



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street
New York, New York 10007*

June 10, 2019

BY ECF

Honorable Stewart D. Aaron
United States Magistrate Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *New York Times and Vogel v. United States Dept. of Justice,*
No. 18 Civ. 2095 (LAK) (SDA)

Dear Judge Aaron:

This Office represents the United States Department of Justice (“DOJ” or the “government”) in the above-captioned FOIA case. I write respectfully pursuant to the Court’s April 3 and May 2, 2019 orders, ECF Nos. 67 and 70, as extended by the Court’s June 4, 2019 order, ECF No. 74, to provide redacted versions for filing of the two ex parte declarations the government previously filed under seal in support of its motions for summary judgment.

Attached as Exhibit A to this letter is a redacted version of the first ex parte declaration of Patrick Findlay, notice of which was filed as ECF No. 45 on November 9, 2018. Attached as Exhibit B is a redacted version of the second ex parte declaration of Patrick Findlay, notice of which was filed as ECF No. 60 on February 15, 2019.

The attached redacted versions of these documents have been cleared for this public filing by the Department of Justice. However, disclosure of the unredacted original declarations would, as explained in the government’s briefs in support of summary judgment, ECF Nos. 44 and 59, reasonably be expected to interfere with enforcement proceedings. For these reasons, the government respectfully requests that the unredacted original declarations be maintained under seal.

Honorable Stewart D. Aaron
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We thank the Court for its consideration of this request.

Respectfully submitted,

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United States Attorney for the
Southern District of New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and
KENNETH P. VOGEL,

Plaintiffs,

– versus –

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

No. 18 Civ. 2095 (LAK) (SDA)

EX PARTE DECLARATION OF PATRICK N. FINDLAY

I, Patrick N. Findlay, declare as follows:

1. As more fully-explained in my public declaration (“Public Declaration”), executed November 9, 2018, which I expect to be filed simultaneously with this declaration, I am the Acting Chief and Special Counsel of the Office of Strategy Management and Development (“OSMD”) of the National Security Division (“NSD” or “the Division”) of the United States Department of Justice (“DOJ” or “the Department”). Among other responsibilities, in my capacity as the Acting Chief of OSMD, I serve as the Acting Director of the Freedom of Information Act and Declassification Unit (“NSD FOIA”), which is responsible for responding to requests for access to NSD records and information pursuant to the *Freedom of Information Act* (“FOIA”), codified at 5 U.S.C. § 552, and the *Privacy Act of 1974*.

2. The statements in this declaration are based on my personal familiarity with the FOIA requests and related information and upon information provided to me by various Department of Justice (“DOJ”) colleagues overseeing or participating in the investigations

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discussed herein. Where information relates to a specific investigation, that information has been reviewed for accuracy by one or more individuals assigned to that investigation.

3. In addition to the reasons discussed in my Public Declaration, as elaborated below, release of the withheld records could reasonably be expected to interfere with [REDACTED] [REDACTED] not been officially disclosed or acknowledged by the Department of Justice.

4. Through each of plaintiffs' three FOIA requests NSD received, plaintiffs requested certain internal and external correspondence related to four groups of entities and individuals (collectively, "persons")¹ from the FARA Unit: (A) the European Centre for a Modern Ukraine and its employees, representatives and officials ("Group A"), (B) the Ukrainian Party of Regions and its employees, representatives and officials ("Group B"), (C) Inovo BV and Flynn Intel Group and their employees, representatives, and officials, and (D) the Human Rights Accountability Global Initiative Foundation and Prevezon Holdings and their employees, officials, or representatives.

BACKGROUND

A. Groups A and B

5. Release of FARA Unit records relating to the individuals or entities enumerated in groups A and B ("group A/B enumerated persons") would be reasonably likely to interfere with [REDACTED]

¹ Because in their FOIA requests at issue here plaintiffs seek records related to both corporate entities and individuals, I use the term "persons" in this declaration to refer to both natural and corporate persons. When describing the persons specifically identified in the FOIA requests and complaint as belonging to a particular group, I use the term "enumerated persons."

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6. With respect to Group A in the FOIA requests, plaintiffs specifically seek correspondence related to:

The European Centre for a Modern Ukraine and its employees, representatives or officials, including Ina Kirsch and employees, officials or representatives of DMP International, Podesta Group, Mercury Public Affairs/dba Mercury/ Clark & Weinstock and Skadden Arps Slate Meagher & Flom, related to the European Centre for a Modern Ukraine's activities in the U.S. The requests sought copies of correspondence related to these companies and individuals sent or received between February 2015 and the present.

Complaint ¶ 14.a & Exs. A-D.

7. With respect to Group B in the FOIA requests, plaintiffs specifically seek correspondence related to:

The Ukrainian Party of Regions, and its employees, officials or representatives, including employees, representatives or officials of DMP International and Skadden Arps Slate Meagher & Flom. The requests sought copies of correspondence related to these companies and individuals sent or received between February 2015 and the present.

Complaint ¶ 14.b & Exs. A-D.

8. The Special Counsel's Office ("SCO") at DOJ has prosecuted Paul Manafort and Richard Gates (owner and employee, respectively, of Manafort's consulting firm, DMP International, or "DMI"), for various criminal offenses, including failure to register as a foreign agent in violation of the Foreign Agents Registration Act ("FARA"), 22 U.S.C. §§ 611 *et seq.*

9. The FARA conduct for which Manafort and Gates were prosecuted and pleaded guilty relates to DMI's lobbying and public relations work in the United States on behalf of the government of Ukraine; its then-president, Viktor F. Yanukovich; and two Ukrainian political parties, the Party of Regions and the Opposition Bloc. *See* Manafort Statement of Offense ("Manafort Statement") ¶ 2, *United States v. Manafort*, Criminal No. 17-201-1 (ABJ) (D.D.C.)

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(Sept. 14, 2018), *available at* <<https://www.justice.gov/file/1094156/download>> (visited Nov. 9, 2018).

10. According to Gates' Statement of Offense;

[I]n or about 2012 Manafort and others obtained the approval of Ukraine President Yanukovich to implement a global lobbying strategy to promote Ukraine's interests, including entry into the European Union. . . . Thereafter, DMI, through Manafort, and with the assistance of GATES, worked with various entities and people to lobby in the United States, among other locations. As part of this scheme, the European Centre for a Modern Ukraine (the Centre) was set up by the Government of Ukraine to coordinate lobbying principally in Europe, as well as to act as the ostensible client for two lobbying firms in the United States. The Centre reported to Ukraine Party of Regions member, and Ukraine First Vice Prime Minister, Andriy Klyuyev. The Centre largely oversaw European lobbying and Manafort and GATES generally oversaw the work of lobbyists in the United States.

Gates Statement of Offense ("Gates Statement") ¶ 7, *United States v. Gates*, Criminal No.

17-201-2 (ABJ) (D.D.C.) (Feb. 23, 2018), *available at*

<<https://www.justice.gov/file/1038806/download>> (visited Nov. 9, 2018).

11. Thus, although in their FOIA requests plaintiffs list two separate groups of persons (one relating to the Centre, and one relating to the Party of Regions), the government understands that the Centre was an agent for the Party of Regions, and correspondence related to one is related to the other. In evaluating the applicability of FOIA exemption 7(A), the government has therefore treated groups A and B as a single unit.

12. 



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14. Releasing the requested records related to group A and B enumerated persons could reasonably be expected to harm [REDACTED] as detailed below.

B. Group C

15. Release of FARA Unit records relating to the persons enumerated in group C (“group C enumerated persons”) would be reasonably likely to interfere with [REDACTED]



16. With respect to Group C in the FOIA requests, plaintiffs specifically seek correspondence related to

Inovo BV, and its employees, officials or representatives, including Ekim Alptekin, and employees, officials or representatives of Flynn Intel Group. The requests sought copies of correspondence related to these companies and individuals sent or received between June 2016 and the present.

Complaint ¶ 14.c.

17. Flynn has pleaded guilty to making false statements to the FBI and making false statements or omissions in FARA filings with DOJ on behalf of himself and his company, Flynn Intel Group (“FIG”). This matter is public.



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19. Releasing the requested records related to group C enumerated persons could reasonably be expected to harm [REDACTED].

C. Group D

20. Release of FARA Unit records relating to the individuals or entities enumerated in group D (“group D enumerated persons”) would be reasonably likely to interfere with [REDACTED]



21. With respect to Group D in the FOIA requests, plaintiffs specifically seek correspondence related to

The Human Rights Accountability Global Initiative Foundation and/or Prevezon Holdings, and their employees, officials or representatives, including Rinat Akhmetshin, Robert Arakelian, Chris Cooper, Mark Cymrot, Ron Dellums, Howard Schweitzer, Glenn Simpson and employees, officials or representatives of Baker Hostetler, Cozen O’Connor Public Strategies, Fusion GPS and Potomac Square Group. The requests sought copies of correspondence related to these companies and individuals sent or received between June 2015 and the present.

Complaint ¶ 14.d & Exs. A-D.



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[REDACTED]

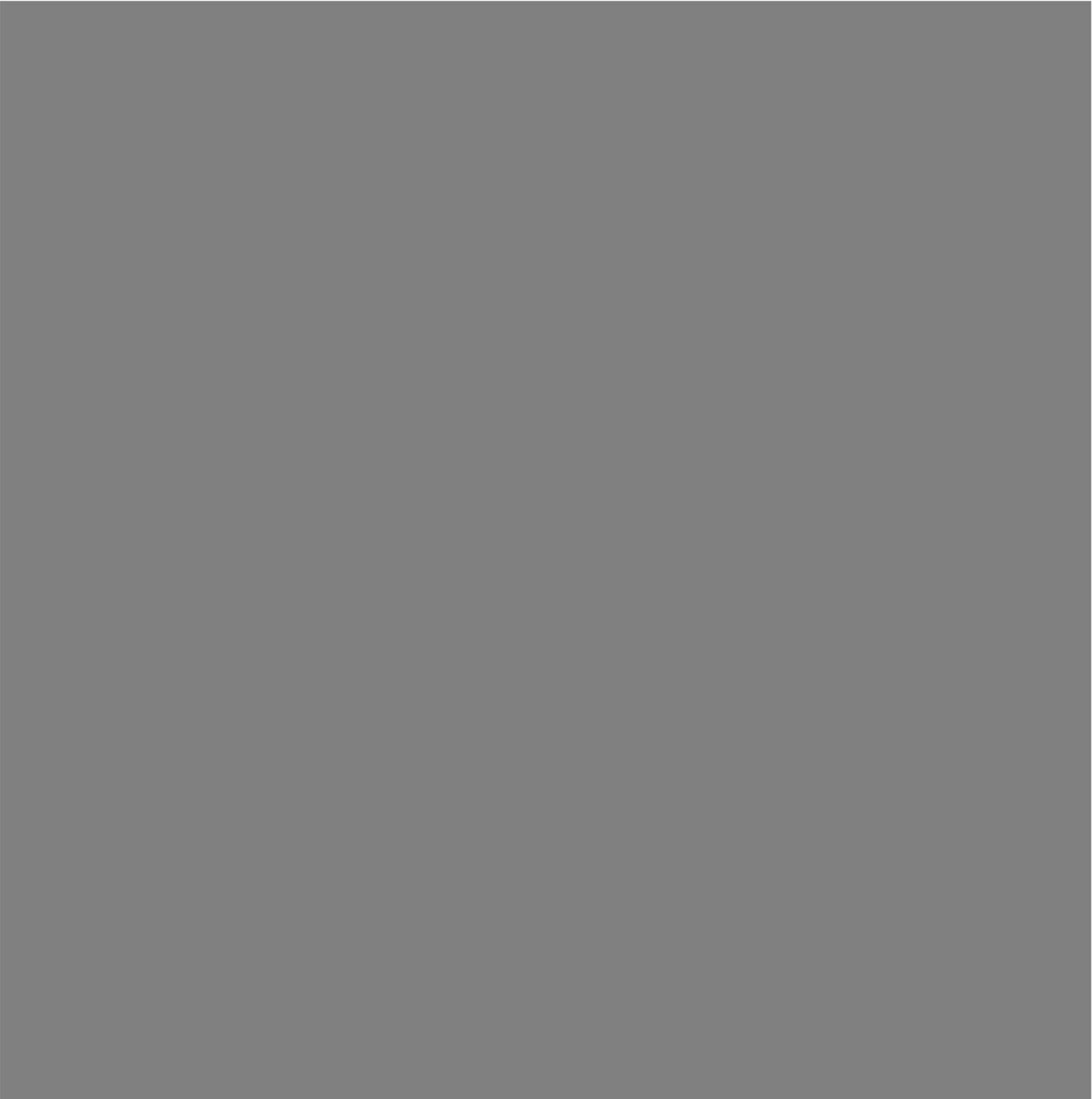
23. Releasing the requested records related to group D persons could reasonably be expected to harm [REDACTED].

WITHHOLDINGS

24. The records that the government has withheld pursuant to exemption 7(A) include the following categories: (1) correspondence between DOJ and enumerated persons or their representatives, [REDACTED], as well as exhibits to the Hermitage Capital Management complaint (“external correspondence”); (2) internal emails among DOJ employees that include substantive discussion of enumerated persons (“internal correspondence”); (3) other internal emails among DOJ employees—which provide only links to or forwards of public press accounts of enumerated persons without additional discussion of those press accounts (“news distributions”); and (4) tens of thousands of individual records contained on a DVD [REDACTED]. As described below, release of each category could reasonably be expected to interfere with one or more of the above-described enforcement proceedings, and all categories of records have therefore been withheld in full pursuant to FOIA’s exemption 7(A).

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A. External Correspondence



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29. Premature revelation of the existence of a criminal investigation can harm the investigation in many ways. For example, witnesses, subjects or targets may destroy relevant records. They may also flee. 

 Witnesses, subjects or targets may also attempt to coordinate their actions or their testimony in an effort to defeat criminal prosecution.

30. In this case, the individuals who were communicating (including through counsel) with DOJ's FARA Unit will know of these communications, and the principals of organizations that communicated with DOJ may also have knowledge of the communications. 



² If CES believes a willful violation of FARA has occurred, CES (though not the FARA Unit in particular) will partner with the appropriate U.S. Attorney's Office and the FBI to open a criminal investigation. Similarly, if CES believes a significant violation of FARA has occurred for which a civil injunctive remedy is appropriate, it will file such an action in the appropriate U.S. district court with the assistance of the local U.S. Attorney's Office.

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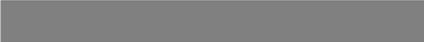


b. Group C

36. The government withheld two pages of records consisting of correspondence between DOJ and attorneys for Flynn and FIG pursuant to exemption 7(A). These records consist of a letter sent by counsel for Flynn and FIG to the FARA Unit making representations about Flynn’s and FIG’s activities in relation to the government of Turkey. This correspondence is listed in the Vaughn index as document category 2.

37. Release of the letter could reasonably be expected to harm 



³ This Declaration and the Public Declaration address only exemption 7(A). Though not described more here, I note that, for the Hermitage exhibits in particular, the government also asserts exemption 7(F), because their release “could reasonably be expected to endanger the life or physical safety” of individuals .

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B. Internal Correspondence

39. The withheld records also include internal correspondence among employees of the FARA Unit and NSD relating to [REDACTED]

These records form a portion of the records listed in the Vaughn index as document category 6.

40. The FOIA requests seek records from the FARA Unit. As discussed further above in paragraph 28, the FARA Unit does not itself pursue criminal charges; instead, its role is to conduct administrative enforcement of FARA's requirements. However, the FARA Unit does refer matters elsewhere in CES for criminal and civil enforcement. Additionally, CES or others in NSD, in turn, consult with FARA Unit staff about criminal investigations which implicate FARA.

41. The internal communications withheld pursuant to exemption 7(A) include, for example, deliberations about whether DOJ should look into enumerated persons' potential requirement or failure to register under FARA; discussions of what information to request from specific enumerated persons; circulations for review or comment of draft correspondence with enumerated persons; discussions about information that enumerated persons provided to DOJ, and what additional steps might be warranted; discussions about developments in the news and their potential impact on existing or anticipated FARA registration requests; discussions of how DOJ should respond to requests for information from Congress about its FARA registration practices and its handling of matters relating to specific enumerated persons; discussions of the

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relevance of past FARA Unit correspondence or practices to subsequent criminal investigations; and other similar topics.⁴

42. Some of the substantive internal communications also have attachments. The search that DOJ conducted yielded native-format Outlook emails with native-format attachments (including PDF, Word, and PowerPoint files). The attachments include drafts and final versions of intra-DOJ memoranda or presentations; draft and final external correspondence; materials submitted by enumerated persons; and publicly available material, including news articles, public DOJ-created documents, and public documents created by other parts of the government, including Congress.

43. Releasing the substantive internal emails could reasonably be expected to interfere with 







⁴ These records (or portions of them) are also likely to be exempt from disclosure pursuant to FOIA's exemption 5, which incorporates various civil privileges, including the deliberative process privilege, the attorney-client privilege, and the work product doctrine.

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[Redacted]

[Redacted]

[Redacted]

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C. News Distributions

48. The withheld emails also include exclusively internal emails among DOJ employees that provide links to or forwards of public press accounts covering enumerated persons. These records form the remainder of the records in document category 6 in the Vaughn index. Releasing these news distributions could also reasonably be expected to interfere with enforcement proceedings.

49. As part of its mission to ensure compliance with FARA, the FARA Unit regularly monitors public sources of information—including newspapers and other periodicals, as well as reports from internet sources—about activities in the United States that may be conducted on behalf of foreign principals and which may warrant further government investigation or action. This process, which is a form of open-source intelligence (or evidence) gathering, is used alongside other methods to determine when the FARA Unit should take action with respect to any particular individual or entity.

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50. Staff in the FARA Unit circulate these press accounts to each other by email. Sometimes this leads to an email chain and further discussion of, for example, the content of the article or what steps to take next, and sometimes it does not. For the purposes of this FOIA response, the government has grouped any emails containing substantive discussions in the previous category of internal correspondence, discussed in paragraphs 39-47, above.

51. Releasing the news distributions could reasonably be expected to interfere with active law enforcement proceedings.

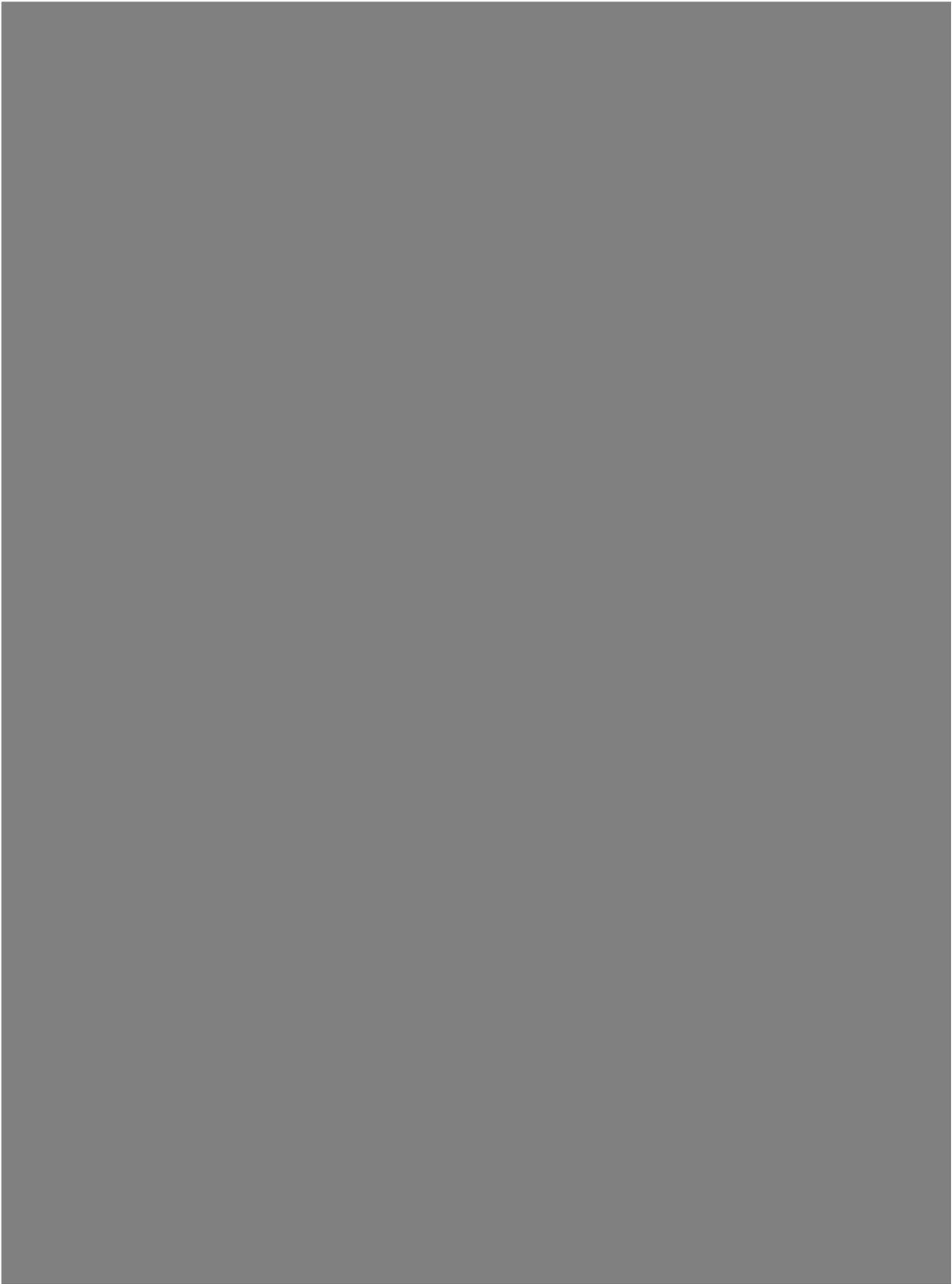
52. First, [REDACTED] are not officially acknowledged, and releasing these emails would raise the inference that [REDACTED]. The fact that the government monitored press accounts about specific persons or specific activities makes it significantly more likely that the government has investigative interests in the persons discussed in those public press accounts. In turn, premature revelation of the existence of the investigation could be expected to have the harms described in paragraph 29, above.

53. Second, beyond raising the inference that [REDACTED], the fact that DOJ was aware of specific pieces of information at specific times could reasonably be expected to harm [REDACTED] by providing a roadmap of the government's evidence or thinking about [REDACTED]. For example, it may be significant that the government has apparently taken note of one public report but not another, or that the government only appeared to take note of an issue after a certain point in time. Disclosing these pieces of information could lead to harms similar to those described in paragraph 31, above.

D. DVD Documents

54. The government has also withheld pursuant to exemption 7(A) the contents of a DVD [REDACTED]. These records are listed on the Vaughn index as document category 5.

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SEGREGABILITY

59. 5 U.S.C. § 552(b) requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” Nonetheless, the records described above were withheld in full. Releasing any part of them—or even publicly describing them in any detail in a *Vaughn* index or declaration—could reasonably be expected to interfere with .



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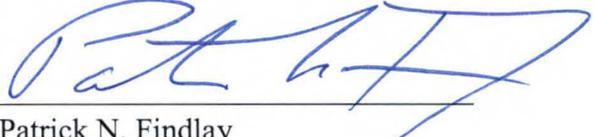


63. For these reasons, and for the reasons given above describing each specific category of records, all records have been withheld in full pursuant to Exemption 7(A).

CONCLUSION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of November, 2018, at Washington, D.C.


Patrick N. Findlay

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and
KENNETH P. VOGEL,

Plaintiffs,

– versus –

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

No. 18 Civ. 2095 (LAK) (SDA)

EX PARTE SUPPLEMENTAL DECLARATION OF PATRICK N. FINDLAY

Pursuant to 28 U.S.C. § 1746, I, Patrick N. Findlay, declare the following to be a true and correct statement of facts:

1. As stated in my November 9, 2018, public declaration filed previously in this case (Docket No. 43) (“First Public Declaration”), I am the Acting Chief and Special Counsel of the Office of Strategy Management and Development of the National Security Division of the United States Department of Justice.¹ Additional information about my responsibilities is provided in the First Public Declaration. *See* First Public Decl. ¶ 1. I submit this supplemental ex parte declaration in further support of the government’s motion for partial summary judgment and in opposition to plaintiffs’ cross-motion.

¹ In this supplemental declaration, I employ the same acronyms and terms as I did in the First Public Declaration and in my prior ex parte declaration previously filed in this case, also dated November 9, 2018, (Docket No. 46) (“First Ex Parte Declaration”).

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2. The statements I make in this declaration are based on my personal familiarity with the FOIA requests and related information at issue in this matter, as well as upon information provided to me by various DOJ colleagues overseeing or participating in the investigations discussed herein. Where information relates to a specific investigation, that information has been reviewed for accuracy by one or more individuals assigned to that investigation.

Update on [REDACTED]

3. In the First Ex Parte Declaration, I explained that release of the FARA Unit records requested in this case could reasonably be expected to interfere with enforcement actions against [REDACTED]

4. On December 17, 2018, criminal charges were unsealed in the Eastern District of Virginia against two individuals: Bijan Rafiekian, aka Bijan Kian, and Kamil Ekim Alptekin. *See United States v. Rafiekian et al.*, No. 18 Cr. 457 (E.D.V.A.). Alptekin is specifically enumerated in group C of the FOIA requests.

5. These unsealed indictments are [REDACTED]

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6. In light of these developments in the investigation, I provide the following updates to the harms that could reasonably be expected to result from release of withheld material [REDACTED]. These harms were previously discussed in my First Ex Parte Declaration at [REDACTED].

7. First, the criminal proceedings against Kian and Alptekin are now public. All of the subjects of those proceedings, including the one who has not been charged at this time, are presumably aware of the proceedings. Nonetheless, revealing the contents of the letter withheld as *Vaughn* category 2 could still reasonably be expected to interfere with the proceedings, because the letter contains evidence relevant to the criminal prosecutions and investigation. Thus, the government continues to withhold the letter because its release now would provide Kian and Alptekin earlier and greater access to evidence than otherwise would be available under the Federal Rules of Criminal Procedure and other applicable laws. [REDACTED]

8. Second, both forms of intra-DOJ correspondence [REDACTED]—the internal correspondence and news distributions—also continue to be withheld notwithstanding the new public criminal filings. The harms described in paragraphs 44 through 47 and 52 through 53 of my First Ex Parte Declaration persist and are not diminished by the public criminal filings. [REDACTED]

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Update on 

9. On January 8, 2019, criminal charges were unsealed in the Southern District of New York against Natalya Veselnitskaya, a Russian national. *See United States v. Veselnitskaya*, No. 18 Cr. 904 (S.D.N.Y.).

10. Although Veselnitskaya is not specifically listed in the plaintiffs' FOIA requests, the criminally charged conduct relates to a government investigation into Prevezon Holdings, which is listed in group D. 



11. The charges against Veselnitskaya stem from her alleged obstruction of justice in a factually-related civil case, *United States v. Prevezon Holdings, Ltd.*, No. 13 Civ. 6326 (S.D.N.Y). The government litigated that case between 2013 and 2018.



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General Information in *Vaughn* Index

13. Although [REDACTED], without risk of enabling interference with enforcement proceedings, the government still cannot provide a more detailed public *Vaughn* index with regard to the FOIA Exemption 7(A) withholdings than was previously provided.

14. First, the reasons given in paragraphs 59 through 62 of my First Ex Parte Declaration remain valid. Specifically, [REDACTED]

[REDACTED]

15. Second, providing further detail about any portion of the records – for example, those relating to publicly filed criminal cases – would still interfere with [REDACTED]

[REDACTED]

16. Third, as described in paragraph 62 of my First Ex Parte Declaration, disclosing overview information or data of the sort commonly found in a public *Vaughn* index—for example, a list of each email containing its sender, recipients, date, and subject line—could

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reasonably be expected to interfere with enforcement proceedings [REDACTED]
[REDACTED]. Sophisticated observers could use such overview information and data to draw inferences about what the government knew—including who within the government knew it—and when the government knew it. For example, if a *Vaughn* index disclosed significant intra-DOJ email traffic during a specific time period, correlating this fact with other publicly known events could shed light on the nature and timing of the government's investigative interests.

17. As explained in paragraph 61 of my First Ex Parte Declaration, the concerns raised above are magnified in the context of ongoing investigations both because the government cannot be sure what the subjects or targets of investigations know or may find significant, and because the government's own interests in specific persons or topics may change over the course of an investigation. For these reasons, it is DOJ's usual practice to avoid disclosing any substantial information regarding ongoing investigations beyond that provided in unsealed court filings or proceedings. Further, DOJ and its components generally decline to confirm or deny information suggesting that DOJ does or does not have an active investigative interest in any specific persons, often issuing Glomar responses to FOIA requests seeking investigative information related to specific persons. DOJ's usual practice notwithstanding, in this particular instance, DOJ concluded that a Glomar response would not be appropriate [REDACTED]
[REDACTED]

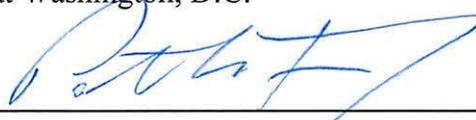
[REDACTED]. The concerns underlying DOJ's usual practice, however, remain in place.

CONCLUSION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

~~EX PARTE~~ ~~UNDER SEAL~~ ~~NOT A FOIA RELEASE~~ ~~NOT FOR PUBLIC RELEASE~~

Executed this 15 day of February, 2019, at Washington, D.C.



Patrick N. Findlay