



U.S. Department of Justice

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By First Class Mail

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Re: Inmate Emails On TRULINCS

Dear Counsel:

The United States Attorney's Office for the Eastern District of New York (the "Office") writes to apprise you of this Office's policy regarding emails sent by inmates at the Metropolitan Detention Center (the "MDC") to their attorneys using the Bureau of Prisons' ("BOP") Trust Fund Limited Inmate Computer System ("TRULINCS"). As you may know, this Office routinely obtains inmates' TRULINCS emails, including those that may have been exchanged between inmates and their attorneys. For the reasons set forth below, emails exchanged between inmates and their attorneys using the TRULINCS system are not privileged, and inmates have other means to communicate with their attorneys in a privileged setting. Accordingly, this Office intends to review all email obtained from the TRULINCS system.

I. Legal Standard

"The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." United States v. Mejia, 655 F.3d 126, 133 (2d Cir. 2011) (citing In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007)). With regard to the second prong, the Second Circuit has previously held in an analogous context that an inmate's communication over a telephone that the inmate knows is being recorded by prison authorities is not protected by the attorney-client privilege. See Mejia, 655 F.3d at 133 ("We agree with the district court that, on the basis of the undisputed fact that [defendant] Rodriguez was aware that his conversation was being recorded by BOP, Rodriguez's disclosure to his sister of his desire to engage in plea discussions with his attorney was not made in confidence and thus constituted a waiver of the privilege.").

Mejia was a decision of first impression in the Second Circuit, but it is in line with other circuits that have considered the issue. Those circuits have similarly held that when an inmate is aware that his calls are being recorded, those calls are not protected by a privilege. See United States v. Hatcher, 323 F.3d 666, 674 (8th Cir. 2003) (“The presence of the prison recording device destroyed the attorney-client privilege. Because the inmates and their lawyers were aware that their conversations were being recorded, they could not reasonably expect that their conversations would remain private. The presence of the recording device was the functional equivalent of the presence of a third party.”); United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998) (holding that marital privilege did not apply when spouse seeking to invoke the privilege knew that the other spouse was incarcerated); see also United States v. Pelullo, 5 F. Supp. 2d 285, 289 (D.N.J. 1998) (“[T]o the extent that defendant engaged in telephone conversations with attorneys on the monitored line the communications were not privileged. Defendant had no expectation of privacy in these conversations. They were knowingly made in the presence of the Bureau of Prisons through its taping and monitoring procedures. This constitutes a waiver of any privilege that might otherwise have existed.”); United States v. Lentz, 419 F. Supp. 2d 820, 827-28 (E.D. Va. 2005) (“an inmate's telephone conversations with counsel are not protected by the attorney-client privilege where, as here, the inmate is notified at the outset that the calls are recorded and subject to monitoring”).

In order to waive the privilege, the inmate must have notice that his or her calls are being monitored. After receiving that notice, however, an inmate who communicates with his or her attorney over the monitored telephone has waived the attorney-client privilege by “voluntarily disclosing otherwise privileged information to a third party.” Lentz, 418 F. Supp. 2d at 827. This is particularly true when there are other ways for the inmate to communicate with his or her attorney in a privileged setting, but the inmate chooses not to do so. See Mejia, 655 F.3d at 133 (noting defendant’s failure to use options offered by the BOP that preserve confidentiality).

II. Inmates and Attorneys Are Provided Express Notice that Emails on the TRULINCS System are Monitored

As set forth below, inmates at the MDC and their counsel are provided with ample notice that their emails are being monitored. Thus, no attorney-client privilege attaches to such communications.

Prior to gaining access to TRULINCS, an inmate must consent to the monitoring of all emails placed using TRULINCS. In order to gain access to TRULINCS, each inmate must execute the “Inmate Agreement for Participation in TRULINCS Electronic Messaging Program.” That one-page agreement includes seven separate conditions of participation. One of those conditions is the “Consent to Monitoring” condition, which provides in relevant part:

I am notified of, acknowledge and voluntarily consent to having my messages and transactional data (incoming and outgoing) monitored, read, retained by Bureau staff and otherwise handled as described in

[BOP directives]. **I am notified of, acknowledge and voluntarily consent that this provision applies to messages both to and from my attorney or other legal representative, and that such messages will not be treated as privileged communications.**

(emphasis added). The BOP retains, and is able to access, the Inmate Agreement for each inmate at the MDC.

Moreover, each time an inmate logs onto TRULINCS, the system generates a message to the inmate with the following warning:

The Department may monitor any activity on the system and search and retrieve any information stored within the system. By accessing and using this computer, I am consenting to such monitoring and information retrieval for law enforcement and other purposes. I have no expectation of privacy as to any communication on or information stored with the system.

Further down the page, the same warning banner states:

I understand and consent to having my electronic messages and system activity monitored, read, and retained by authorized personnel. **I understand and consent that this provision applies to electronic messages both to and from my attorney or other legal representative, and that such electronic messages will not be treated as privileged communications, and I have alternative methods of conducting privileged legal communication.**

(emphasis added). In order to continue using the system and access their email, the inmate must click "I accept."

Similarly, non-inmate users of TRULINCS, including attorneys, are provided with notice that all communications on the system are monitored. In order to use TRULINCS, non-inmate users must be added to an inmate's "contact list." Once the inmate adds someone to his or her contact list, the TRULINCS system sends a generated message to the proposed contact's email address. That generated email states, *inter alia*, "[b]y approving electronic correspondence with federal prisoners you consent to have the Bureau of Prison staff monitor the content of all electronic messages exchanged." The message is written in both English and Spanish. The recipient of the email is then directed to a website where he or she must insert a specific code in order to be given access to TRULINCS.¹

¹ In addition, BOP's TRULINCS Program Statement 5265.13 specifically states that "special mail" recipients or other legal representatives on an inmate's contact list may be added to the TRULINCS system, with the acknowledgment that electronic messages

Finally, the American Bar Association (“ABA”) has acknowledged that the communications between inmates and their attorneys on TRULINCS are not privileged. In February 2006, when TRULINCS was undergoing a limited initial rollout, the ABA’s Governmental Affairs Office submitted a letter to Harley Lappin, the Director of the BOP. In that letter, the ABA urged the BOP to make permanent and extend the TRULINCS program, which was then being tested at several federal correctional institutions. In its letter, the ABA acknowledged that the TRULINCS system would be monitored by the BOP and stated that TRULINCS emails are utilized for unprivileged communications:

Although presenting confidentiality concerns, TRULINCS greatly enhances the attorney-client relationship by supplementing unmonitored forms of communication, that is legal mail, legal calls and professional visiting. It affords attorneys and their incarcerated clients the possibility of making expedited contact when quick decisions must be made or non-privileged information relayed. . . . TRULINCS also eases the burden on institution staff by relieving them of the responsibility of coordinating visits or calls for what are otherwise administrative, though time-sensitive, matters.

(emphasis added) .

III. Inmates Have Adequate Alternative Means to Communicate in Unmonitored Settings

The MDC’s policy of monitoring all email on TRULINCS comports with the suggestion in the case law that an inmate must have the means to communicate with his or her attorney in an unmonitored setting. The MDC specifically provides multiple methods for an inmate to do so: (i) unmonitored, in-person visits; (ii) unmonitored telephone calls, which must be approved by a staff member; and (iii) “Special Mail” correspondence, which can only be opened in the presence of an inmate.

exchanged with individuals will not be treated as privileged communications and will be subject to monitoring.

IV. Conclusion

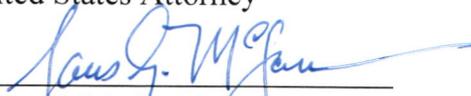
For the above reasons, emails between inmates and their attorneys sent over the TRULINCS system are not privileged, and thus the Office intends to review all emails obtained from the TRULINCS system.

Please let me know if you would like to discuss this issue or have any questions.

Very truly yours,

LORETTA E. LYNCH
United States Attorney

By: _____


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cc: The Honorable Carol B. Amon, Chief Judge, Eastern District of New York
The Honorable Cheryl L. Pollak, Chair, Eastern District Criminal Justice Act Panel
Committee