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November 6, 2003

VIA FACSIMILE AND CERTIFIED MAIL/RETURN RECEIPT REQUESTED

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

Re: Freedom of Information Appeal--Records Relating to Alien Inmates Contained in Grants Management Systems Database (OJP FOIA No. 03-00400)

Dear Sir or Madam:

CEI Washington Bureau, Inc. ("Cox Washington Bureau" or "Cox"), the Washington news bureau of Cox newspapers, through counsel, pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6) ("FOIA"), hereby appeals the decision of the Office of Justice Programs, Department of Justice ("OJP") to withhold in full all records maintained on alien inmates in the Grants Management System ("GMS").

By letter of September 12, 2003, addressed to Ms. Dorothy Lee, Legal Technician of the OJP, Cox Washington Bureau requested access to and copies of all records maintained on alien inmates in the GMS, including, without limitation, all records relating to the State Criminal Alien Assistance Program. Cox also requested a copy of the record layout of all relevant databases and all codes used in the alien records that are necessary to read the information contained therein. A copy of Cox's FOIA request is attached as Exhibit A (original attachments omitted). By letter received on October 9, 2003, Rafael A. Madan, General Counsel for OJP, informed Cox's counsel that OJP was withholding in full all records sought by Cox in its FOIA request. A copy of Mr. Madan's letter is attached as Exhibit B. Some background regarding the procedural history of Cox's FOIA request may facilitate the processing of this appeal.

A. History of Cox's FOIA Request

Elliot G. Jaspin, Systems Editor at Cox Washington Bureau, first submitted a FOIA request for these records on November 1, 2002, in a letter that was addressed to the attention of Ms. Dorothy Lee. A copy of Mr. Jaspin's letter is attached as Exhibit C. Mr. Jaspin did not receive any response to his request and accordingly sent a second letter to Ms. Lee's attention on

December 23, 2002, that repeated his request. See Exhibit D. After four months passed without a response, Cox Washington Bureau treated the agency's failure to respond as a constructive denial and appealed the denial of its FOIA request to the Office of Information and Privacy, Department of Justice ("OIP") on March 21, 2003. See Exhibit E. To facilitate consideration of its appeal and to expedite disclosure of the requested records, Cox Washington Bureau's appeal outlined why the requested GMS records are not exempt from disclosure under FOIA Exemptions 6 or 7(C). *Id.*

On April 21, 2003, counsel for Cox Washington Bureau received a letter from OIP declining to act on Cox Washington Bureau's FOIA appeal without an initial determination by the OJP. See Exhibit F. OIP stated, however, that "[i]n the event that the OJP still has not responded to your request at the time you receive this letter, you may, if you choose, treat my letter as a denial of your appeal and bring action in an appropriate federal court." *Id.* On May 20, 2003, Cox Washington Bureau accordingly filed a complaint for declaratory and injunctive relief against the United States Department of Justice ("DOJ") in the United States District Court for the District of Columbia. See Exhibit G. Cox's complaint, among other things, sought an order directing the OJP to provide access to, or copies of, all records maintained on alien inmates in the GMS, the record layout of the GMS, and all codes used in the alien records that are necessary to read the information contained therein.

Unbeknownst to Cox Washington Bureau, OJP had apparently sent a letter to Cox Washington Bureau on April 30, 2003 denying Cox's FOIA request. See Exhibit H. Because the denial was addressed to an office at which Cox Washington Bureau had not been located for several years, Cox Washington Bureau did not receive a copy of the denial until well after it had filed suit. DOJ answered the complaint on June 27, 2003 (see Exhibit I) and the parties filed a Joint Meet and Confer Report on August 12, 2003 (see Exhibit J). Nevertheless, to avoid wasting the court's time and the parties' resources litigating whether, under the peculiar facts presented, Cox Washington Bureau properly exhausted its administrative remedies, Cox Washington Bureau elected to dismiss its lawsuit, without prejudice, and to make this records request under FOIA. See Exhibit K.

B. GMS Records Relating to Alien Inmates Are Not Exempt From Disclosure Under FOIA

OJP has relied upon three FOIA exemptions to justify its decision to withhold all records sought by Cox, Exemptions 2, 6, and 7(c). *See Exhibit B.*

As you know, the underlying congressional objective in enacting FOIA was to facilitate access to and "broad disclosure" of government records. *FBI v. Abramson*, 456 U.S. 615, 621 (1982). *See also Department of Air Force v. Rose*, 425 U.S. 352, 260-61 (1976) (FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language"). It is well-settled law that the FOIA exemptions are to be narrowly construed. *Abramson*, 456 U.S. at 630. As is abundantly clear from review of the

statutory language of FOIA and the relevant case law, none of the exemptions cited by OJP justifies OJP's denial of access to the requested agency records.

1. Exemption 2

Exemption 2 exempts from disclosure under FOIA records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The U.S. Court of Appeals for the D.C. Circuit has adopted a two step process for determining whether Exemption 2 applies. *Schwaner v. Dep't of the Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990). First, the material withheld must "fall within the terms of the statutory language." *Id. (quoting Founding Church of Scientology v. Smith*, 721 F.2d 828, 830 n.4 (D.C. Cir. 1983)). Even if the material falls within the terms of the statute, the agency may withhold access only if it can prove either that "the material relates to trivial administrative matters of no genuine public interest," (*id.*) or that "disclosure may risk circumvention of agency regulation." *Id.* (*quoting Dep't of Air Force v. Rose*, 425 U.S. 352 (1976)).

The statutory language of Exemption 2 protects from disclosure matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. §552(b)(2). The words "personnel rules and practices" encompass "minor employment matters," but may also cover other rules and practices governing agency personnel, such as "job training for law enforcement personnel." *See Department of Air Force v. Rose*, 425 U.S. 352, 363, 366 (1976) ("Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like."); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1056 (D.C. Cir. 1981) (affirming partial withholding of BATF manual that referred to law enforcement investigatory techniques). The word "internal" "plainly limits [Exemption 2] to those rules and practices that affect the internal workings of an agency." *Crooker*, 670 F.2d at 1056.. The "relating solely to" language limits Exemption 2 "to those matters that are truly internal and not of legitimate public interest." *Id. See* Justin D. Franklin & Robert E. Bouchard, *Guidebook to the Freedom of Information and Privacy Acts* § 1:24 (2d ed. 2003) (records that have been found to be "internal," and therefore exempt, include general guidelines for conducting investigations; guidelines for conducting post-investigation litigation; guidelines for identifying law violators; a study of agency practices and problems relating to undercover agents; sections of a Bureau of Prisons manual summarizing procedures for security of prison control centers; and vulnerability assessments.).

The records requested by Cox Washington Bureau do not relate to the internal personnel rules and practices of OJP or any other agency. Therefore, as a threshold matter, the GMS records sought by Cox do not fall within the terms of the statutory language of Exemption 2 and therefore must be released in response to Cox's FOIA request.

Even if the records sought by Cox fell within the statutory language of Exemption 2, they would not be exempt from disclosure because they involve matters of significant public interest. *See Rose*, 425 U.S. at 369-70 (finding that Exemption 2 was designed to "relieve agencies of the burden of assembling and maintaining for public inspection matter *in which the public could not reasonably be expected to have an interest*") (emphasis added).

OJP's letter denying Cox's FOIA request complains that the requested records are exempt from disclosure because they are voluminous. The law is otherwise. *See, e.g., Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1067 (D.C. Cir. 1988) ("[W]e cannot find in the words of the statute any exemption to cover [administrative burdens])." "Congress explicitly dealt with the matter of administrative expense by providing for the payment of search and duplication costs by FOIA claimants." *Id.*; *Cf. Sears v. Gottschalk*, 502 F.2d 122, 125-26 (4th Cir. 1974) (requiring agency disclosure even though request was "far reaching" on grounds that "if otherwise locatable . . . equitable considerations of the costs, in time and money, of making records available for examination do not supply an excuse for non-production.").

In fact, OJP's protestation that the records are too voluminous to produce is belied by the reality of modern records management. The requested records are compiled and stored electronically. They can be copied and provided to Cox in electronic form, as requested by Cox, without undue effort. *Cf.* FOIA Update, Vol. XVI, No. 1, at 1 ("[T]he use of electronic information technology holds rapidly increasing potential for meeting the needs of potential FOIA requesters without the necessity of a FOIA request. As more and more members of the public gain an "on-line" access capability, their government information needs can be met through the availability in electronic form. Electronic information dissemination can be highly cost-effective and is specifically encouraged for agency use under OMB Circular A-130."). *See also* Franklin & Bouchard, at § 1:13 ("given that computer stored records . . . are records for the purposes of the FOIA, agencies should endeavor to use advanced technology to satisfy existing or potential FOIA demands most efficiently.").

Of course, the records sought by Cox would not be exempt from disclosure, even if they fell within the statutory language of Exemption 2, because they do not risk "circumvention of agency regulations or statutes." *Crooker*, 670 F.2d at 1074. The records sought by Cox simply provide basic information with respect to aliens currently incarcerated in state and federal prisons. The data is gathered for the purpose of calculating government reimbursement to states and localities for the expenses incurred in keeping these aliens in prison. Disclosure of these records would not facilitate circumvention of any DOJ statute or regulation.

2. Exemption 6

FOIA exempts from the presumption of disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Determination of whether disclosure of information would

constitute a "clearly unwarranted invasion of personal privacy" under Exemption 6 requires "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *aff'd on other grounds*, 425 U.S. 352, 372. *Accord Department of State v. Ray*, 112 S. Ct. 541 (1991). Cases have consistently held that the "clearly unwarranted" language in Exemption 6 is intended to "tilt the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971), *stay denied*, 404 U.S. 1204 (1971). *See also Local 598 v. Department of the Army Corps of Engineers*, 841 F.2d 1459, 1463 (9th Cir. 1988) ("particularly under Exemption (6), there is a strong presumption in favor of disclosure"); *Department of the Air Force v. FLRA*, 838 F.2d 229, 231 (7th Cir.) (because FOIA is a disclosure statute, the Supreme Court has read Exemption 6 with a strong emphasis on "clearly unwarranted"), *cert. dismissed*, 488 U.S. 880 (1988). As the U.S. Court of Appeals for the District of Columbia Circuit has noted, "Under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere under the Act." *FERA v. Dept. of Veterans Affairs*, 958 F.2d 503, 510 (D.C. Cir. 1982).

In light of the presumption favoring disclosure, a privacy interest is cognizable only if disclosure would work an invasion of personal privacy that is significant or substantial. *National Association of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). The threat to privacy must be tangible, not just a possibility. *Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974) ("Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities."), *aff'd*, 425 U.S. 352 (1976). Here, any interest an alien inmate might have in the limited information in the requested GMS records is modest, at best.

3. <u>Exemption 7(C)</u>

Exemption 7(C) provides that disclosure of "records or information compiled for law enforcement purposes" is not required to the extent that production of such material "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). As a threshold matter, the records relating to alien inmates in the GMS do not constitute "records or information compiled for law enforcement purposes" under Exemption 7(C). The GMS records relating to alien inmates are maintained by the Office of Justice Programs for the purpose of administering a federal reimbursement program. *See* 8 U.S.C. § 1231(i) (federal government reimburses eligible states and localities that incur costs as a result of incarcerating undocumented criminal aliens who have been accused or convicted of state and local offenses and have been incarcerated for a minimum of 72 hours). The requested GMS records are maintained for administrative rather than law enforcement purposes. *See Western Journalism Center v. Office of the Independent Counsel*, 926 F. Supp. 189, 191 (D.D.C. 1996) ("In order for the records to have been compiled for law enforcement purposes, the investigative activities giving rise to the compilation of the records must be related to the enforcement of federal law and there must be a rational connection between the investigative activities and the agency's law

enforcement duties"). Accordingly, Exemption 7(C) is inapplicable to the information requested by the Cox Washington Bureau.

Even if the GMS alien inmate records were deemed to constitute "records or information compiled for law enforcement purposes" under Exemption 7(C), disclosure would be appropriate because release of the records could not be "reasonably expected to constitute an unwarranted invasion of personal privacy" in light of the strong public interest in the disclosure of such records (as outlined in detail below). Exemption 7(C), like Exemption 6, involves a balancing of the public interest in disclosure against the degree of the privacy invasion that would result from disclosure. *Lesar v. Department of Justice*, 636 F.2d 472, 486 (D.C. Cir. 1980); *Congressional News Syndicate v. Department of Justice*, 438 F. Supp. 538, 542 (D.D.C. 1977). Under Exemption 7(C), the government may not withhold all information that may impact any person's privacy interest. Instead, the government must weigh each individual's privacy interest against the public interest in release of the requested information in order to evaluate whether disclosure constitutes an "unwarranted invasion of privacy." *National Sec. Archive v. Federal Bureau of Investigation*, 759 F. Supp. 872, 883 (D.D.C. 1991).

In contrast to the alien inmates' modest privacy interest in the requested records, there is a significant public interest in disclosure of the alien inmate records; release of the requested records will allow the public to evaluate how the government is managing its responsibilities with respect to aliens who have been arrested in connection with criminal activity. For example, the requested GMS records are maintained in connection with the State Criminal Alien Assistance Program ("SCAAP"). Under SCAAP, the federal government makes federal funds available to states and localities that incur costs as a result of incarcerating undocumented aliens who have been accused or convicted of state or local offenses and have been incarcerated for a minimum of 72 hours. In recent years, Congress has appropriated roughly $500 million dollars annually to partially reimburse state and local jails and correctional facilities for the care and feeding of illegal aliens. To obtain these funds, state and local officials must supply the federal government with a list of alien inmates in their care. The federal government is then responsible for checking the list against the INS database and certifying which inmates qualify for federal reimbursement. Without access to the GMS records that relate to alien inmates, it is impossible to evaluate the effectiveness of SCAAP. Given the substantial taxpayer dollars used to fund SCAAP, the public interest in evaluating the program's effectiveness is obvious and significant.

Access to the GMS's alien inmate records is also of great public interest because the GMS records can be used to evaluate the effectiveness of yet another federal government program, the INS's Institutional Removal Program ("IRP"). The IRP is designed to identify "removable" aliens in federal, state and local jails, prisons and correctional facilities and to remove them from the United States immediately after they have completed their sentences. "The goal of the IRP is to complete the administrative review [of the incarcerated alien] prior to the end of [the] alien's sentence, making more efficient use of INS detention space and reducing any threat to public safety by effecting immediate deportation upon completion of the alien's

sentence." *Fact Sheet: Institutional Removal Program issued by U.S. Department of Justice, Immigration and Naturalization Service*, September 20, 1999.

In numerous audit and testimonial reports, the Inspector General of the U.S. Department of Justice ("IG") and the General Accounting Office ("GAO") have expressed concerns regarding INS's failure to properly administer the IRP. Both the IG and the GAO have criticized the INS for failing to identify all deportable imprisoned criminal aliens. The INS's failure to identify all deportable criminal aliens directly results in its inability to meet the stated goals of the IRP. *See Immigration and Naturalization Service Institutional Removal Program*, Report No. 02-41, September 2002; *Criminal Aliens: INS' Efforts to Remove Imprisoned Aliens Continue to Need Improvement*, Report No. GAO/T-GGD-99-47, February 25, 1999; *Criminal Aliens: INS' Efforts to Remove Imprisoned Aliens Continue to Need Improvement*, Report No. GAO/GGD-99-3, October 1998. The IG, in a report last fall, pointed out that one reason for the INS's failure to identify all deportable criminal aliens is that the INS lacks estimates of the alien population incarcerated in local jails, prisons and correctional facilities. "While the INS does track foreign-born inmate populations at the federal and state level, it does not maintain INS-wide statistics on foreign-born inmate populations at the county level." *Immigration and Naturalization Service Institutional Removal Program*, Report No. 02-41, September 2002. An analysis of the GMS alien inmate records, which contain the names of alien inmates identified as being incarcerated in state and local jails and correctional facilities, can help evaluate the scope of this problem.

The GMS alien inmate records can also be used to evaluate whether the INS is meeting its goal of deporting criminal aliens *immediately* after their release from prison. In particular, an inmate's date of expected release, as identified in the requested GMS records, can be compared with other INS public records relating to the IRP. The public obviously has a profound interest in avoiding waste of taxpayer dollars due to inefficient use of INS resources. According to the GAO's 1999 audit report, analysis of 1997 data showed that the INS could have avoided over $40 million in detention costs expended in cases in which the INS failed to complete the removal proceedings during the alien inmate's incarceration. *Criminal Aliens: INS' Efforts to Remove Imprisoned Aliens Continue to Need Improvement*, Report No. GAO/T-GGD-99-47, February 25, 1999.

According to both the GAO and the IG, the INS entirely fails to deport a substantial number of criminal aliens after they have completed their sentences. *See Immigration and Naturalization Service Institutional Removal Program*, Report No. 02-41, September 2002; *Criminal Aliens: INS' Efforts to Remove Imprisoned Aliens Continue to Need Improvement*, Report No. GAO/T-GGD-99-47, February 25, 1999. In Georgia, Cox Newspapers has identified at least three convicted child molesters who should have been, but were not, deported upon their release from prison. In each instance, the INS claimed that it was never notified of the existence of the inmate. Copies of these news stories are enclosed for your convenience. By comparing the data in the requested GMS alien inmate records with INS deportation records, the public can evaluate how the INS is performing its critical role of deporting criminal aliens of which the

government is aware. Given the obvious public safety concerns raised by the wrongful presence in this country of undocumented criminal aliens with a history of violent crime and/or crime with a high rate of recidivism, such as child molestation, the public has a strong interest in evaluating the INS's activities with respect to removal of aliens who have been incarcerated in the United States for illegal activity.

The public clearly has a substantial interest in evaluating local, state and federal government activities relating to criminal aliens, and, in particular, evaluating the effectiveness of the governmental programs implemented to manage the incarceration and removal of criminal aliens, such as SCAAP and IRP. As the Court of Appeals for the District of Columbia has ruled, "the purpose of FOIA is to permit the public to decide for itself whether governmental action is proper." *Washington Post Co. v. Department of Health and Human Services*, 690 F.2d 252, 264 (D.C. Cir. 1982).

> [In enacting the Freedom of Information Act], Congress was all too aware of the "[in]numerable times" that agencies had withheld information under prior law "only to cover up embarrassing mistakes or irregularities" . . . . FOIA was designed to prevent such incidents and establish instead "[t]he right of the individual to be able to find out how his government is operating."

Id. (citations omitted). *See also National Association of Atomic Veterans v. Director, Defense Nuclear Agency*, 583 F. Supp. 1483, 1487 (D.D.C. 1984) (stating that public oversight of governmental operations provides a public benefit even if the requester's efforts overlap the government's in whole or in part).

Accordingly, a balancing of the public interest in disclosure of the GMS records relating to alien inmates against any privacy interest that may be implicated under Exemption 6 or 7(C) of FOIA would plainly favor disclosure of the GMS alien inmate records.

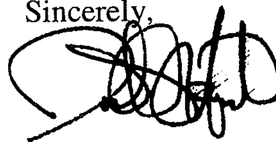
Moreover, even if one item of information in the GMS alien inmate records were exempt from disclosure, any reasonably segregable, non-exempt portion of the records would remain subject to disclosure. "An item of exempt information does not insulate from disclosure the entire file in which it is contained, or even the entire page on which it appears." *Arieff v. United States Department of Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983). Rather, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b).

Because the public interest in disclosure of the GMS alien inmate records far outweighs any pertinent privacy interest, the U.S. Department of Justice should order disclosure of the requested GMS records in the interest of avoiding unnecessary litigation. In the event that any portions of the requested records are withheld or deleted, the Department at a minimum should

specifically identify any portions withheld, provide an index or similar statement of the scope of the material withheld, and specify the exemptions upon which the denial on appeal is based.

Pursuant to the requirements of FOIA, we request a response to this appeal within twenty (20) working days. In light of the extraordinary public interest in the requested information and the already significant delay in receiving the requested materials, I urge you to contact me by telephone if you have any questions or if I can facilitate your review, or the expeditious release of the requested records, in any way.

Sincerely,



Jonathan D. Hart

Attachments
cc: Mr. Andrew N. Alexander
Mr. Elliot G. Jaspin