GANNETT

Thomas Curley
Associate General Counsel

September 13, 2017

VIA FIRST CLASS MAIL

Director, Office of Information Policy
United States Department of Justice
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-001

Re: ***Freedom of Information Act Appeal***
FOIPA Request No. 1345002-000
Subject 194B-CG-87424

Dear Sir or Madam:

I write on behalf of Robin Amer, a journalist employed by the *USA Today Network*. Please accept this correspondence as an appeal of the denial of Ms. Amer's request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq*. ("FOIA"), for certain tape recordings in the possession of the Federal Bureau of Investigation ("FBI" or the "Agency"). A copy of the Agency's FOIA denial letter is attached.

Factual Background

The following facts are relevant to this appeal:

Ms. Amer is an award-winning reporter with nearly fifteen years of professional experience in broadcast, print and digital media. Prior to joining the *USA Today Network*, she held the position of deputy editor at the *Chicago Reader*. In 2015 her podcast *The City* won top honors in WNYC's national Podcast Accelerator competition. She has received two national awards from the Sidney Hillman Foundation and several more from the Society for Professional Journalists, and her contributions helped the podcast *Gravy* win the 2015 James Beard Award for best podcast. As an investigative reporting fellow for Northwestern University's Medill Watchdog, Amer contributed to a year-long collaboration with *The Chicago Tribune* that was a finalist for the Pulitzer Prize. *See generally* https://robinamer.com/about.

In February 2016, Ms. Amer made a FOIA request for investigative and other files concerning Operation Silver Shovel, a seminal political corruption investigation conducted by the FBI in Chicago in the 1990s. *See* FBI News Release, https://web.archive.org/web /20081011122000/http:/chicago.fbi.gov/silvershovel/silvershovel.htm ("Operation Silver Shovel was one of the most extensive corruption probes in Chicago history. In the end, corruption convictions were handed out to 18 individuals, six of whom were current or former city

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Exhibit D

aldermen."); *see also, e.g.*, Flynn McRoberts and Matt O'Connor, *Silver Shovel Digs Up a Varied Cache, Ex-aldermen Lead the List Of Convictions*, CHICAGO TRIBUNE, Dec. 6, 1998.

Ms. Amer sought the Tapes in connection with research for her podcast *The City,* which is retrospectively examining the Silver Shovel probe. Each season *The City* podcast explores a different American metropolis using news stories as a vehicle to examine issues of public concern. *See generally* https://www.poynter.org/news/city-usa-today-network-taking-its-local-national-strategy-your-earphones. A podcast is an episodic series of digital audio files that a user can download and listen to, hence the special significance of the audio Tapes to Ms. Amer's journalistic project, as distinct from written transcripts.

In March 2016, the Agency responded that Ms. Amer's FOIA request would take three years to process. In April of that year, Ms. Amer narrowed her request to three tape recordings made by an FBI informant during the investigation. The Tapes are labeled thusly: Tape 908 dated 1/18/1995 at 2:50 PM, Edna's Restaurant; Tape 909 dated 1/20/1995 at 12:31 PM, Edna's Restaurant; Tape 932 dated 1/30/1995 at 2 PM, Alice's Restaurant. These Tapes, as with other recordings made by cooperating witness John Christopher, were instrumental in securing the convictions arising out of the FBI probe. *See, e.g.*, *United States v. Blassingame*, 197 F.3d 271 (7th Cir. 1999); *United States v. Giles*, 67 F. Supp. 2d 947 (N.D. Ill. 1999); *United States v. Jones*, 224 F.3d 621 (7th Cir. 2000).

Operation Silver Shovel received extensive media coverage as did the tape recordings made by Mr. Christopher.[1] *See, e.g.*, Chuck Neubauer, *FBI Mole Probes Local Politicians; Ex-Con Wired in Feds' 'Operation Silver Shovel'*, CHICAGO SUN-TIMES (Jan. 7, 1996) ("It's called Operation Silver Shovel, and it involves a tested FBI tactic in Chicago: using a 'mole' – an undercover operative – with a recording device to investigate possible wrongdoing by local politicians."); Matt O'Connor, *Shovel Tapes Detail Fine Art of Bribery*, CHICAGO TRIBUNE, June 2, 1996; Ambrosio Mudrana, *Chicago City Alderman Accused of* Extortion, NAT'L PUBLIC RADIO, Jan. 10, 1996; Matt O'Connor, *Giles Jury Hears Tape of Alleged Bribe Deal*, CHICAGO TRIBUNE, Oct. 28, 1999; Chinta Strausberg, *Giles Sentenced to 39 Months*, CHICAGO DEFENDER, Jan. 1, 2000.

The Tapes sought by Ms. Amer pursuant to FOIA were played in open court and the recordings were released to the news media during the trial proceedings. *See, e.g.*, Mark LeBien, *Witness Details Payoffs to Jones In Extortion Case*, CHICAGO TRIBUNE, Jan. 21, 1999 ("[p]rosecutors also played some of the secretly recorded conversations that are the backbone of their case"); Matt O'Connor, *West Side Alderman's Bribery Trial Opens, Giles' Lawyers Deny Payments Illegal*, CHICAGO TRIBUNE, Oct. 27, 1999 ("Jurors will get a chance to decide for themselves Wednesday when prosecutors are expected to play critical undercover tape-recordings made by Christopher of his conversations with the West Side alderman."). The Tapes and other

[1] In addition to Mr. Christopher, the other individuals on the Tapes are then Chicago Alderman Percy Giles and James Blassingame, then a politically-connected consultant who headed Bill Clinton's presidential campaign in Indiana in 1992. Both Giles and Blassingame were convicted or pleaded guilty, and their convictions were affirmed on appeal.

recordings made by Mr. Christopher were also part of the appellate record in which context they were extensively quoted and figured prominently in court decisions which remain publicly accessible. *See, e.g.*, *Blassingame*, 197 F.3d at 286 ("the evidence against both Defendants was overwhelming: tape recording after tape recording of the bribes paid to [defendants] were played for the jury"); *Giles*, 67 F. Supp. 2d at 953. None of the records at issue were filed under seal.

In addition, written transcripts of the Tapes remain publicly available at the U.S. District Court for District of Northern Illinois, along with various other records related to the prosecutions.[2] The District Court notified Ms. Amer that the tape recordings introduced into evidence, including the Tapes that are the subject of her FOIA request, were returned to the government post-trial.

More than a year after Ms. Amer's initial FOIA request, and ten months after she narrowed her request to accommodate the Agency's concerns regarding its scope, the FBI denied Ms. Amer's request in its entirety. The Agency made no effort to produce redacted versions of the Tapes.

Concededly, this appeal is being filed outside the deadline set by the Agency. However, in light of the Agency's delay in processing her request and in an effort to avoid unnecessary litigation, Ms. Amer respectfully requests that the Agency consider the merits of her appeal.

The Agency's Denial

The Agency has asserted two exemptions as the basis for withholding the Tapes, Exemption 6 and Exemption 7(C). No further explanation was provided by the FBI justifying the application of these exemptions in the particular context of this FOIA request.

Exemption 6 applies to "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). Exemption 7(C) permits the withholding of "records or information compiled for law enforcement purposes . . . to the extent that" disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

This appeal addresses Exemption 7(C) because it provides broader privacy protection than Exemption 6 and thus "establishes a lower bar for withholding material." *American Civil Liberties Union v. Dep't of Justice*, 655 F.3d 1, 6 (D.C. Cir. 2011). In other words, to the extent the agency's withholding of the Tapes pursuant to Exemption 7(C) is improper, it necessarily follows that invocation of Exemption 6 would be improper as well.

For Exemption 7(C) to apply, a record must be compiled for law enforcement purposes[3] and (1) its release must be reasonably expected to constitute an invasion of personal privacy that

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[2] A copy of the transcription of the three Tapes at issue is attached to this submission. As noted, they remain publicly available at the District Court. On their face, the content of these transcripts offers no justification for the Agency's refusal to release the related audio recordings.

[3] That the Tapes were prepared for law enforcement purposes is not in dispute here.

is (2) found to be "unwarranted," after a weighing of both the private and public interests at stake. *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93, 96 (6th Cir. 1996).

There is no Reasonable Expectation of Privacy in the Tapes

The Agency's denial of Ms. Amer's FOIA request is contrary to settled law and should be reversed.

It bears emphasis that FOIA exemptions "must be narrowly construed." *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011) and the agency bears "the burden to demonstrate that the documents requested are exempt from disclosure." *Judicial Watch, Inc. v. Dep't of the Treasury*, 796 F.Supp.2d 13, 23 (D.D.C. 2011). FOIA's "limited exceptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

To determine whether Congress intended to recognize a privacy interest in certain records, such that they can be properly withheld under Exemption 7(C), courts must examine common law and cultural traditions. *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004); *Dep't of Justice v. Reporters Comm. for Free Press*, 489 U.S. 749, 763-67 (1989). For example, if a category of records was traditionally open to public view, individuals would reasonably expect such records to remain available to the public through FOIA. *See Favish*, 541 U.S. at 169 (courts must "assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and … Exemption 7(C)").

At the risk of understatement, public access to criminal proceedings, as well as to the testimony and evidence presented therein, is a bedrock principle of our judicial system. Indeed, this "tradition of accessibility" predates the founding of the Republic and was fundamental at common law. *See, e.g., Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 605 (1982); *see also Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984) ("The open trial ... play[ed] a[n] important ... role in the administration of justice ... for centuries before our separation from England."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567 (1980) ("[T]he openness of trials was explicitly recognized as part of the fundamental law of the Colony.").

As one District Court has observed, in the context of ordering disclosure under FOIA of tax and other financial information previously entered into evidence in criminal proceeding:

> It is a well-established rule of law that [a] trial is a public event, and [what] transpires in the courtroom is public property. This is true of confidential as well as non-confidential items. In *Mitchell*, the United States Court of Appeals for the District of Columbia Circuit ruled that the appellant broadcasting and communications companies should be allowed to inspect and copy those portions of the White House tapes played before the jury in the Watergate trial. Attorneys for Mr. Nixon and for the appellees argued that the tapes were confidential, containing as they did private presidential conversations. The court stated that, even assuming the tapes

> were confidential to begin with, 'It suffices to note that once an exhibit is publicly displayed, the interests in subsequently denying access to it necessarily will be diminished.'
>
> The documents in the present case were not only exhibits presented to the court as in *Mitchell*, they were also open to public scrutiny for more than one year. It cannot be said that IRS has any real interest in withholding as confidential documents which have been released and displayed in such a manner.

Cooper v. IRS, 450 F. Supp. 752, 754 (D.D.C. 1977) (citations and additional quotation marks omitted) (ordering release of trial exhibits withheld by agency pursuant to Exemption 3). *See also, e.g.*, *Linn v. Dep't of Justice*, 1997 U.S. Dist. LEXIS 9321, at *17 (D.D.C. May 29, 1997) ("The Court finds, however, that there can be no justification for withholding the identities of witnesses who have already testified against Plaintiff at trial.") (holding Exemption 7(C) inapplicable); *Myers v. Dep't of Justice*, 1986 U.S. Dist. LEXIS 20058, at *7 (D.D.C. Sept. 22, 1986) ("In determining whether the 7(C) exemption applies to the withheld information … [t]he Court finds as a matter of law that no privacy interest exists with respect to information previously disclosed in the testimony of law enforcement personnel.")

With respect to the *lack* of privacy for those who participate in criminal proceedings, the *Restatement (Second) of Torts*[4] similarly emphasizes: "Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed." § 652D, cmt. f. Thus, when a "[n]ewspaper publishes daily reports of [a murder trial], together with pictures and descriptions of [the defendant] and accounts of his past history and daily life prior to the trial," it is "not an invasion of [the defendant]'s privacy." *Id., illus. 13.*

Here, there is no dispute that the Tapes were introduced into evidence at trial and were also part of the public appellate record as well. The Tapes, quite literally, "are the very records that the government relied upon to prosecute [the criminal defendant] and the jury used to convict him." *Eil v. Drug Enforcement Agency*, 209 F. Supp. 3d 480, 487 (D.R.I. 2016).

In addition, the Tapes were also released to the news media during the trial and have already been the subject of extensive publicity. Written transcriptions of the Tapes remain publicly available at the District Court. There is nothing within those transcriptions which suggest any legitimate privacy concern and the Agency has declined to offer any.

Furthermore, the convictions of Messrs. Blassingame and Giles remain a matter of public record, as does the central role Mr. Christopher played as a cooperating witness in Operation Silver Shovel. *See* Rosalind Rossi, *Ex-Alderman Fights Ruling Kicking Him Off Ballot*, CHICAGO SUN-TIMES, Feb. 25, 2007 (noting prior conviction in context of Giles' recent run for public office);

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[4] The *Restatement* is a summary of common law tort decisions which reflects the consensus of the courts regarding various legal principles, including with respect to privacy interests.

Mick Dumke, *Percy Giles Understands*, CHICAGO READER, Jan. 1, 2007 ("Giles now preaches every other Sunday at Temple Faith Missionary Baptist Church, on the west side. A couple of months ago he decided to run for his old seat. His platform: helping ex-offenders. 'It's hard to get a job as a convicted felon,' Giles said. 'I know.'").

At bottom, that the recordings themselves now reside in the files of the FBI does not alter the fact that there is no privacy interest here consistent with either common law or cultural traditions. *See, e.g.*, *Cooper*, 450 F. Supp. at 755 ("a formerly confidential document disclosed on the public record [at trial] cannot be made confidential again by a simply change of custody" from trial court to agency). Accordingly, the Tapes should be released by the FBI because no privacy interest is implicated here.

The Public Interest Outweighs Any Privacy Interest

In its denial, the FBI offered no explanation of the privacy interest it seeks to vindicate and, as demonstrated above, there is no such interest in this context.

Even assuming, *arguendo*, that the individuals on the Tapes retain some diminished privacy interest, any such interest would be far outweighed here by the public's interest in access to these materials. For this reason, too, Exemption 7(C) is inapplicable.

The purpose of FOIA is to serve as "a means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Favish*, 541 U.S. at 171-72 (internal quotations and citations omitted). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Here, the public interest in disclosure focuses on the core purpose of the Act – the right of the public to monitor the performance of the government. The public has a legitimate interest in knowing how the government investigates and prosecutes political corruption cases.[5]

As one District Court recently observed in similar circumstances, there is a substantial public interest in permitting access to criminal trial records pursuant to FOIA:

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[5] In this regard, there were concerns raised during Operation Silver Shovel regarding the propriety of the FBI's investigation and especially its reliance upon Mr. Christopher. *See, e.g.*, Matt O'Connor, *'Silver Shovel' Investigation Goes Out with a Whimper*, CHICAGO TRIBUNE, Jan. 27, 2001 ("Six Chicago aldermen and a dozen others were convicted. But critics contended the integrity of the criminal justice system was dealt a blow from the government's association with John Christopher, the lifelong, mob-connected crook whose 3 1/2 years of undercover work and hundreds of secretly recorded tapes were the underpinnings of the investigation."); Mary A. Mitchell, *Illegal Dumps Had City, Feds Working At Cross-Purposes*, CHICAGO SUN-TIMES, Jan. 10, 1996 ("For years, while FBI mole John Christopher was working for the federal government, he was trashing Chicago neighborhoods with illegal dumps.").

> Public scrutiny of judicial proceedings produces a myriad of societal benefits. Recent examples of tenacious journalists exposing potential flaws in criminal cases illustrate this axiom. For example, in the case of Adnan Syed's murder conviction, memorialized in season one of a popular podcast entitled *Serial* by Sarah Koenig, Ms. Koenig exposed facts from his trial that contributed to Maryland state court Judge Martin P. Welch granting the defendant a new trial. Another recent example flows from "Making a Murderer," Netflix's 10-episode series concerning a murder in Manitowoc, Wisconsin. A Milwaukee state court jury convicted Brendan Dassey of first-degree intentional homicide and sentenced him to life in prison. In federal post-conviction relief, Magistrate Judge William Duffin recently granted Mr. Dassey's petition for a writ of habeas corpus and ordered his retrial or release ...
>
> In this case, the public has an interest in the court records from Dr. Volkman's trial because it allows the public to know "what their government is up to" in carrying out its investigative and judicial functions. … Because the information petitioned for disclosure is the very information used to convict Dr. Volkman, the public interest in this information cannot be served in any way other than by releasing the court exhibits. Indeed, these particular documents are an integral part of a serious investigation and prosecution by the DEA. The government selected each of these requested exhibits to present as full exhibits at trial. These exhibits led to Dr. Volkman's ultimate conviction and sentence to four consecutive life terms in prison. The exhibits Mr. Eil seeks ultimately demonstrate how and why Dr. Volkman was convicted—that is, how the DEA carried out its statutory obligations as a government agency with respect to Dr. Volkman and how the judiciary handled his trial.

Eil, 209 F. Supp. 3d at 486 (footnotes and citations omitted) (rejecting application of Exemption 7(C) and ordering disclosure to journalist of records submitted as trial exhibits).

Indeed, time and again courts "have repeatedly recognized a public interest in the manner in which the DOJ carries out substantive law enforcement policy." *Citizens for Responsibility and Ethics in Wash. v. Dep't of Justice*, 746 F.3d 1082, 1093 (D.C. Cir. 2014) (collecting authorities holding same) (reversing District Court finding of limited public interest in disclosure of investigative records associated with political corruption probe); *see also id.* at 1094 (emphasizing the significant public interest in records which "may show whether prominent and influential public officials are subjected to the same investigative scrutiny and prosecutorial zeal as local alderman").[6]

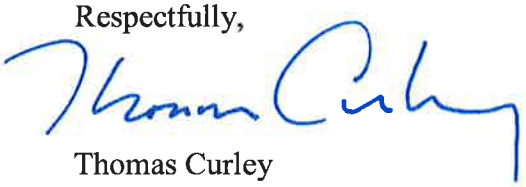
[6] In a subsequent decision in the same case, the Court of Appeals again emphasized that "the substantial public interest present here may outweigh privacy interests that have been

Here, whatever negligible privacy interest may be implicated by the release of the Tapes, it is significantly outweighed by the public interest in the light which potentially would be shed on the Agency's law enforcement responsibilities in the context of a landmark public corruption investigation. The balancing test under Exemption 7(C) mandates disclosure of the Tapes.[7]

Conclusion

Thank you very much for your consideration of this appeal. Please do not hesitate to contact me if there is any additional information which you require. In addition, I attach the following materials as exhibits: (1) the Agency's FOIA denial letter; (2) the Correspondence between Ms. Amer and the Agency concerning her records request; (3) the District Court's order releasing the tape recordings to the news media and (4) written transcripts of the Tapes at issue.

Respectfully,



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diminished by prior disclosures, including through guilty pleas and convictions." *Citizens for Responsibility and Ethics in Wash. v. Dep't of Justice*, 854 F.3d 675, 682 (D.C. Cir. 2017).

[7] As noted, the FBI denied Ms. Amer's FOIA request in its entirety. However, the Agency is under an obligation to redact and release disclosable portions of the Tapes, rather than simply refuse to release any part of them. *See, e.g., Rugiero v. Dep't of Justice*, 257 F.3d 534, 553 (6th Cir. 2001) (agency cannot completely withhold records merely because some portion is exempt from disclosure).

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