

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	X	
THE NEW YORK TIMES COMPANY,	:	
Plaintiff,	:	
v.	:	<u>COMPLAINT</u>
UNITED STATES DEPARTMENT OF STATE,	:	
Defendant.	:	
	X	

Plaintiff THE NEW YORK TIMES COMPANY (“The Times”), by and through its undersigned attorneys, alleges as follows:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (“FOIA”), to obtain an order for the production of agency records from the United States Department of State (“State Department”) in response to a request properly made by Plaintiff.

PARTIES

2. Plaintiff The New York Times Company publishes *The New York Times* newspaper and www.nytimes.com. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, New York, 10018.

3. Defendant the State Department has possession and control of the records that Plaintiff seeks.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

5. Venue is premised on Plaintiff's place of business and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

6. FOIA requires that agencies respond to FOIA requests within 20 business days. *See* 5 U.S.C. § 552(a)(6)(A).

7. Defendant the State Department has failed to meet the statutory deadlines set by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)–(B). Plaintiff is therefore deemed to have exhausted all administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

FACTS

8. On June 7, 2021, Mr. Vogel submitted a FOIA Request (“the First Request”) to the State Department, seeking copies of correspondence sent or received between August 1, 2015, and December 14, 2019, by a specific list of U.S. Embassy Officials in the United States Embassy in Romania that mentioned any of the words in a specific list of keywords. The First Request is attached as Exhibit A.

9. On December 7, 2021, The Times sought to amend the First Request.

10. On the same day, the State Department informed The Times that the First Request is “already in process” and could not be amended. The State Department told The Times that it would have to submit a new FOIA request in lieu of amending.

11. On December 10, 2021, The Times submitted a new FOIA Request (“the Second Request”) to the State Department, seeking similar but non-duplicative correspondence. The Second Request is attached as Exhibit B.

12. On December 13, 2021, The Times asked the State Department for an estimated date of completion for the Second Request. The State Department informed The Times that the estimated date of completion is September 20, 2024.

13. On December 17, 2021, The Times asked the State Department for an estimated date of completion for the First Request. The State Department informed The Times that the estimated date of completion is April 15, 2023.

14. The State Department has not communicated with The Times since.

CAUSE OF ACTION

15. Plaintiff repeats, realleges, and reincorporates the allegations in the foregoing paragraphs as though fully set forth herein.

16. Defendant is an agency subject to FOIA and must therefore release, in response to a FOIA request, any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any other materials as to which it is claiming an exemption.

17. Defendant has failed to meet the statutory deadlines of 20 business days set by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). Accordingly, Plaintiff is deemed to have exhausted its administrative remedies under FOIA.

18. Defendant is permitted to withhold records or parts of records only if one of FOIA's enumerated exemptions apply.

19. No exemptions permit the withholding of the records sought by either FOIA request.

20. Accordingly, Plaintiff is entitled to an order compelling Defendant to produce the records responsive to both the First Request and the Second Request.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

21. Declare that the records sought by the First Request, as described in the foregoing paragraphs and as attached in Exhibit A, are public under 5 U.S.C. § 552 and must be disclosed;

22. Declare that the records sought by the Second Request, as described in the foregoing paragraphs and as attached in Exhibit B, are public under 5 U.S.C. § 552 and must be disclosed;

23. Order Defendant to undertake an adequate search for the requested records and provide the records to Plaintiff within 20 business days of the Court's order;

24. Award Plaintiff the costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by FOIA; and

25. Grant Plaintiff such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 31, 2022

/s/ David E. McCraw
David E. McCraw
Legal Department
The New York Times Company
620 8th Avenue
New York, NY 10018
Phone: (212) 556-4031
Fax: (212) 556-4634
E-mail: mccraw@nytimes.com

Counsel for Plaintiff

Exhibit A

June 7, 2021

RE: FREEDOM OF INFORMATION ACT REQUEST

To Whom It May Concern:

Pursuant to the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, I request access to and copies of correspondence sent or received by the following U.S. Embassy Officials in the U.S. Embassy in Romania between August 1, 2015 and December 14, 2019 mentioning the keywords listed below.

U.S. EMBASSY OFFICIALS

- 1) Ronald E. Hawkins
- 2) Hans G. Klemm
- 3) Scott A. Reese
- 4) Abigail M. Rupp
- 5) Dean Richard Thompson

KEYWORDS:

- 1) Devon Archer or darcher@rosemontcapital.com or devon@rstp.com
- 2) George Argentopoulos
- 3) Baneasa
- 4) Patti Bescrypt or bescrypt@freehgroup.com
- 5) Hunter Biden or Robert H. Biden or hbiden@rosemontseneca.com
- 6) Christopher Boies or cboies@BSFLLP.com
- 7) Jim Bucknam or bucknam@freehgroup.com
- 8) Gabi Ciocoiu or Gabi.Ciocoiu@baneasa.ro
- 9) Louis Freeh or Louie Freeh or freeh@freehsporkinsullivan.com or freeh@freehgroup.com
- 10) Mark Gitenstein or mgitenstein@mayerbrown.com
- 11) Rudy Giuliani or Rudolph W. Giuliani
- 12) Michael J. Gottlieb or Mike Gottlieb or mgottlieb@bsflp.com
- 13) Bogdan Micu or Micu Bogdan Florin or bogdan.micu@mnpartners.ro
- 14) Gabriel Popoviciu or Puiu
- 15) Andreia Pislaru or andrea.pislaru@aplaw.ro or andrea.pislaru@nplaw.ro
- 16) John Sandweg or john.sandweg@frsdc.com
- 17) Eric Schwerin or ESchwerin@rspinv.com or ESchwerin@rosemontseneca.com
- 18) Rob Walker or rob@rstp.com

Format of Requested Records

Under FOIA, you are obligated to provide records in the format requested. *See, e.g.,* 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”).

I request all records in an electronic .pdf format that is text searchable and OCR formatted. Additionally, please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or, if that is not possible; (2) in .pdf format, without any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily-accessible. Please do not provide the records in a single, or “batched,”.pdf file. We appreciate the inclusion of an index.

Please provide all records on a rolling basis. You may email copies of the requested records to:

Kenneth P. Vogel
kenneth.vogel@nytimes.com

If you are unable to deliver the documents through electronic means, please deliver the documents to:

Kenneth P. Vogel
6356 Waterway Drive
Falls Church, Virginia 22044

Request for Explanation of Withholdings and Redactions

If this request is denied in whole or in part, please provide a reasonable description of any withheld materials and a justification for all such withholdings that includes reference to the specific FOIA exemptions authorizing withholding and specific reasons why such exemptions apply. 22 C.F.R. § 171.166 C.F.R. § 5.6(e). An agency shall withhold information only if “the agency reasonably foresees that disclosure would harm an interested protected by an exemption” or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). We therefore request that if the State Department determines that an exemption applies that it also provides specific reasons why disclosure would harm any interest protected by such exemption. An agency shall also “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible” and “take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii). We therefore request that the State Department release all segregable portions of otherwise exempt material.

Fee Waiver

A waiver of search and review fees is appropriate here because disclosure of the requested information is in the public interest under 5 U.S.C. § 552(a)(4)(A)(iii) and 22 C.F.R. § 171.16(a)(1), and because the request is not primarily in The Times’s commercial interest, 22 C.F.R. § 171.16(a)(2)

Disclosure of the requested information is likely to contribute significantly to the public understanding of the federal government’s operations, specifically of its U.S. Agency in Romania. 22 C.F.R. § 171.16(a)(1). The disclosure is not primarily in The Times’s commercial interest. 22 C.F.R. § 171.16(a)(2). As a news media organization, we have demonstrated our “ability and intention to effectively convey information to the public.” 22 C.F.R. § 171.16(a)(1)(iii)

Expedited Processing

We also ask that the information requested be disclosed on an expedited basis. Expedited processing is appropriate here because a “compelling need” exists for the disclosure of the requested information. 5 U.S.C. § 552(a)(6)(E)(i)(I). A compelling need exists when “the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal government activity.” 22 C.F.R. § 171.11(f)(2). As an investigative reporter for The New York Times, my primary activity involves “disseminating information to the public in general.” *Id.*

This request seeks records related to actual or alleged Federal government activity, including (1) the possible improper use of federal government resources to assist and advance private business interests with connections to United States government officials and (2) the possible evasion of the Foreign Agents Registration Act (FARA) by those private business interests, and (3) the non-enforcement of FARA by the federal government in relation to those private business interests.

Response Time

We appreciate your help in expeditiously obtaining a determination on the requested records. Pursuant to the applicable FOIA provision, we expect a response regarding this request within the ten (10) working day time limit set by law. 5 U.S.C. § 552(a)(6)(E)(ii)(I).

Thank you for your prompt attention to this request. If you have any questions or concerns about what we are seeking, please do not hesitate to contact me by email at kenneth.vogel@nytimes.com.

Sincerely,

Ken Vogel

Exhibit B

The New York Times

620 EIGHTH AVENUE
NEW YORK, N.Y. 10018

December 10, 2021

VIA EMAIL

Kellie Robinson
FOIA Public Liaison
U.S. Department of State
2201 C Street N.W., Suite B266
Washington, D.C. 20520-0000
foiarequest@state.gov

RE: FOIA Request

Dear Miss Robinson,

Documents Requested

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, I seek access to and copies of written material (including emails, memos, notes, invitations, and calendar appointments) produced, sent, or received by the following State Department Officials in the U.S. Embassy in Romania that mention any of the keywords listed below, not only in the body text but also anywhere else in the document, such as the subject heading, sender field, or recipient field.¹

U.S. EMBASSY OFFICIALS

1. Duane C. Butcher
2. Debra L. Hevia

KEYWORDS

1. Alltrom
2. Devon Archer or darcher@rosemontcapital.com or devon@rstp.com
3. George Argentopoulos
4. Baneasa
5. Belvedere Developments
6. Patti Bescrypt or bescrypt@freehgroup.com
7. Hunter Biden or Robert H. Biden or hbiden@rosemontseneca.com or rhbdc@icloud.com
8. Tony Bobulinski or tbobulinski@nazent.com
9. Christopher Boies or Chris Boies or cboies@BSFLLP.com
10. Jim Bucknam or bucknam@freehgroup.com
11. Gabi Ciocoiu or Gabi.Ciocoiu@baneasa.ro
12. Louis Freeh or Louie Freeh or freeh@freehsporkinsullivan.com or freeh@freehgroup.com

¹ In other words, the requested records should include, but not be limited to, any communication sent or received by anyone in the list of U.S. Embassy Officials to or from any individuals, entities, and/or email addresses listed among the keywords.

13. James Gilliar or jamesgilliar@icloud.com or james.gilliar@j2cr.com or james.gilliar@eei-group.com
14. Mark Gitenstein or mgitenstein@mayerbrown.com
15. Rudy Giuliani or Rudolph W. Giuliani
16. Michael J. Gottlieb or Mike Gottlieb or mgottlieb@bsflp.com
17. Joan Mayer or jmayer@rosemontseneca.com
18. Metav SA
19. Meteor SA
20. Bogdan Micu or Micu Bogdan Florin or bogdan.micu@mnpartners.ro
21. Gabriel Popoviciu or Puiu or popoviciu@alltrom.ro
22. Andreia Pislaru or andreia.pislaru@aplaw.ro or andreia.pislaru@nplaw.ro
23. John Sandweg or john.sandweg@frsdc.com
24. Matthew L. Schwartz or Matt Schwartz or mlschwartz@bsflp.com
25. Eric Schwerin or ESchwerin@rspinv.com or ESchwerin@rosemontseneca.com
26. Universal SA
27. Rob Walker or rob@rstp.com or rob.walker@j2cr.com or rob@pilotgrowth.com or rwalker@rosemontseneca.com

I also seek access to and copies of written material (including emails, memos, notes, invitations, and calendar appointments) produced, sent, or received by the following State Department Officials in the U.S. Embassy in Romania that mention any of the keywords listed below, not only in the body text but also anywhere else in the document, such as the subject heading, sender field, or recipient field.²

U.S. EMBASSY OFFICIALS

1. Ronald E. Hawkins
2. Hans G. Klemm
3. Scott A. Reese
4. Abigail M. Rupp
5. Dean Richard Thompson

KEYWORDS

1. Alltrom
2. Belvedere Developments
3. Tony Bobulinski or tbobulinski@nazent.com
4. James Gilliar or jamesgilliar@icloud.com or james.gilliar@j2cr.com or james.gilliar@eei-group.com
5. Joan Mayer or jmayer@rosemontseneca.com
6. Metav SA
7. Meteor SA
8. Matthew L. Schwartz or Matt Schwartz or mlschwartz@bsflp.com
9. Universal SA

² In other words, the requested records should include, but not be limited to, any communication sent or received by anyone in the list of U.S. Embassy Officials to or from any individuals, entities, and/or email addresses listed among the keywords.

I request all the above documents for the period from December 1, 2014 to December 31, 2019, to be produced in the following order, if possible:

1. July 2, 2015 – December 31, 2016
2. January 1, 2017 – December 31, 2019
3. December 1, 2014 – July 1, 2015

Please provide copies of written material produced, sent, or received by the above U.S. Embassy Officials for, to, or from non-government officials first. Then provide copies of written material produced, sent, or received by the above U.S. Embassy officials for, to, or from government officials.

Where otherwise possible, please provide responsive documents in batches as they become available, rather than all at once.

Format of Requested Records

Under FOIA, an agency is required to provide records “in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(B).

I request all records in an electronic .pdf format that is text searchable and OCR formatted. Please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or, if that is not possible; (2) in .pdf format, without any “portfolios” or “embedded files.” Please do not provide the records in a single, or “batched,” .pdf file. We appreciate the inclusion of an index.

Please provide all records on a rolling basis. You may email copies of the requested records to Ken Vogel at kenneth.vogel@nytimes.com. If you are unable to deliver the documents through electronic means, please deliver them to the below address:

Kenneth P. Vogel
6356 Waterway Drive
Falls Church, Virginia 22044

Fee Waiver Request

A waiver of search and review fees is appropriate here because disclosure of the requested information would shed light on the operations or activities of the government, is in the public interest, and is not primarily in The Times’s commercial interest. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.16(a).

First, disclosure of the requested information would shed light on the operations or activities of the government. 22 C.F.R. § 171.16(a)(1). The requested documents consist of written material produced, sent, or received by a list of U.S. Embassy Officials in the U.S. Embassy in Romania. Given that they are materials produced, sent, or received by government officials using official government credentials, there is little doubt that the information requested is related to the operations or activities of the government.

Second, disclosure of the requested information would be meaningfully informative and would contribute significantly to public understanding of those operations or activities. 22 C.F.R. § 171.16(a)(1). There is much public interest in the dealings of the U.S. Embassy in Romania, especially as it relates to Hunter Biden and Joe Biden’s involvement and interactions with the embassy. Because little is known about these relationships, disclosure of the requested documents would necessarily add to the public’s understanding. The Times, as a trusted news media organization with a broad national audience, is presumed to have—and has historically demonstrated that it has—the expertise, ability, and intention to effectively convey the results of this FOIA request to the public.

Third and finally, disclosure is not primarily in the commercial interest of The Times. 22 C.F.R. § 171.16(a)(2). The State Department’s regulations explicitly provide that requests for the purpose of writing “an article[] or other publication will not be considered a commercial interest.” 22 C.F.R. § 171.16(a)(2)(iii); *see also Davy v. Cent. Intel. Agency*, 550 F.3d 1155, 1160 (D.C. Cir. 2008) (explaining that courts have widely and long held that “news interests, regardless of private incentive, generally should not be considered commercial interests”). The Times has—both historically and here—more than demonstrated that its primary interest in submitting FOIA requests is to serve the public by shedding light on the operations and activities of the government through detailed, fair, and expert reporting. *See N.Y. Times Co. v. Cent. Intel. Agency*, 251 F. Supp. 3d 710, 713 (S.D.N.Y. 2017) (explaining that The Times’s interest is “public-minded and journalistic, not narrowly focused on the bottom line”). There should thus be no question that disclosure is not primarily in The Times’s commercial interest.

Request for Explanation of Withholdings and Redactions

If this request is denied in whole or in part, please provide a reasonable description of any withheld materials and a justification for all such withholdings that includes reference to the specific FOIA exemptions authorizing withholding and specific reasons why such exemptions apply. 5 U.S.C. § (6)(A)(i)(I). An agency shall withhold information only if “the agency reasonably foresees that disclosure would harm an interested protected by an exemption” or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). We therefore request that if the State Department determines that an exemption applies, it also provides specific reasons why disclosure would harm any interest protected by such exemption.

An agency shall also “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible” and “take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii); *see also* 22 C.F.R. § 171.11(l). We therefore request that the State Department release all segregable portions of otherwise exempt material.

Pursuant to the applicable FOIA provision and departmental regulations, we expect a response regarding this request within the twenty (20) working-day time limit set by law. 5 U.S.C. § 552(a)(6)(A)(i); 22 C.F.R. § 171.11(e).

Thank you for your prompt attention to this request. If you have any questions or concerns about what we are seeking, please do not hesitate to contact us at the email address below.

Sincerely,

Ken Vogel
kenneth.vogel@nytimes.com