UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY,	:	
Plaintiff,	:	
		No. 20-cv-00833 (PAE)
v.	:	
FEDERAL BUREAU OF PRISONS,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The Federal Bureau of Prisons initially told The New York Times that it could not release a single document in response to The Times's FOIA request.[1] That was not true. Nearly a year and a half later, it has released thousands of pages—but it continues to withhold crucial documents that would shed light on how BOP handled the incarceration and suicide of Jeffrey Epstein.

Approximately 3,500 pages of records remain at issue. BOP relies upon Exemption 7(A) to withhold almost all of them. But BOP cannot establish that release of these records could interfere with the law enforcement proceedings it cites—the prosecution of murder defendant Nicholas Tartaglione, who shared a cell with Epstein for a brief period of time, and the prosecution of the two correctional officers who failed to perform prisoner counts at the time of Epstein's suicide. The Government also asserts Exemptions 5, 6, 7(C), and 7(E) to justify a limited number of redactions. BOP likewise fails to meet its burden with respect to these withholdings.

The Court should deny the Government's motion for summary judgment, grant Plaintiff's cross-motion, and order that the records be disclosed.

ARGUMENT

I. The Government Has Failed to Satisfy Its Burden in Justifying Withholding Under Exemption 7(A)

The Government pins its Exemption 7(A) argument primarily on two prosecutions that are only tangentially related to Epstein. No matter how often BOP describes them as presenting "weighty criminal law enforcement concerns" (*See* Def. Reply Mem. of L. in Supp. of Summ. J., ECF No. 41 [hereinafter "Gov't Reply Br."], at 5.), the Government has not met its burden to show (a) that the records were "compiled for law enforcement purposes" and (b) that their release "could

[1] Defined terms and abbreviations have the same meaning as in our moving memorandum of law. (*See* Pl.'s Mem. of L. in Supp. of Summ. J., ECF No. 26 [hereinafter "Pl.'s Br."].)

reasonably be expected to interfere" with the proceedings. 5 U.S.C. § 552(b)(7)(A). In its reply, the Government is wrong on both the law and the facts.

As an initial matter, the Government, relying on out-of-circuit precedents, wrongly asks the court to find that any record of a law enforcement agency meets the "compiled for" requirement—the so-called per se rule. (Gov't Reply Br., at 6.) The Government proposes that all the records qualify as "compiled for law enforcement purposes" because they were created "in the exercise of BOP's statutory authority to detain arrested individuals." (Supplemental Decl. of Kara Christenson, ECF No. 39 [hereinafter "Christenson Supp. Decl."], at ¶ 29.) But this sweeping application of Exemption 7(A) would effectively shield every BOP record. *Cf., Human Rights Watch v. DOJ Fed. Bureau of Prisons*, 2015 U.S. Dist. LEXIS 123592, at *13 (S.D.N.Y. Sept. 16, 2015) ("This broader, commonsense understanding of 'law enforcement purposes' need not and does not embrace all BOP records."). To avoid such a result, courts within *this* Circuit—as the Government's own cited cases make clear—have consistently declined to adopt the per se rule. (*See* Gov't Reply Br., at 5–6 (citing to *New York Times Co. v. Dep't of Justice*, 2016 WL 5946711, at *7 (S.D.N.Y. Aug. 18, 2016)); *Radcliffe v. IRS*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008); *Human Rights Watch*, 2015 U.S. Dist. LEXIS 123592, at *11 (rejecting per se rule in BOP case)). Instead, the Government needs to show a "rational nexus" between the documents and the proceedings. *See, e.g.*, *Gonzalez v. U.S. Citizenship & Immigration Servs.*, 2020 U.S. Dist. LEXIS 134482, at *27 (S.D.N.Y. July 29, 2020).

That rationale falls away when the Court looks at the actual records the Government wants to shield under Exemption 7(A). The most critical documents include: (1) emails addressing Epstein's mental and physical health; (2) emails discussing details of Epstein's incarceration prior to his suicide; (3) reports, evidence, and emails addressing Epstein's July 23, 2019 apparent suicide

attempt; (4) reports and evidence of Epstein's death on August 10, 2019; (5) email correspondence between Tartaglione's attorneys and legal counsel at the MCC; and (6) medical and psychological records of Epstein prepared by BOP. (Decl. of Russell Capone, ECF No. 22 [hereinafter "Capone Decl."], at ¶¶ 24–25, 28). These sorts of records logically have no nexus with the prosecutions and therefore cannot be deemed to have been "compiled for law enforcements purposes." These are more properly viewed as administrative records created in the routine course of prison administration as part of the admission and detention of Epstein. They are tangential at best to the prosecutions.[2]

The Government fares no better on the interference prong of the 7(A) test. BOP wants the Court to believe that if Tartaglione stands trial, and if he is convicted, and if his condition of confinement somehow is relevant to penalty phase, the release of these documents could interfere with that possible far-in-the-distance proceeding. (Gov't Reply Br., at 7–8.) But in the penalty phase of a death penalty case, the focus is on findings as to the defendant's "predicate mental states . . . [and] the statutory aggravating factors alleged by the government." *United States v. Perez*, 2004 U.S. Dist. LEXIS 7500, at *3 (D. Conn. June 16, 2006). Even if his confinement were relevant, the Government needs to show a link between interference and the release of their records. Typically, that means that a defendant would be afforded "greater access to agency investigatory files" that would bear on the prosecution than he would under the rules of criminal procedure. *New York Times Co. v. Dep't of Justice*, 390 F. Supp. 3d 499, 512 (S.D.N.Y. 2019). But, as to least one important category, emails of Tartaglione's counsel, he already has access to those records through his counsel. More generally, the Government's declarations fail to demonstrate that these particular

[2] Nor do they become "compiled for law enforcement purposes" by the fact that the Government says they play some role in preventing suicides at BOP facilities or in the investigation of Epstein's death. (*See* Christenson Decl. ¶ 53.) The needed logical linkage simply does not exist there either.

documents would be of any use to the defense or materially affect any witness in the trial of murders from 2016. While the declarants march out the usual and generic parade of horribles—witness interference, fair trial concerns, undue advantage to the defendants—they fall short of actually connecting these specific types of records to any of those concerns. (*See* Capone Decl. ¶¶ 18–22, 24–25; Supplemental Decl. of Russell Capone, ECF No. 40 [hereinafter "Capone Supp. Decl."], at ¶¶ 6–7, 10–13). Generic concerns that some administrative documents in some cases may interfere with some prosecutions do not establish interference in this murder prosecution.

The case for interference is even weaker in respect to the Noel prosecution. The Government concedes that the documents have already been disclosed to defendants as part of discovery. (Gov't Reply Br., at 10.) Thus, the sole rationale is that the disclosure may taint witnesses' testimony. (Gov't Reply Br., at 9.) But the records at issue do not discuss the critical issue in the prosecution: what the two officers were doing or not doing on the shift during which the suicide took place. They are instead administrative records, such as medical files for Epstein. (Capone Decl. ¶¶ 19–21.) The declarations fail to make the connection between the release of those kinds of records and any shaping of testimony that might occur. (Capone Decl. ¶ 20.) BOP assumes, without basis, that witnesses will lie if exposed to these records that are of no obvious relevance to the prosecution. In any event, the protective order governing discovery in the Noel prosecution allows these documents to be provided to expert witnesses and shown to fact witnesses. (*See* Protective Order, *United States v. Noel*, No. 19-cr-830 (AT) (S.D.N.Y.), Dkt. No. 16, at ¶¶ 2(b)(ii), 3.) Release here will have no material effect.

In a last-ditch effort to establish the possibility of interference, the Government argues that the records may negatively influence a jury. (Gov't Reply Br., at 8–9.) But "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of

criminal case to an unfair trial." *United States v. Martoma*, 2013 U.S. Dist. LEXIS 182959, at *22 (S.D.N.Y. Dec. 8, 2013) (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976)). Nor is withholding the records the only measure that courts can use to mitigate the adverse effects of publicity. *Neb. Press Ass'n*, 427 U.S. at 563–64 (enumerating methods to mitigate the effect of pre-trial publicity including: "change of [a trial] venue," "postponement of the trial to allow public attention" to subside, "searching questioning of prospective jurors," and "the use of emphatic and clear instructions" to jurors). Ultimately, the Government can take proactive steps to mitigate any purported prejudice resulting from publicity about Tartaglione's case, including the release of the records, if and when he stands trial.

II. The Government Has Failed to Satisfy Its Burden in Justifying Withholding Under Exemption 6 and 7(C)

The Government also seeks to withhold some of these same documents under FOIA's privacy exemptions, Exemption 6 and 7(C)—mainly the phone logs and visitor logs and medical records from the suicide. Those exemptions require "balancing an individual's right to privacy against the preservation of FOIA's basic purpose of opening agency action to the light of public scrutiny." *Assoc. Press v. Dep't of Def*, 554 F.3d 274, 291 (2d Cir. 2009).

In its reply, in respect to the logs, BOP doubles down on what it deduces to be the privacy interests of Epstein's friends and associates. (Gov't Reply Br., at 13–14.) But BOP provides no evidence that any of these people, many of whom have been publicly linked to Epstein over the years, actually has a privacy concern; instead, BOP relies solely on its own speculation that they would not want to be associated with Epstein. (*See* Christenson Decl. ¶ 60.) BOP tries to use that speculation to overcome the obvious and legitimate public interest at stake here. Questions persist about whether BOP properly managed Epstein's interactions with associates and friends while incarcerated. *See, e.g.,* Ali Watkins, Danielle Ivory & Christina Goldbaum, *Inmate 76318-054: The*

Last Days of Jeffrey Epstein (Aug. 17, 2019), https://nyti.ms/3h8uED2. These individuals chose to call or visit an individual who had garnered international media attention during his brief detention. But, more to the point, revelations of the logs will shed light on "what [the] government is up to." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 34 (D.C. Cir. 2002). BOP has established guidelines and procedures for visitation and telephone calls to inmates housed at MCC. *See* U.S. Dep't of Justice Federal Bureau of Prisons, *Attorney's Guide to the Metropolitan Correctional Center New York, New York* (2008), https://bit.ly/3aWIUNW. BOP acts as a gatekeeper between inmates and the outside world; those who wish to contact a prisoner through visitation or telephone call must do so through BOP. Specifically, the records provide the public information about whom Epstein was in contact with while he was under Government supervision. The Government's attempt to distance itself from these records is both disingenuous and unpersuasive (Gov't Reply Br., at 14), since the documents would facilitate public oversight and shed light on how BOP monitors visitors of high-profile inmates. Ultimately, the public interest in understanding who was afforded access to Epstein by the Government outweighs any purported privacy interest.

The Government again relies on an *unasserted* privacy interests to withhold records pertaining to the death—the privacy interest of Epstein's sole surviving relative—his brother. (Gov't Reply Br., at 11.) But BOP provides no evidence of what Epstein's brother actually wants or does not want. (*See* Christenson Decl. ¶ 62.) In fact, he has publicly called for BOP to produce records related to the suicide. *See* Julie K. Brown, *Jeffrey Epstein Wasn't Trafficking Women – And He Didn't Kill Himself, Brother Says*, Miami Herald (Nov. 14, 2019), https://hrld.us/3ibIANJ. Rather than address the public statements of Epstein's brother, the Government focuses on other issues. The Government avers that it was not required to secure declarations to demonstrate a privacy interest.

(Gov't Reply Br., at 12.) Undoubtedly, that is so—when there is other evidence of the privacy interest. But there is none here.

The Government then proceeds to minimize the public's interest in the records providing certain details of Epstein's death. (*See* Gov't Reply Br., at 12–13.) The Epstein death continues to raise troubling questions about how BOP allowed the suicide to happen. Ali Watkins & Michael Gold, *Jeffrey Epstein Autopsy Results Show He Hanged Himself in Suicide,* N.Y. Times (Aug. 16, 2019), https://nyti.ms/3bBRMsi. It is abnormal when a prisoner unexpectedly dies in federal custody. A death by suicide necessarily implicates a government failure. The call and visitor logs, documents about Epstein's death, and photographs would contribute directly to the "public understanding of the operations or activities of the government," insofar as they would provide the public with greater information about how Epstein died. *Dep't of Def. v. FLRA*, 510 U.S. 487, 495 (1994). Moreover, there is a significant amount of "media coverage of speculation and theories about Epstein's death." (Capone Supp. Decl. ¶ 8.) And the Government is inextricably intertwined with this speculation. The public has a right to know how BOP failed.

III. The Government Has Failed to Satisfy Its Burden in Justifying Withholding Under Exemption 5

The Government next argues that certain of the documents can also be withheld as deliberative under Exemption 5.[3] As an initial matter, the Government attempts to muddle the issues before this Court by quibbling about which documents remain in dispute. (*See* Gov't Reply Br., at 16.) There is no mystery. The Times disputes the entirety of BOP's Exemption 5 withholdings, as set forth in footnote 3 here, with the exception of communications between BOP employees and

[3] The Government now asserts Exemption 5 over four broad categories of documents: (1) the psychological reconstruction of Epstein's death; (2) psychological reconstruction responses; (3) emails pertaining to Epstein's July 23, 2019 suicide attempt; and (4) emails pertaining to Epstein's death. (Exhibit A to Christenson Decl. ("Index"), Dkt. 39-1, Entries 37, 12, 41, 52, 53.) The Times challenges each of these categories.

Assistant United States Attorneys subject to the attorney-client privilege. (*See* Pl.'s Br., at 18–19.) The Government's drawn-out recitation of the remaining issues cannot distract from the fundamental problem: BOP has failed to meet its burden to justify withholding the requested records. *Assoc. Press*, 554 F.3d at 283 ("Consistent with FOIA's purpose and design, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.").

First, the documents appear to be largely factual in nature and therefore are not subject to a blanket withholding under Exemption 5. (Pl.'s Br., at 19); *see Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) ("Purely factual material not reflecting the agency's deliberative process is not protected."). Instead, the Government cherry-picks portions of documents to defend its withholdings. For example, the Government asserts that "certain emails" reflect "deliberations about where and how to house Epstein following his apparent suicide attempt in July 2019." (Gov't Reply Br., at 16–17; Christenson Decl. ¶ 49(d).) But decisions about where to place a specific prisoner after a suicide attempt are not a "policy-oriented judgment;" they are instead properly understood as "routine operating decisions." *Seife v. Dep't of State*, 366 F. Supp. 3d 592, 606 (S.D.N.Y. 2019). Routine operational decisions are not deliberative communications protected by the privilege. *See id.*; *Schiller v. City of New York*, 2007 U.S. Dist. LEXIS 4285, at *34 (S.D.N.Y. Jan. 19, 2007); *E.B. v. New York City Board of Educ.*, 233 F.R.D. 289, 293 (E.D.N.Y. 2005). Contrary to the Government's proposed application of Exemption 5, the deliberative process privilege "does not operate indiscriminately to shield all decision-making by public officials." *N.Y. Times Co. v. Dep't of Def.*, 499 F. Supp. 2d 501, 514 (S.D.N.Y. 2007).

Moreover, the Government's Exemption 5 withholdings cannot survive because BOP has failed to meet the "foreseeable harm" standard created by the FOIA Improvement Act of 2016. In its

reply, the Government does little more than recite the boilerplate rationale for protecting deliberative documents. (Gov't Reply Br., at 17–18.) That is not enough. In order to satisfy the Amendment's standard, BOP "must explain how a particular Exemption 5 withholding would harm [its] deliberative process." *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't*, 2020 U.S. Dist. LEXIS 167637, at *33 (S.D.N.Y. Sept. 14, 2020). "General explanations" that disclosure would impair or chill deliberations alone do not satisfy the foreseeable harm standard. *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019); *see also N.Y. Times Co v. Dep't of Health and Human Servs.*, 2021 U.S. Dist. Lexis 6267, at *30–31 (S.D.N.Y. Jan 13, 2021). That is the exact justification the Government offers. (*See, e.g.*, Christenson Decl. ¶ 49(b) (stating that "[r]elease of the [psychological reconstruction and responses] would hamper frank and open discussions and assessments by these officials in reaching policy decisions" without further justification).) Missing is any explanation of how the disclosure of *these* records would cause specific harm to the agency's deliberative processes. *See, e.g.*, *Judicial Watch, Inc.,* 375 F. Supp. 3d at 100 (agency must articulate "a link between the specified harm and specific information contained in the material withheld").

IV. The Government Has Failed to Satisfy Its Burden in Justifying Withholding Under Exemption 7(E)

Exemption 7(E) is designed to shield secret law enforcement techniques. That necessarily means that an agency has kept the information secret. Not so here. (Pl.'s Br., at 21.) At issue are those records dealing with how BOP responds to suicide attempts. (Gov't Reply Br., at 18.) But the techniques for suicide response are not secrets. The Government's public reports address this very topic and provide comprehensive guidance as to how a BOP staff member should respond to an inmate's suicide attempt. *See* U.S. Dep't of Justice Nat'l Inst. of Corrections, *National Study of Jail Suicide: 20 Years Later* (Apr. 2010), at 52, https://bit.ly/3lYuoKm (discussing the three requisite

components for an effective policy regarding intervention). In fact, the Department of Justice has a detailed description of suicide attempt/post-suicide procedures discussing the specific duties of the officers on duty at the time of suicide events and the equipment needed by those staff members. U.S. Dep't of Justice Nat'l Inst. of Corrections, *Prison Suicide: An Overview and Guide to Prevention* (1995), at 23–25, https://bit.ly/2FhaZnb. There is nothing secret here.

While it is true that courts have at times found that commonly known procedures may be protected from disclosure, this applies when "the manner and circumstances of the various techniques . . . [are] not generally known to the public." *Coleman v. FBI*, 13 F. Supp. 2d 75, 83 (D.D.C. 1998); *see also Shapiro v. Dep't of Justice*, 249 F. Supp. 3d 502, 507 (D.D.C. 2017) ("Even though the *identity* of the investigative technique is more publicly known, disclosure of the manner and circumstances of the technique may still frustrate enforcement of the law.") (emphasis added). The Government has done little to actually explain why the available information does not obviate invocation of the exemption. (*See* Gov't Reply Br., at 20.) BOP needs to explain away why the public disclosures, but it has not done so. *See Am. Immigration Lawyers Ass'n v. Dep't of Homeland Sec.*, 852 F. Supp. 2d 66, 80 (D.D.C. 2012) ("Where an agency has publicly disclosed information that is similar to what is being withheld, its Vaughn submission must be 'sufficiently detailed' to distinguish the withheld information from the public information.").

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to (i) declare that the documents sought by The Times are public under 5 U.S.C. § 552 and must be disclosed; (ii) order BOP to provide the requested documents to The Times within 20 business days of the Court's order; (iii) award The Times the costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by 5 U.S.C. § 552(a)(4)(E); and (iv) grant such other and further relief as the Court deems just and proper.

Dated: New York, NY
February 10, 2020

Respectfully submitted,

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