

From: "[REDACTED] (USANY)" <[REDACTED]>
To: "[REDACTED] (USANY)" <[REDACTED]>
Cc: "[REDACTED] (USANY)" <[REDACTED]>, "[REDACTED] (USANY)" <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action
Date: Mon, 10 Feb 2020 23:38:11 +0000

We have 30 days to Answer in a FOIA case. I don't think we have a basis for a Rule 12 motion here (in FOIA we generally don't). Generally, FOIA cases go straight to summary judgment (after the Court sets a schedule, usually submitted on consent by the parties), where we defend agency withholdings based on a declaration from the agency. I need to see the underlying FOIA request here and get more details on BOP's response. My understanding is that they categorically refused to disclose any documents. Categorical refusals can be difficult to defend, although they are allowed under certain FOIA exemptions.

The Times is an aggressive but not unreasonable FOIA plaintiff. Once we have the requests, we might check in about whether or not it would be possible for BOP to release anything. Or, we can check in about how best to maintain the categorical withholdings. I'll circle back once I have a more substantive conversation with BOP (BOP counsel is out tomorrow, but should follow up later in the week).

Thanks,
[REDACTED]

From: [REDACTED] (USANY) <[REDACTED]>
Sent: Monday, February 10, 2020 4:35 PM
To: [REDACTED] (USANY) <[REDACTED]>
Cc: [REDACTED] (USANY) <[REDACTED]>; [REDACTED] (USANY) <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action

Thanks. What would your proposed response be?

From: [REDACTED] (USANY) <[REDACTED]>
Sent: Monday, February 10, 2020 4:01 PM
To: [REDACTED] (USANY) <[REDACTED]>
Cc: [REDACTED] (USANY) <[REDACTED]>; [REDACTED] (USANY) <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action

Sorry, included it on the first email, but not later. Here it is.

Also, FYI, it sounds like the FOIA BOP contact is going to be [REDACTED], who's in DC. Thanks.

From: [REDACTED] (USANY) <[REDACTED]>
Sent: Monday, February 10, 2020 1:04 PM
To: [REDACTED] (USANY) <[REDACTED]>
Cc: [REDACTED] (USANY) <[REDACTED]>; [REDACTED] (USANY) <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action

Got it. Do you mind sending the complaint, then?

From: [REDACTED] (USANY) <[REDACTED]>
Sent: Monday, February 10, 2020 1:02 PM

To: [REDACTED] (USANYS) <[REDACTED]>
Cc: [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action

I don't have the underlying FOIA requests yet. The Times did not attach them to the Complaint, and BOP hasn't sent them to me. I will circulate once I have them. Thanks.

From: [REDACTED] (USANYS) <[REDACTED]>
Sent: Monday, February 10, 2020 12:35 PM
To: [REDACTED] (USANYS) <[REDACTED]>
Cc: [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action

Thanks – could you send us the request?

From: [REDACTED] (USANYS) <[REDACTED]>
Sent: Monday, February 10, 2020 12:28 PM
To: [REDACTED] <[REDACTED]>
Cc: [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action

Thanks, [REDACTED], [REDACTED] and [REDACTED], please let me know if you'd like to discuss or have any particular concerns here.

From: [REDACTED] <[REDACTED]>
Sent: Monday, February 10, 2020 12:19 PM
To: [REDACTED] (USANYS) <[REDACTED]>
Cc: [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action

I think the AUSAs you'd particularly want to check with are the ones doing that prosecution – [REDACTED], [REDACTED] and [REDACTED]. Copying them here.

From: [REDACTED] (USANYS) <[REDACTED]>
Sent: Monday, February 10, 2020 12:00
To: [REDACTED] <[REDACTED]>
Cc: [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>
Subject: RE: Jeffrey Epstein-Related Touhy Requests - Times FOIA Action

All,

FYI, the New York Times has filed the attached FOIA complaint challenging BOP's response (or lack thereof) to the Times's FOIA requests for records related to Jeffrey Epstein. I've contacted [REDACTED] to see who at BOP will be handling this. Our Answer date is currently March 4, 2020. Please let me know if you have any particular concerns here or would like to discuss.

Thanks,

From: [REDACTED] <[REDACTED]>

Sent: Thursday, January 2, 2020 7:10 PM

To: [REDACTED] (USANYS) <[REDACTED]>

Cc: [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>

Subject: RE: Jeffrey Epstein-Related Touhy Requests

[REDACTED],

Thanks for talking with me this evening about this, we appreciate it. To briefly memorialize our discussion, and to loop in everybody on the case on the criminal side, you'll be the point person for requests from civil plaintiffs / victims in connection with Epstein lawsuits, and we'll work with you on those requests given our knowledge of the relevant facts and materials.

In terms of this first question from the plaintiff, which was essentially presented as a question of how they should go about making a request for certain materials possibly in the possession of the Government, we'll plan to take a look at the letter you draft that will essentially set forth the requirements for making a Touhy request (e.g., similar to, or including, the kind of information in [REDACTED] example below), and separately sometime early next week I'll let plaintiff's counsel (Robbie Kaplan at Kaplan & Hecker) know that they can expect to hear from someone in our Civil Division, within approximately a week or so (of when that conversation occurs), and that we anticipate that communication will include the relevant requirements of making such a request.

Please let me know if I'm forgetting anything, thanks again, and talk soon.

From: [REDACTED] (USANYS) <[REDACTED]>

Sent: Thursday, January 02, 2020 10:01

To: [REDACTED] <[REDACTED]>; [REDACTED] (USANYS) <[REDACTED]>

Subject: Jeffrey Epstein-Related Touhy Requests

[REDACTED], [REDACTED],

I spoke to [REDACTED] about continuing to use [REDACTED] as the POC to outsiders for Touhy requests for information relating to Jeffrey Epstein. (Thank you [REDACTED]!) [REDACTED], please give [REDACTED] a call. [REDACTED], FWIW, following is a markup of a "please give us a Touhy statement" email that I have used in the past. [REDACTED] anticipates that we will be getting additional requests stemming from civil litigation by alleged victims, so it would be useful to have some consistency here. [REDACTED] knows that the criminal AUSAs will have to do all the work digging for any pertinent information, but it will be useful to have another AUSA handle the actual communications, particularly since the criminal AUSAs may be dealing with the alleged victims as victim-witnesses in ongoing criminal matters. Thanks again,

[REDACTED]

Here's some draft language you may or may not find useful:

Dear XXX:

EFTA00098072

I am the Assistant U.S. Attorney who will be handling the request that you made to AUSA [REDACTED] for certain information relating to Jeffrey Epstein. To assist us in evaluating your request, we ask that you provide us with a detailed written statement of the litigation for which you seek this information; the pertinence of the information sought to your litigation; and the availability (or absence) of means in that litigation, including discovery, to obtain the information in question. This statement should be relatively thorough—i.e., it should not assume that the persons reviewing your request will have any particular familiarity with the litigation in question.

For your information, following are the general principles that govern disclosure, in unrelated litigation, of information obtained during the course of our official duties. Specifically, the response of federal agencies to subpoenas and other third-party discovery demands is largely governed by Department of Justice regulations, commonly referred to as *Touhy* regulations. See generally 5 U.S.C.A. § 301; *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (authorizing such regulations). These regulations dictate the procedure for obtaining a government employee's testimony or government records in state or federal proceedings. The Department of Justice has its own *Touhy* regulations that set out the procedure it follows in responding to demands for "production or disclosure" of information from the Department and its employees for use in state or federal court proceedings. See 28 C.F.R. §§ 16.21-16.29. These *Touhy* regulations channel review of such demands to the responsible United States Attorney, and then provide a set of procedures for the United States Attorney to follow when considering such demands. See *id.* §§ 16.22(b), 16.24. These regulations apply to both current and former Government employees. See *id.* §§ 16.21(a), 16.22(a), 16.28. The Department's *Touhy* regulations prohibit any Department employee from testifying or producing documents in a case in which the Government is not a party, even in response to a subpoena, "without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part." *Id.* § 16.22(a). For matters concerning our Office, the proper official is the United States Attorney for the Southern District of New York. *Id.* § 16.22(b). To facilitate the process of determining whether such approval will be given, a party seeking such information must provide this Office with an affidavit or written statement setting forth the testimony sought and its relevance to the proceeding for which it is sought. See *id.* § 16.22(c), (d). We will then evaluate the request in light of governing rules of procedure in the case for which the information is sought, substantive law, and privilege; specific statutory prohibitions such as may apply to federal tax information, grand jury matters, or classified information; and the requirement of Deputy or Associate Attorney General approval where the disclosure would identify a confidential source over the objection of the agency or source, would interfere with enforcement proceedings or reveal sensitive investigative techniques, or would reveal trade secrets without the owner's consent. See 28 C.F.R. § 16.26. To the extent information sought derives from a criminal investigation, such information may be subject to, *inter alia*, the law enforcement privilege. The law enforcement privilege protects against the disclosure of information that would "reveal a confidential source or informant, . . . reveal investigatory records compiled for law enforcement purposes . . . interfere with enforcement proceedings[,] or disclose investigative techniques and procedures" *Id.* § 16.26(b)(4)-(5); see also *In re City of New York*, 607 F.3d 923 (2d Cir. 2010); *In re Dep't of Investigation of the City of New York*, 856 F.2d 481, 484 (2d Cir. 1988); *Tuite v. Henry*, 181 F.R.D. 175, 176 (D.D.C. 1998) ("The federal law enforcement privilege is a qualified privilege designed to prevent disclosure of information that would be contrary to the public interest in the effective functioning of law enforcement"), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999). The Government's privilege not to disclose material contained in the files of criminal investigations is well-recognized. See *In re Department of Investigation of the City of New York*, 856 F.2d at 483; *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *Kinoy v. Mitchell*, 67 F.R.D. 1, 11 (S.D.N.Y. 1975) (discussing privilege for files compiled in connection with a criminal investigation). To the extent documents are sought for use in state court proceedings, note that the Department's decision whether to authorize testimony or produce documents is not reviewable in state court. Review of the agency's decision may only be had pursuant to the federal Administrative Procedure Act in federal court. See *US. EPA v. Gen. Elec. Co.*, 197 F.3d 592, 598-99 (2d Cir. 1999) (review pursuant to Administrative Procedure Act), modified in part, 212 F.3d 689 (2d Cir. 2000); 5 U.S.C. § 702 (sovereign immunity waived to permit Administrative Procedure Act only in "a court of the United States"). Federal sovereign immunity bars any proceeding in state court to enforce a subpoena or otherwise compel testimony or production of documents. See *Louisiana v. Sparks*, 978 F.2d 226, 234-36 (5th Cir. 1992); *Boron Oil Co.*, 873 F.2d at 69-71; see also, e.g., *People v. Rodriguez*, 546 N.Y.S.2d 861, 862-63 (1st Dep't 1989) (holding that "state courts are without authority to compel production of such files without the federal government's consent"); *People v. Carbonaro*, 427 N.Y.S.2d 701, 702-03 (Kings Co. Sup. Ct. 1980) (quashing subpoena served on federal employee where

Department of Justice ordered him not to comply); *Jacoby v. Delfiner*, 51 N.Y.S.2d 478, 479 (N.Y. Co. Sup. Ct. 1944), *aff'd*, 63 N.Y.S.2d 833 (1st Dep't 1946).