

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

THE NEW YORK TIMES COMPANY,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

No. 20-CV-833(PAE)

SUPPLEMENTAL DECLARATION OF RUSSELL CAPONE

I, Russell Capone, hereby declare as follows:

1. I am Counsel to the Acting United States Attorney for the Southern District of New York (“USAO-SDNY”). My prior declaration in this matter dated August 5, 2020, details my service in this capacity and prior service in the USAO-SDNY. As noted therein, I am familiar with the Freedom of Information Act requests filed by the New York Times Company (the “FOIA Requests”) that are the subject of this case, which seek records related to the incarceration of Jeffrey Epstein at the Metropolitan Correctional Center (“MCC”). I am also familiar with the responsive records that defendant the Federal Bureau of Prisons (“BOP”) has withheld in whole or in part pursuant to various FOIA exemptions, including BOP’s withholdings from the records provided back to BOP by the Office of the Inspector General of the Department of Justice (“OIG”) since the submission of my August 5, 2020, declaration.

2. The statements contained in this declaration are based on my personal knowledge, documents maintained in the files of the USAO-SDNY, conversations with members of the *Noel* and *Tartaglione* prosecution teams at the USAO-SDNY, public court filings, and conclusions made in accordance therewith.

3. I submit this declaration in further support of BOP's motion for summary judgment in this case. Specifically, this declaration addresses the bases for the withholding in whole or in part of certain records provided back to BOP by OIG pursuant to FOIA Exemption 7(A).

Records Withheld in Full or in Part from Disclosure Pursuant to FOIA Exemption 7(A) on
Account of Likely Interference with *Noel*

4. 5 U.S.C. § 522 (b)(7)(A) ("Exemption 7(A)") exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings"

5. I and the prosecutors responsible for the *Noel* prosecution have reviewed each of the records provided back to BOP by OIG that BOP withheld in full or in part under Exemption 7(A) (the "7(A) Returned Records"), including those reflected as withheld in full at Entries 55-57 and 60 on the updated index attached to the Supplemental Declaration of Kara Christenson (the "updated BOP index"). The 7(A) Returned Records fall into four categories: documents related to counts of inmates, staffing records, psychology records, and entries on certain BOP logs for August 9 and 10, 2019. Each of these categories fall within the scope of Exemption 7(A).

6. Public disclosure of the 7(A) Returned Records could reasonably be expected to interfere with the pending *Noel* prosecutions. These records include information about which numerous witnesses are expected to testify at trial, details that are not publicly known or known to other witnesses, and information and documents prepared by potential trial witnesses. These records also include potential trial exhibits, which some or all potential trial witnesses have not seen. Premature disclosure of these records and/or the information contained therein could

reasonably be expected to influence witnesses' potential testimony at trial and/or enable witnesses to alter or shape their testimony to conform to other evidence.

7. Further, premature public disclosure of any of the 7(A) Returned Records could reasonably be expected to impair the government's (and the defendants') ability to seat a fair and impartial jury in *Noel*. The government anticipates that some of these records will be entered into evidence as exhibits at trial, and other records that may not be trial exhibits bear on the contents of potential trial exhibits. Premature disclosure of these records and/or the information contained therein could influence potential jurors' understanding of the evidence at trial and the case overall. Similarly, premature disclosure of the records and/or the information contained therein could prejudice potential jurors for or against the defendants in the *Noel* action, which would also impair the government's (and the defendants') ability to seat a fair and impartial jury. In addition, as noted above, these records include specific information about which witnesses are expected to testify at trial, as well as information and documents prepared by potential trial witnesses, such that premature public disclosure could reasonably be expected to influence potential jurors' perception of the witnesses and the evidence to be presented at trial.

8. The risks of interference with the *Noel* proceedings are heightened by the media coverage of speculation and theories about Epstein's death. Many publicly-discussed theories of Epstein's death are unfounded. Premature release of the withheld records, particularly if the records are released in part or without full context, may influence the perception of jurors who have been exposed to such media coverage of speculation and theories.

9. The considerations discussed above apply to each of the categories of 7(A) Returned Records.

10. First, as discussed in my prior declaration, the government anticipates that documents related to counts of inmates, including count slips, associated inmate rosters, and

records of rounds and checks, for dates between and including July 23, 2019, and August 12, 2019, will be the subject of trial testimony at the *Noel* trial. 7(A) Returned Records containing such documents are noted at Entry 55 of the updated BOP index.¹ In addition, the government anticipates that some of these documents will be trial exhibits. Releasing these materials prematurely could reasonably be expected to influence witnesses' potential testimony at trial, allow witnesses to alter or shape their testimony to conform to other evidence, identify potential government witnesses at the *Noel* trial, and/or influence potential jurors' perceptions of witness testimony or evidence.

11. One subcategory of these documents are records from the Special Housing Unit (the "SHU"), specifically rosters of inmates in the SHU on August 9 and 10, 2019, and SHU records showing which BOP employees conducted rounds in the SHU. Although BOP had previously withheld six pages of these records in full, included at Entries 22, 34 and 37 of the prior index submitted by BOP, the prosecutors responsible for the *Noel* prosecution and I determined that these records could be released in part without interfering with the *Noel* prosecution, provided that information on these records showing details of the occupants of the SHU on August 9 and 10, 2019, and which BOP employees conducted rounds in the SHU was redacted. Releasing such information prematurely could reasonably be expected to influence witnesses' potential testimony at trial, allow witnesses to alter or shape their testimony to

¹ In reviewing the records returned to BOP by OIG, the prosecutors responsible for the *Noel* and *Tartaglione* prosecutions and I determined that a one-page attorney visit room inventory log, dated July 21, 2019, and an 18-page inmate census roster, dated August 9, 2019, each of which BOP had previously withheld in full under Exemption 7(A), could be released without a reasonable expectation of interference with the *Noel* or *Tartaglione* prosecutions. The attorney visit room inventory log was previously listed at Entry 26 of BOP's index, and the census roster was previously included among the count documents noted at Entry 24 of BOP's index.

conform to other evidence, identify potential government witnesses at the *Noel* trial, and/or influence potential jurors' perceptions of witness testimony or evidence.

12. Second, as discussed in my prior declaration, the government anticipates that MCC staffing records, including daily assignment rosters for the MCC on July 23, August 9, and 10, 2019, will be the subject of witness testimony at the *Noel* trial. 7(A) Returned Records containing such documents are noted at Entry 56 of the updated BOP index.² In addition, the government anticipates that some of these documents will be trial exhibits. Releasing these materials prematurely could reasonably be expected to influence witnesses' potential testimony at trial, allow witnesses to alter or shape their testimony to conform to other evidence, and/or influence potential jurors' perceptions of witness testimony or evidence.

13. Third, as discussed in my prior declaration, the government anticipates that certain psychological notes and records of Epstein prepared by BOP may be trial exhibits, the subject of witness testimony, and/or were prepared by witnesses who will testify at trial. 7(A) Returned Records containing such documents are noted at Entry 57 of the updated BOP index. Premature disclosure of these records could influence the testimony of potential witnesses, including by potentially causing them to alter or shape their testimony to conform to other evidence. In addition, premature disclosure of these records could reasonably be expected to prejudice potential jurors for or against the defendants in the *Noel* action, which would impair the government's (and the defendants') ability to seat a fair and impartial jury.

14. Fourth, as discussed in my prior declaration, the government anticipates that entries in certain BOP logs for August 9 and 10, 2019, may be trial exhibits, the subject of

² The daily assignment rosters included in the 7(A) Returned Records appear identical to the daily assignment rosters BOP previously located and withheld in response to the FOIA Requests, except that they contain a different date stamp, which I understand to indicate when they were electronically generated.

witness testimony, and/or were prepared by witnesses who will testify at trial. 7(A) Returned Records containing such documents are noted at Entry 60 of the updated BOP index. Premature disclosure of these materials could reasonably be expected to influence witnesses' potential testimony at trial, allow witnesses to alter their testimony to conform to other evidence, and/or influence potential jurors' perceptions of witness testimony or evidence.

7(A) Returned Records Withheld in Part from Disclosure Pursuant to Exemption 7(A) on
Account of Likely Interference with *Tartaglione*

15. The release of portions of two 7(A) Returned Records could also be reasonably expected to interfere with the *Tartaglione* prosecution. First, portions of psychological records, withheld in full as noted at Entry 57 of the updated BOP index, concerning the circumstances of Epstein's apparent suicide attempt on July 23, 2019, could reasonably be expected to interfere with the prosecution of *Tartaglione*. Second, premature release of one of the entries in a lieutenant's log dated July 23, 2019, concerning the circumstances of Epstein's apparent suicide attempt on that date, could reasonably be expected to interfere with the prosecution of *Tartaglione*.

16. As discussed in my prior declaration, *Tartaglione*'s interactions with Epstein in July 2019 have been placed at issue by *Tartaglione*'s defense counsel, specifically in connection with the potential penalty phase of the case against *Tartaglione*. See Letter dated January 13, 2010, Dkt. No. 186, *United States v. Tartaglione*, No. 16 Cr. 832 (KMK); Letter dated January 21, 2020, Dkt. No. 193, *United States v. Tartaglione*, No. 16 Cr. 832 (KMK). In light of defense counsel's position, the information contained in the psychological records and in the entry in the lieutenant's log may be relevant evidence in any possible penalty phase of the case against *Tartaglione*. In that event, premature release of the information could reasonably be expected to


adversely affect the *Tartaglione* proceedings and influence potential jurors' perceptions of *Tartaglione*, thereby impairing the district court's ability to seat a fair and impartial jury.

Segregability

17. The 7(A) Returned Records withheld in full are exempt from disclosure in their entirety under Exemption 7(A). To the extent the records contain any non-exempt information, such information is inextricably intertwined with information that could reasonably be expected to interfere with the *Noel* prosecution for the reasons discussed above. As noted in my previous declaration, the media coverage of speculation and theories about Epstein's death makes the segregation of any possibly non-exempt information particularly difficult because providing information pertaining to Epstein without complete context risks contributing to the dissemination of speculation and theories about his death. This, in turn, could reasonably be expected to interfere with the district court's ability to seat a fair and impartial jury in *Noel*, for the reasons discussed above.

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

Executed this 15 day of January 2021.



Russell Capone
Counsel to the Acting United States Attorney
United States Attorney's Office for the
Southern District of New York