



Office of General Counsel

March 1, 2021

Via Email

Solomon Shinerock, Esq.
Assistant District Attorney
c/o Gabrielle Hoessly ((b) (6))
New York County District Attorney's Office
One Hogan Place
New York, NY 10013

Re: Subpoena Duces Tecum
Investigation Number 2018-00403803

Dear Mr. Shinerock,

In accordance with 41 C.F.R. § 105-60.1003(a), and as requested in your letter dated February 26, 2021, to Nitin Shan, General Counsel, U.S. General Services Administration (GSA), I hereby accept service of the subpoena duces tecum issued in the above-referenced matter on behalf of GSA. We will promptly review the subpoena and intend to provide a written response to your office by March 5, 2021. Please feel free to contact me at (202) 708-9882 or timothy.tozer@gsa.gov with any questions.

Very truly yours,

A handwritten signature in cursive script that reads "Timothy C. Tozer".

Timothy C. Tozer
Regional Counsel



March 5, 2021

Via Email

Solomon Shinerock, Esq.
Assistant District Attorney
c/o Gabrielle Hoessly ((b) (6))
New York County District Attorney's Office
One Hogan Place
New York, NY 10013

Re: Subpoena Duces Tecum
Investigation Number 2018-00403803

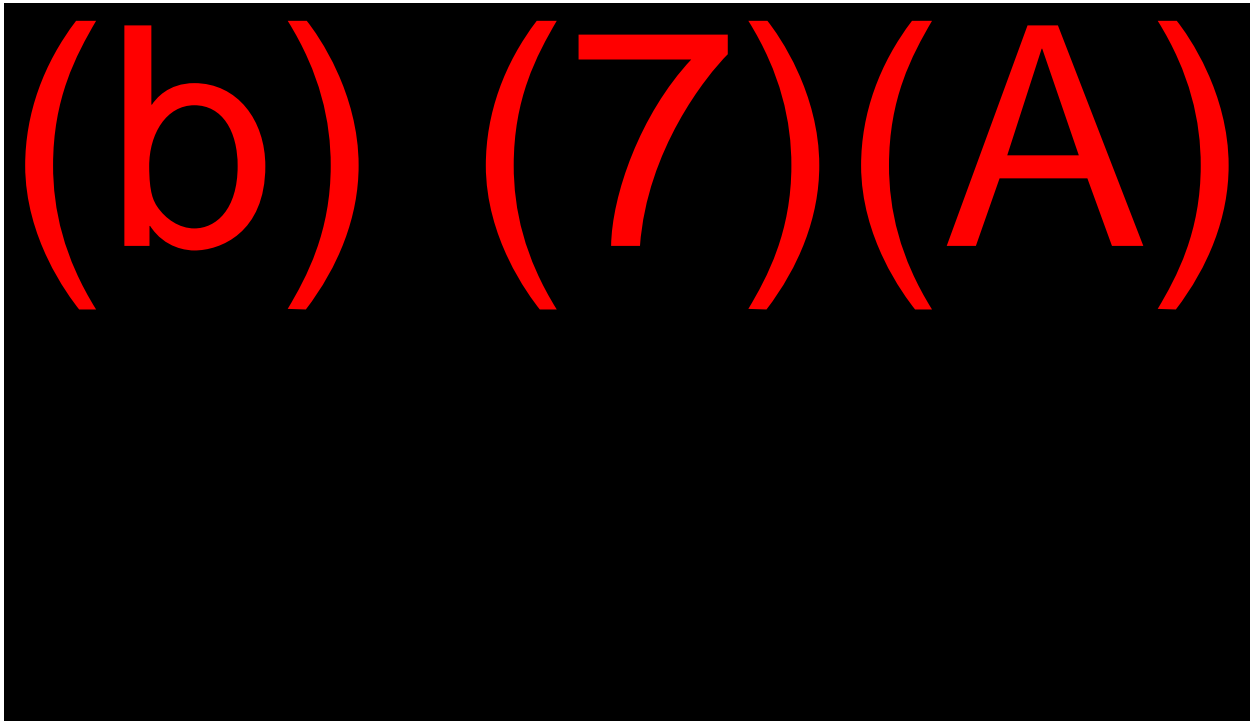
Dear Mr. Shinerock,

Pursuant to 41 C.F.R. § 105-60.1005(b), the United States General Services Administration ("GSA") provides this initial response to the subpoena duces tecum (the "Subpoena") issued by the New York County District Attorney's Office (Investigation Number 2018-00403803) to GSA on February 26, 2021. As set forth below, GSA respectfully requests additional information and time to respond to the Subpoena in order to comply with its obligations under applicable Federal regulations.

For your awareness, GSA has promulgated regulations, at 41 C.F.R. § 105-60.1001 *et seq.*, which "establish instructions and procedures to be followed . . . in response to subpoenas or similar demands issued in judicial or administrative proceedings for production or disclosure of material or information . . ." *Id.* § 105-60.1001(a). The regulations only permit GSA to provide information in response to a subpoena or similar demand when certain requirements are satisfied. *See id.* § 105-60.1005. In particular, "the party seeking production or the party's attorney [must] provide a detailed summary, by affidavit or other statement, of the information sought and its relevance to the proceeding." *Id.* § 105-60.1005(c)(2). The regulations further set out eight factors for GSA to consider in responding to subpoenas and similar demands, including, *inter alia*, "[t]he relevance of the testimony or documents to the proceeding," "[t]he information provided by the issuer of the demand in response to requests" by GSA, "[t]he steps taken by the issuer of the demand to minimize the burden of disclosure or production on GSA," and "the burden on GSA which disclosure or production would entail." *Id.* § 105-60.1005(e). Subject to certain limited exceptions, the regulations prohibit the Appropriate Authority from disclosing six categories of information, including "trade secrets or commercial or financial information which is privileged or confidential without prior consultation with the person from whom it was obtained." *Id.* § 105-60.1005(f). Lastly, while there is no express timeline for

rendering a determination, the regulations instruct the Appropriate Authority to make a determination as “expeditiously as possible.” *See id.* § 105-60.1005(g).

In order to process the Subpoena pursuant to these regulations, we require additional information from you with respect to the four categories of documents requested, which are as follows:



First, the information sought may contain trade secrets or commercial or financial information which is privileged or confidential. Accordingly, pursuant to 41 C.F.R. § 105-60.1005(g), GSA must consult with Trump Old Post Office LLC (the person from whom the information was obtained) in responding to the Subpoena. However, your letter specifically requested that GSA not disclose the existence of the Subpoena. Accordingly, I am hereby requesting written permission from your office to disclose the Subpoena (and the contents thereof) to Trump Old Post Office LLC so that GSA may fulfill its obligations in accordance with applicable regulations.

Second, Request 4 as currently written may impose an undue burden and expense on GSA. *See* 41 C.F.R. § 105-60.1005(e)(7); *see also* *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 277 (4th Cir.1999); *Solomon v. Nassau County*, 274 F.R.D. 455, 459 (E.D.N.Y. 2011).¹ GSA respectfully requests that your office consider narrowing the scope of Request 4. *See* 41 C.F.R. § 105-60.1005(e)(7).

¹ Much of the correspondence between GSA and Trump Old Post Office LLC that falls within the parameters of Request 4 as currently written involves project management-related issues pertaining to the planning, design, and

Third, with respect to all four Requests, we respectfully request an explanation of the relevance of the information sought to the underlying proceedings, as required under our regulations. *See* 41 C.F.R. § 105-60.1005(c)(2), (e)(2), and (e)(4).² Accordingly, in order to evaluate the Subpoena, please submit a supplemental statement or affidavit to articulate the connection between the documents sought and the grand jury proceeding. *See id.* at (c)(2).

Fourth, we note that none of the documents sought are uniquely within GSA's possession. In particular, they are directly available from Trump Old Post Office LLC itself and from other private persons and entities.³ Accordingly, in order to avoid imposing an undue burden on government operations, we respectfully request that your office provide an explanation of why it is not able to obtain the request documents from non-governmental entities. *See id.* at (c)(2).

Fifth, and particularly in light of the issues identified herein, which require a response from your office before GSA is able to process the Subpoena, GSA will not be able to comply with the March 19, 2021 deadline identified in the Subpoena. If GSA determines that it will produce documents pursuant to your request, GSA looks forward to working with your office to reach a mutually agreeable arrangement on timing and format.

To summarize, in order for us to process the Subpoena under GSA regulations, please provide the following to my attention: (1) written permission to share the Subpoena with Trump Old Post Office LLC; (2) a revised Request 4 that is narrowly tailored to your office's need for information relevant to the underlying proceeding while minimizing the burden imposed on GSA; (3) a supplemental statement explaining the relevance of the information requested herein to the underlying proceeding; (4) an explanation of why the information cannot be obtained from non-governmental entities; and (5) written confirmation that your office will not seek to enforce the March 19, 2021 return date in order to afford your office and GSA sufficient time to address the issues identified above.⁴ Please feel free to contact Timothy Tozer, Regional Counsel, at (202) 708-9882 or timothy.tozer@gsa.gov with any questions or if you wish to discuss the matter further.

alteration of the Old Post Office Building in Washington, D.C. Its relevance to the underlying proceeding is not immediately apparent.

² *See supra* note 1 (example of request whose relevance to underlying proceeding is not immediately apparent).

³ According to publicly available documents, the financial statements sought were prepared by WeiserMazars LLP (now Mazars USA LLP). *See* documents available at <https://www.gsa.gov/reference/freedom-of-information-act-foia/electronic-reading-room>.

⁴ *See* 41 C.F.R. § 105-60.1005(g) (agency determination "shall be made as judiciously as possible").

Solomon Shinerock, Esq.

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This letter does not constitute a final agency determination. Nothing in this letter shall be construed as a waiver of any rights, remedies, claims, or defenses available to GSA.

Very truly yours,

/s/

Nitin Shah
General Counsel



April 13, 2021

Via Email and Overnight Delivery

Trump Old Post Office, LLC
c/o The Trump Organization
725 Fifth Avenue, 25th Floor
New York, New York 10022
Attn: Eric Trump

Re: Subpoena Duces Tecum
Investigation Number 2018-00403803

Dear Mr. Trump:

Enclosed, please find a subpoena duces tecum (the "Subpoena") issued by the New York County District Attorney's Office (Investigation Number 2018-00403803) to the United States General Services Administration ("GSA"). Pursuant to 41 C.F.R. § 105-60.1005(f)(5), we are, through this letter, consulting with Trump Old Post Office LLC regarding the production of documents potentially responsive to the Subpoena that may contain trade secrets or commercial or financial information provided by you which is privileged or confidential. The hard copy of this transmittal encloses an encrypted thumb drive containing Bates numbered documents (GSA 000001 through GSA 001110) that we have thus far identified as potentially responsive to the documents requested in the Subpoena. Please contact Timothy Tozer, Regional Counsel, at (202) 708-9882 or timothy.tozer@gsa.gov to obtain the password for the thumb drive or if you wish to discuss the matter further.

We respectfully request any response no later than Wednesday, April 28, 2021. To the extent you believe that any material should be withheld, please identify the relevant pages, and portions thereof, with reference to the Bates number, and include a detailed written statement that specifies any grounds for withholding the identified material. We will consider your response, if any, in a manner consistent with our regulations.

Very truly yours,

/s/

Nitin Shah
General Counsel

Enclosures



Office of General Counsel

May 12, 2021

Via Email

Trump Old Post Office, LLC
c/o The Trump Organization
725 Fifth Avenue, 25th Floor
New York, New York 10022
Attn: Eric Trump

Re: Subpoena Duces Tecum
Investigation Number 2018-00403803

Dear Mr. Trump:

Enclosed, please find a subpoena duces tecum (the "Subpoena") issued by the New York County District Attorney's Office (Investigation Number 2018-00403803) to the United States General Services Administration ("GSA"). Pursuant to 41 C.F.R. § 105-60.1005(f)(5), we are, through this letter, consulting with Trump Old Post Office LLC regarding the production of documents potentially responsive to the Subpoena that may contain trade secrets or commercial or financial information provided by you which is privileged or confidential. The attached Zip file contains Bates numbered documents (GSA 000111 through GSA 001255) that we have thus far identified as potentially responsive to the documents requested in the Subpoena. Please contact Timothy Tozer, Regional Counsel, at (202) 708-9882 or timothy.tozer@gsa.gov to obtain the password for the Zip file or if you wish to discuss the matter further.

We respectfully request any response no later than Wednesday May 19, 2021. To the extent you believe that any material should be withheld, please identify the relevant pages, and portions thereof, with reference to the Bates number, and include a detailed written statement that specifies any grounds for withholding the identified material. We will consider your response, if any, in a manner consistent with our regulations.

Very truly yours,

/s/

Nitin Shah
General Counsel

Enclosures



Office of General Counsel

May 25, 2021

Via Email & Overnight Delivery

New York County District Attorney's Office
80 Centre Street

Major Economic Crimes Bureau
New York, NY 10013

ATTN: Assistant District Attorney Solomon Shinerock, c/o Gabrielle Hoessly

(b) (6)

Re: Subpoena Duces Tecum
Investigation Number 2018-00403803

Dear Mr. Shinerock,

Pursuant to 41 C.F.R. 105-60.1001, *et seq.*, the United States General Services Administration ("GSA") is providing documents in response to the subpoena duces tecum (the "Subpoena") issued by the New York County District Attorney's Office (Investigation Number 2018-00403803) to GSA on February 26, 2021. The hard copy of this transmittal encloses an encrypted thumb drive containing Bates numbered documents GSA 000001 through GSA 001110. In addition, GSA provided an encrypted Zip file via email containing Bates numbered documents GSA 001111 through GSA 001255. Please contact Timothy Tozer, Regional Counsel, at (202) 708-9882 or timothy.tozer@gsa.gov to obtain the password for the thumb drive and Zip file.

Please note that these documents may contain confidential commercial or financial information or trade secret information which is protected from disclosure under the Freedom of Information Act. We are making this production based on your assurance that the documents are necessary for purposes of a criminal investigation and/or prosecution, and will not be disclosed to other parties except as authorized under New York State Criminal Procedure Law Article 190.

This letter constitutes a final agency determination. Nothing in this letter shall be construed as a waiver of any rights, remedies, claims, or defenses available to GSA.

Very truly yours,
/s/
Nitin Shah
General Counsel

Enclosure



Office of General Counsel

MEMORANDUM

TO: FILE

FROM: NITIN SHAH
GENERAL COUNSEL (L) A blue DocuSigned signature box containing the handwritten name "Nitin Shah" and a long alphanumeric hash: "3FF35BB4D12F414..."

DATE: MAY 21, 2021

SUBJECT: SUBPOENA DUCES TECUM ISSUED BY THE NEW YORK COUNTY
DISTRICT ATTORNEY'S OFFICE (INVESTIGATION NUMBER 2018-
00403803)

This memorandum memorializes my decision to provide documents in response to a subpoena duces tecum issued by the New York County District Attorney's Office, and the reasons for that decision.

Procedural History

On or around February 26, 2021, the New York County District Attorney's Office (the "DA") issued a subpoena duces tecum (the "Subpoena") to the United States General Services Administration ("GSA") seeking documents pertaining to the redevelopment of the Old Post Office building in Washington, D.C. by Trump Old Post Office LLC and/or the Trump Organization (collectively "TOPO"). *See* Exhibit 1. On March 1, 2021, GSA accepted service of the Subpoena in accordance with 41 C.F.R. § 60-1003(a). *See* Exhibit 2. On March 5, 2021, GSA issued a letter to the DA requesting additional information and time to respond to the Subpoena. *See* Exhibit 3. In its March 5 letter, GSA also requested permission to share the Subpoena with TOPO for purposes of obtaining TOPO's views regarding the potential production of documents in response to the Subpoena. *See id.* The DA's response, dated March 26, 2021, granted GSA such permission and narrowed the scope of the production sought. *See* Exhibit 4. The parties then exchanged correspondence to more accurately set forth their mutual understanding regarding the narrowed scope of production. *See* Exhibits 5 and 6. Shortly thereafter, on April 13, 2021, pursuant to 41 C.F.R. § 105-60.1005(f)(5), GSA sent a letter to TOPO "regarding the production of documents potentially responsive to the Subpoena that may contain trade secrets or commercial or financial information provided by you which is privileged or confidential." *See* Exhibit 7. In its letter, GSA enclosed a copy of the Subpoena and a thumb drive containing a first batch of potentially responsive documents (labeled GSA 000001 through

GSA 001110). *See id.* GSA requested a response by April 28, 2021. *See id.* TOPO did not respond except to obtain access to the encrypted documents. On May 12, 2021, pursuant to 41 C.F.R. § 105-60.1005(f)(5), GSA sent an additional letter via email to TOPO “regarding the production of documents potentially responsive to the Subpoena that may contain trade secrets or commercial or financial information provided by you which is privileged or confidential.” *See* Exhibit 8. The mail included a copy of the Subpoena and a Zip file containing a second batch of potentially responsive documents (labeled GSA 001111 through GSA 001255). *See id.* GSA requested a response by May 19, 2021. *See id.* TOPO did not respond except to obtain access to the encrypted documents.

Regulations

GSA has promulgated regulations, at 41 C.F.R. § 105-60.1001 *et seq.*, which “establish instructions and procedures to be followed . . . in response to subpoenas or similar demands issued in judicial or administrative proceedings for production or disclosure of material or information” *Id.* § 105-60.1001(a). The regulations only permit GSA to provide information in response to a subpoena or similar demand when approved by an Appropriate Authority upon their determination that certain requirements are satisfied. *See id.* § 105-60.1005. In particular, “the party seeking production or the party’s attorney [must] provide a detailed summary, by affidavit or other statement, of the information sought and its relevance to the proceeding.” *Id.* § 105-60.1005(c)(2). The regulations further set out eight factors the Appropriate Authority must consider in responding to subpoenas and similar demands, including, *inter alia*, “[t]he relevance of the testimony or documents to the proceeding,” “[t]he information provided by the issuer of the demand in response to requests” by GSA, “[t]he steps taken by the issuer of the demand to minimize the burden of disclosure or production on GSA,” and “the burden on GSA which disclosure or production would entail.” *Id.* § 105-60.1005(e). Subject to certain limited exceptions, the regulations prohibit the Appropriate Authority from disclosing six categories of information, including “trade secrets or commercial or financial information which is privileged or confidential without prior consultation with the person from whom it was obtained.” *Id.* § 105-60.1005(f). As General Counsel, I am the Appropriate Authority for purposes of responding to the Subpoena. *See id.* § 105-60.1002(d).

I have considered these regulations and the Subpoena, as amended and clarified during our subsequent exchanges with the DA. I have concluded that the Subpoena now satisfies GSA’s regulations. I have also considered the eight factors set forth by our regulations and have determined that, in the circumstances of this specific request, those factors support producing the requested documents.

Consideration of the Eight Factors (41 C.F.R. § 105-60.1005(e))

Factor 1: Whether disclosure or production is appropriate under rules of procedure governing the proceeding out of which the demand arose.

Discussion: We have been assured that the scope and nature of information sought by the Subpoena are appropriate under the applicable rules of procedure governing grand jury subpoenas in the State of New York. Based on our limited review of these rules, and based on the explanation by the DA of the relevance of the information sought to the underlying proceeding, we have not identified any basis to question the validity or appropriateness of the Subpoena under the applicable rules of procedure governing the proceeding out of which the demand arose.

Factor 2: The relevance of the testimony or documents to the proceedings.

Discussion: In the Subpoena, the DA provided an explanation of the connection between the documents sought and the grand jury proceeding. The DA further elaborated on that connection in subsequent correspondence and telephone discussions. *See* Exhibits 1 and 4. I conclude that the DA has established the relevance of the materials sought, particularly in the context of grand jury proceedings, which, given the investigative nature of such proceedings, are not typically held to the same strict relevance standard as evidence to be admitted at trial.

Factor 3: The impact of the relevant substantive law concerning applicable privileges recognized by statute, common law, judicial interpretation or similar authority.

Discussion: We have identified one responsive document that contains potentially privileged information. This document, the 2012 “Source Selection Evaluation Report and Recommendation,” evaluates and scores each of the proposals for redevelopment of the Old Post Office Building. This document contains the candid recommendations of the source selection evaluation board regarding an agency decision. Accordingly, portions of this document containing those recommendations may be subject to the deliberative process privilege. The deliberative process privilege is a qualified privilege which is overcome in civil litigation by a showing that the requester’s need for the document exceeds the government’s interest in maintaining confidentiality. *See, e.g., FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Applying the balancing test normally applicable in civil litigation, I have determined that release of this document in part is appropriate, based on four factors. [REDACTED]

Accordingly, in balancing relative interests, I conclude that the DA's interest in obtaining this document is very high. Second, the document is now nine years old and concerns a governmental decision that occurred many years ago, the result of which (selection of the Trump Organization's proposal) is a public fact. Accordingly, the risk of harm to government interests from disclosure is at this point fairly low and consists entirely of the generalized chilling effect of releasing documents of this sort, and not any harm specifically connected to the content of this particular document. Third, the DA has assured us that the documents being produced are protected by grand jury secrecy rules, and thus they will only be disclosed, if at all, pursuant to court order, which mitigates the potential harm of more widespread dissemination. *See* New York State Criminal Procedure Law Article 190. And fourth, the document may be redacted to withhold all facts and analysis that pertain to the other proposals, and also the names of the evaluation board, which will mitigate the risk of chilling future submissions and deliberations. Based on this analysis, I have concluded that release in part of the document is not "contrary to a recognized privilege," 41 C.F.R. § 105-60.1005(f)(6), because the DA has demonstrated that its need for the releasable portions of the document outweighs the government's interest in maintaining its confidentiality.¹

Factor: The information provided by the issuer of the demand in response to requests by the Appropriate Authority pursuant to paragraphs (b) and (c) of this section.

Discussion: The DA provided all of the documentation required under the applicable regulations. *See* Exhibits 1 and 4.

Factor 5: The steps taken by the issuer of the demand to minimize the burden of disclosure or production on GSA, including but not limited to willingness to accept authenticated copies of material in lieu of personal appearance by GSA employees.

Discussion: The DA agreed to narrow the scope of the documents requested to minimize the burden of disclosure. *See* Exhibits 4, 5, and 6. The DA has also waived any requirement of personal appearance by GSA employees. *See* Exhibit 1.

Factor 6: The impact on pending or potential litigation involving GSA or the United States as a party.

Discussion: None.

¹ There are good arguments that production of this document pursuant to a grand jury subpoena and subject to the protection of grand jury secrecy rules would not effect a waiver of FOIA Exemption 5. Moreover, I note that the document may also still be subject to potential withholding pursuant to other FOIA exemptions, namely Exemptions 3 (source selection information) and 4 (confidential financial or commercial information).

Factor 7: In consultation with the head of the GSA organizational component affected, the burden on GSA which disclosure or production would entail.

Discussion: The burden on GSA would be *de minimis*. Much of the information sought in the Subpoena was already contained in readily accessible electronic files and has been compiled in order to respond to FOIA and congressional oversight requests. The remaining information would entail the contracting officer reviewing a discrete subset of email correspondence during a limited time period and having an attorney apply redactions to one document.

Factor 8: Any additional factors unique to a particular demand or proceeding.

Discussion: This matter should be distinguished from the more common context in which such a request arises--in civil litigation between a government contractor and its competitor. In those cases, the government would be disclosing documents directly to the contractor's competitor, and there often is no assurance that the documents will be maintained in confidence or not used for purposes unrelated to the litigation. Here, in contrast, the nature of grand jury proceedings make it unlikely that documents produced by GSA will be publicly released, except as may be subject to disclosure in connection with an indictment. *See* New York State Criminal Procedure Law Article 190.

The Consultation Requirement

As previously noted, GSA reached out to TOPO to fulfill the consultation requirement under 41 C.F.R. § 105-60.1005(f)(5). TOPO did not respond except to obtain access to the encrypted documents and has not lodged any objection to GSA's proposed production of documents despite having been given ample opportunity to do so. *See* Exhibits 7 & 8. GSA has, accordingly, satisfied its consultation obligations under the regulations.

Determination

Pursuant to 41 C.F.R. § 60-1001, *et seq.*, and in light of the foregoing, I hereby authorize the production of documents to the New York County District Attorney's Office in response to Investigation Number 2018-00403803. This Memorandum constitutes final agency action.