

CAITLIN KELLY HENRY, ESQ.
ATTORNEY AT LAW, CASBN #287949
1423 Broadway # 215 Oakland, CA 94612
TEL:(510)277-2025 ckh@caitlinkellyhenry.com

August 18, 2024

Office of Information Policy
U.S. Department of Justice
441 G Street N.W.
6th Floor
Washington, D.C. 20530-0001
Sent Via: <https://doj-foia.entellitrak.com/etk-doj-foia-prod/login.request.do>

Re: Appeal – Denial of Expedited Request 2024-04492

Dear Appeals Officer:

This letter constitutes an administrative appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and 28 C.F.R. § 16.8(a)¹ regarding the Bureau of Prisons (BOP) and Department of Justice's (DOJ) denial of expedited FOIA request number 2024-04492. Disclosure of the records was urgently requested and benefits Requester Victoria Law and the public because it is likely to contribute significantly to the court, public, news media, litigant, and congressional understanding of the activities or operations related to the BOP's handling of the Dublin prison and camp conditions, medical and mental health treatment, abuse, retaliation, and prison closure, and transfer matters. The lack of expedited **determination** poses an imminent threat to life and physical safety per 5 U.S.C. § 552(a)(6)(E)(v)(i) and 28 C.F.R. § 16.5(e)(1)(i). An urgency exists to inform the public about an actual or alleged government activity of the BOP and DOJ per 5 U.S.C. § 552(a)(6)(E)(v)(ii) and 28 C.F.R. § 16.5(e)(1)(ii). Failure to expedite the **determination** is causing the loss of substantial due process rights per 5 U.S.C. § 552(a)(6)(E)(I) and 28 C.F.R. § 16.5(e)(1)(iii). The request concerns questions about government integrity and documenting the widespread and exceptional domestic and international media coverage as per 5 U.S.C. § 552(a)(6)(E)(I) and 28 C.F.R. § 16.5(e)(1)(iv).

¹ 28 C.F.R. § 16.8(a) states: "A requester may appeal any adverse determinations to OIP." "The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response."

I. Constructive Denial: Factual and Procedural History

- On July 5, 2024 Requester transmitted the request. *See* Exhibit 7. BOP acknowledges this the date received as July 5, 2024. *See* Exhibit 6. BOP **acknowledged**² the request, assigned **tracking number** 2024-04492, and granted **expedited**³ status on 7/10/2024. *Id.*
- On August 4, 2024 counsel emailed the Ms. Kara Christenson, FOIA/Privacy Act Liaison and the general BOP FOIA email asking for a status and timeline update. *See* Exhibit 5.
- On August 4, 2024 counsel called the BOP FOIA hotline and left a message inquiring about a timeline for a substantive response and release of records.
- On August 12, 2024 counsel emailed the Western Regional Office FOIA/Privacy Act Liaison email asking for a status and timeline update. *See* Exhibit 3.
- On August 12, 2024 counsel emailed P. Willcott and the general BOP FOIA email asking for a status and timeline update. *See* Exhibit 4.
- On August 13, 2024 P. Willcott emailed stating “A search is still being conducted for records responsive to your request. As we have yet to receive responsive records from the records custodian, our anticipated date of completion is January 10, 2025. Until then please feel free to check the status of your request at <https://www.bop.gov/foia/index.jsp#tabs-6> by entering the number of your request and clicking the “search button”.” *See* Exhibit 2.
- As of August 16, 2024 the FOIA tracking portal is the BOP’s only action other than the acknowledgement letter. The portal provides only the following "Document Search: We are in the process of searching for your records" and provides no details as to response, determination, timeline for release of records, argued exemptions/exclusions, or fee waiver. *See* Exhibit 1. Per 5 U.S.C. § 552(a)(6)(B)(i) the BOP’s “**determination**” regarding **any** request is due no later than twenty business days from receipt of request plus ten additional working days if the agency had invoked the exceptional circumstances provisions. BOP has not invoked the exceptional circumstances provisions, and waived its right to an extension. Had it requested an extension, August 16, 2024 would have been the statutory and regulatory deadline.

² 28 C.F.R. § 16.6(e)(4) states that “A component shall **acknowledge** the request and assign it an individualized **tracking number** if it will take longer than 10 **working** days to process.” Ten working days from July 5, 2024 was July 19, 2024.

³ The BOP’s **response** to an **expedited** request is due no later than 10 **calendar** days after the request was received by BOP’s department designated to receive FOIA requests for agency records. For expedited requests 28 C.F.R. § 16.5(e)(4) states: “A component shall notify the requester within **10 calendar days** of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited requests, and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.” Ten calendar days from July 5, 2024 was July 15, 2024.

II. Argument

When an agency fails to respond to a FOIA request within the statutory timeframe, it has constructively denied the request. *See Oglesby v. U.S. Dep't of Army*, 920 F.2d 57 (D.C. Cir. 1990) (“Congress adopted the time limit provision in the FOIA in order to ‘contribute to the fuller and faster release of information, which is the basic objective of the Act.’” (quoting H.R. Rep. No. 93-876, 93d Cong., 2d Sess., reprinted (1974) U.S. Code Cong. & Ad. News 6267 at 6271) “The constructive exhaustion provision was a spur to the agencies to respond within the ten-day deadline.”).

A. **Constructive Denial: Failure to Make a Determination**

BOP’s failure to make a determination by the statutory and regulatory deadline constitutes constructive denial. On August 12, 2024, P. Willcott emailed counsel stating “A search is still being conducted for records responsive to your request. As we have yet to receive responsive records from the records custodian, our **anticipated** (emphasis added) date of **completion** (emphasis added) is January 10, 2025. 5 U.S.C. § 552(a)(7)(B) states that each agency shall ...establish a system to...provide to each person making a request the tracking number assigned to the request and “an estimated date on which the agency will complete action on the request.” However, the agency has not provided an estimated date of **determination** that meets within the statutory or regulatory deadline.

The BOP is required to make “**determination**” whether to comply with a FOIA request—and communicate “the reasons therefor” within twenty business days of its receipt. 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(B)(i). A “**determination**” “must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013) (“CREW”). To satisfy its statutory obligations the BOP “must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Id.* The August 13, 2024 email indicates the BOP has not gathered and reviewed the documents; as it has “yet to receive responsive records from the records custodian.” The August 13, 2024 email indicates BOP has not determined and communicated the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents, as it has “yet to receive responsive records from the records custodian.” As no **determination** has been made, BOP has not informed Requester that she can appeal whatever portion of the ‘determination’ is adverse.

5 U.S.C. § 552(a)(6)(B)(i) allows an agency to extend the date by which it may make a determination by no more than “ten working days” in “unusual circumstances.” BOP has not asserted “unusual circumstances” and waived its right to an extension. Had BOP requested an extension, August 16, 2024 would have been the thirty day statutory and regulatory deadline, yet

BOP failed to make a **determination** within thirty business days as defined by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i); *Id.* § 552(a)(6)(B)(i); *Id.* § 552(a)(6)(B)(iii)(III). Therefore, BOP violated FOIA's statutory deadline.

B. Constructive Denial: Failure to Determine Production Scope and Reasoning

BOP's failure to determine a production scope and reasoning by the statutory and regulatory deadline constitutes a constructive denial. The BOP has not produced any documents in response to the Request and has not communicated: 1. the scope of the records it intends to produce; 2. the scope of the records it intends to withhold; 3. reasoning and exceptions/exemptions argued for the withholding of any documents; or 4. A Vaughn Index. Therefore, the BOP is in violation of its statutory duties under FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i); *Id.* § 552(a)(6)(B)(i); *Id.* § 552(a)(6)(B)(iii)(III); CREW, 711 F.3d at 188.

C. Constructive Denial: Failure to Grant Fee Waiver

BOP's failure to grant a fee waiver by the statutory and regulatory deadline constitutes constructive denial. As detailed in the initial request and exhibits, the immediate release of the information sought is in the public interest and made by a representative of the news media, Requester Victoria Law, *See* Exhibit 7. Requester Law is entitled to a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) because disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *Id.*

III. Conclusion

The BOP's failure to provide a **determination** within the statutory deadline violates the FOIA statute and Department of Justice's implementing regulations, 28 C.F.R. § 16 et seq..

IV. Relief Requested

Here, the Requester is not required to appeal before filing suit, but does so out of courtesy. A requester is only required to administratively appeal a "**determination**" before bringing suit if agency has made and communicated its "**determination**" in a timely manner. *See* CREW, 711 F.3d at 182. However, as occurred here, "if the agency has not issued its "**determination**" within the required time period, the requester may bring suit directly in federal district court without exhausting administrative appeal remedies." *Id.*

Despite not being required to appeal, Requester appeals for a decision directing the BOP to, within statute's twenty business day deadline (5 U.S.C. § 552(a)(6)(A)(ii)), September 13, 2024:

1. Declare the Requester is entitled to records;
2. Make a determination as soon as possible;
3. Release all non-exempt records;

4. Provide reasoning and exemptions/exclusions argued for the withholding of any documents;
5. Provide a Vaughn Index for argued exemptions/exclusions;
6. Provide a timeline for release;
7. Release records on a rolling basis as records are processed, rather than waiting for all the processing to be complete before releasing any records;
8. Declare that Requester qualifies as a representative of the news media;
9. Grant fee waiver and order BOP to refrain from charging search, review or duplication fees;
10. Order such other relief as the OIP may deem just and proper.

Sincerely,

/s/

Caitlin Kelly Henry, Esq.

Enclosures:

Exhibit 1: 2024.08.18 BOP FOIA Portal Status Check 2024-04492

Exhibit 2: 2024.08.13 BOP Response to CKH 2024-04492

Exhibit 3: 2024.08.12 Request for Response, Determination, and Timeline Expedited Request Number 2024-04492 Western Regional

Exhibit 4: 2024.08.12 Request for Response, Determination, and Timeline Expedited Request Number 2024-04492 HQ

Exhibit 5: 2024.08.04 Request for Response, Determination, and Timeline Expedited Request Number 2024-04492

Exhibit 6: 2024.07.10 BOP to CKH Assigning Expedited

Exhibit 7: 2024.07.05 Victoria Law Initial FOIA Request to BOP DOJ