1) and 28 C.F.R. ¶ 16.5, *Timing of responses to requests*; *see also Ettliger 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.").

If anything besides public interest fee waiver, the requestor's attached demonstrations of regular publication to electronic news distribution media merit waiver of all but, at most, "reasonable standard charges for documents duplication," as reserved to "a representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Twenty-First Century is upon us, and technology with some command of grammar allows most anyone to claim journalist status. In this requestor's case, his established pattern of publication to professional electronic news outlets – coupled with the professional standards to which he is bound, and violation of which can lead to professional discipline – qualify him as a legitimate media representative under Congress' broad FOIA meanings. Independent and cumulative standing for media representative status also lies in the requestor's demonstrated reporting to the currently investigating, non-profit Commission on Safety and Abuse in America's Prisons.

"The mandate of the FOIA calls for broad disclosure of Government records." *Central Intelligence Agency v. Sims*, 471 U.S. 159, 166 (1985). "Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files. Rather, Congress sought . . . to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976) [internal quotation omitted]. As Justice Stevens wrote for seven members of the U.S. Supreme Court (with Justices Blackmun and Brennan concurring in the unanimous judgment):

Finally, we 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).

Please make no mistakes about the exceptional public interest reasons for asking BOP to preserve and produce public records regarding FCC Victorville’s USP and FCI Medium II. See 28 C.F.R. § 16.11(b)(1) (“When it appears that the requester will put the records to a commercial use . . . the component shall provide the requester a reasonable opportunity to submit further clarification.”). The requestor’s personal and professional costs underscore this FOIA request’s non-commercial nature, and the public is clearly the primary beneficiary of regularly kept DOJ-BOP records regarding loss of good Federal order and security, and an inmate’s murder, at FCC Victorville.

Moreover, records documenting whether BOP abused its authority stands an “obvious public interest” that requires “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 negligent treatment of special mail, 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](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].”).

Reliable direct evidence, including media reports of Inmate Scopazzi’s death, demonstrates something has gone terribly wrong with good order and security at FCC Victorville. The public has a weighty interest in knowing why four wardens – including the BOP’s West Regional Director – needed three lockdowns in nine months to keep USP Victorville’s inmate death toll to one. Reliable direct evidence also demonstrates at least BOP negligence about more than just special mail, and supports citizens’ claims of widespread BOP abuses at both USP and FCI Medium II Victorville, to possibly include, *inter alia*, felony assault by DOJ-BOP officers; making knowingly false statements to DOJ-BOP investigators; willful neglect

of inmate health and safety; willful deprivation of inmate medical treatment and care; willful deprivation of inmate religious liberties; willful deprivation of attorney-client communications; and willful deprivation of inmate due process and equal protection under the Fifth and Sixth Amendments.

If even half the reported misconduct is true – and BOP’s current acts, omissions, and demonstrated prior negligence lend the reports credibility – then grave abuses of public trust are today ongoing at FCC Victorville. Only the requested public records will bear the truth to Congress and the American people. Every public interest ever considered when Congress enacted the FOIA today favors full and free disclosure under FOIA Request No. 2005-03244.

These records are particularly relevant to immediate public discourse on two grounds. Mainstream U.S. news media currently scrutinize maltreatment of prisoners by another Executive administrator, the Department of Defense (“DOD”), based largely on documents produced under the FOIA. To the extent documents requested under FOIA Request No. 2005-03244 may show similar maltreatment of prisoners by DOJ agents, Congress and the public deserve an open proof through public records that BOP officers are not responsible for credible allegations similar misconduct against United States citizens.

Additionally, the landmark case of *United States v. Booker*, 543 U.S. --, 125 S.Ct. 738 (2005) has led some members of Congress to support additional mandatory minimum sentences to 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 sentencing policy is to include additional, mandatory BOP custody, then the documents showing how BOP keeps custody over FCC Victorville take on unique relevance in public discussions about a pending Congressional policy decision.

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 FCC Victorville. *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”). I am competent to interpret the data I seek and to reduce it to a format usable by my target news audience. *See* 28 C.F.R. § 16.11(k)(2)(ii)-(iii). Readers of this Request’s news include affected family members, members of the Federal defense bar, and panelists investigating United States prisons, and the requested records directly relate to current national political and fiscal discourse. *See* 28 C.F.R. § 16.11(k)(1)(i).

To date I have invested over sixty hours in matters related to FOIA Request No. 2005-03244 without any compensation, without any promises of compensation, and without any outside assistance toward direct expenses like postage, telephone and other telemedia costs, and photocopying. *See* 28 C.F.R. § 16.11(k)(1)(ii), 16.11(k)(3). I am wholly out-of-pocket for this

request because the public's interest in knowing what BOP officials are doing to other citizens at FCC Victorville outweighs personal interests, and requires my attention as an officer of the court.

While understanding your April 12 "review fee" calculation would otherwise more than halve by excluding Medium I and the camp, I respectfully submit such calculation should not occur at all because this Request merits fee waiver, fee reduction, or, at absolute most, calls only for the reasonable costs of duplication.

The only statutory provision allowing for "document . . . review" is § 552(a)(4)(A)(ii)(I), which governs "records . . . requested for commercial use." *See also* 28 C.F.R. § 16.11(c)(3) ("Review fees will be charged to requesters who make a commercial use request."). Department of Justice ("DOJ") regulations define commercial use as "a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation." 28 C.F.R. § 16.11(b)(1).

Alternatively, the requestor regularly gathers information for regular publication to legal professionals and the general public alike through, *inter alia*, Yahoo groups BOP Watch (<http://groups.yahoo.com/group/BOPWatch/>) and FedCURE (<http://groups.yahoo.com/group/FedCURE-org/>).<sup>1</sup> The Department of Justice defines "Representative of the news media, or news media requester," as "any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public."

I attach recent posts to both BOP Watch and FedCURE demonstrating those organizations' operations involving publication of news to the public, refer BOP to my forwarded report to the Commission on Safety and Abuse in America's Prisons. Under these facts, and should BOP West Regional Counsel persist in denying fee waiver, I alternatively claim status as a "news media representative" for purposes of FOIA fee determinations.

Whatever profit or litigation interests may prospectively accrue to the public at-large, BOP cannot factually establish the requestor possesses any current profit interest in Request No. 2005-03244 – voluntarily waiving possible attorney's fees in this matter made it impossible for me to break financially even. *See* 28 C.F.R. § 16.11(k)(3)(i). BOP certainly cannot demonstrate the requestor's (non-existent) pecuniary reward outweighs the public's interest

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<sup>1</sup> These current events groups include over 2,000 regular, subscribed members who exchange news on relevant criminal justice issues. The requestor's regular publication to these groups reach both family members affected by BOP custody and members of the Federal defense bar, and has helped at least one lawyer secure an inmate's immediate transfer away from the Metropolitan Detention Center ("MDC") Brooklyn, New York on health and safety grounds. The requestor's regular publication to these groups thus qualifies for media representative treatment.

in knowing what has gone wrong with Federal agents' control inside Victorville's wires. *See* 28 C.F.R. § 16.11(k)(3)(ii).

BOP cannot fairly categorize an accounting of operations at FCC Victorville, Federal Executive activities that culminated in a Federal ward's murder, as anything other than in the public's significant informative interest. *See* 28 C.F.R. § 16.11(k)(2). Conversely, and despite BOP bearing the burdens of production and persuasion, I can affirmatively show the economic disadvantage at which I have placed myself to seek immediately relevant public records. Respectfully, Mr. Penn, denying a full fee waiver under these disquieting facts calls for more than a statutory quote and a guess. Federal law requires BOP to respond in full to these substantial, legally-supported requests for full fee waiver and immediate document production, using all considerations specified by 5 U.S.C. § 552 and Title 28 C.F.R., Part 16. *See* 5 U.S.C. § 552(a)(4)(F).

These regularly kept Federal records will allow open public inspection of otherwise secreted BOP activities and operations within FCC Victorville, activities credibly demonstrated to involve at least BOP negligence, and one homicide. The private attorney general seeking these records does so without any consideration or promise of reward, and in fact waived his personal rights to seek attorneys' fees in the original Request. Rather, the requestor is a legally-trained citizen who has refused other, income-producing professional activities and diverted needed commercial resources to pursue FOIA Request No. 2005-03244. *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.").

This situation seems the very antithesis of "commercial use," and respectfully seems the very reason Congress enacted the Freedom of Information Act in the first place. *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 burdens of proving commercial use and lack of public interest remain the Government's, Mr. Penn, and these substantial and cited fee waiver justifications respectfully represent a heavy Government burden. I respectfully submit the Government cannot show the requestor's out-of-pocket service *pro bono publico*, to his financial detriment, is an active commercial use under the FOIA. I further respectfully submit the BOP cannot factually or legally show this requestor's net commercial loss outweighs the public's extraordinary interest in knowing how FCC Victorville treats citizens serving mandatory minimum Federal sentences, and how one of those imprisoned citizens wound up killed (possibly over contraband tobacco).

Though your Response wholly ignored my express request for written guarantee of records preservation, 28 C.F.R. § 16.10, *Preservation of Records*, clearly requires that:

Each component shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

As your Office is the Executive agent currently holding primary responsibility for withholding agency records, whether lawfully, your Office seems correspondingly responsible for assuring full compliance with 28 C.F.R. § 16.10. Given your primary role in this matter, I trust you have already taken all steps necessary to preserve all requested Victorville records, and thank you for your efforts.

I understand every Federal agency subject to FOIA now has difficulty keeping up with the hundreds of thousands of annual requests. I need your help, Mr. Penn, to preserve Victorville's records for eventual, though relatively speedy, production, in the least expensive manner possible. The public records here requested will contribute significantly to the public's understanding of the BOP operations and activities culminating in the murder of Federal prisoner Peter Stephen Scopazzi, Register Number 71855-004. These records will more generally, yet still significantly contribute to the public's understanding what we mean by "Federal imprisonment" as the Congress considers additional, mandatory sentences of Federal imprisonment.

To the extent Victorville's USP and FCI Medium II already readily possess many of the regularly-kept records requested under FOIA Request No. 2005-03244, especially following the presumptively thorough FBI investigation of Inmate Scopazzi's murder, such records clearly are not subject to any "review" or "research" fees. Such records are already at hand, necessitating only reproduction or denial under a FOIA exemption, and allowing me to respectfully request BOP's 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 Revised Request, though BOP's timely response will presumptively include some statement regarding the *Vaughn* Index.

I respectfully withdraw without prejudice my requests for records regarding FCI Victorville Medium I and its satellite minimum-security prison camp (one or two facilities, depending

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on the speaker). I also respectfully reserve the right to seek those and other records through separate FOIA requests.

I understand that seeking this Revised FOIA Request No. 2005-03244 moots other appeal rights raised by your April 12 response, and re-initiates the twenty-day response period mandated by 5 U.S.C. § 552(a)(6)(A). I remain available at any of the letterhead contacts for questions or concerns, and assure the BOP of my willingness to assist an expeditious response.

Respectfully submitted,

EJ Hurst II

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