

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

THE NEW YORK TIMES COMPANY,
JESSE McKINLEY, and VIVIAN YEE,

Petitioners,

-against-

NEW YORK STATE EXECUTIVE CHAMBER,

Respondent.

For a judgment pursuant to Article 78 of
the Civil Procedure Law and Rules

Index No.

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

AFFIDAVIT OF JESSE McKINLEY

JESSE McKINLEY, being duly sworn, deposes and says under penalty of
perjury:

1. I am a reporter for *The New York Times* (the “Times”), which is published
by Petitioner The New York Times Company (“The Times Company”). I work on the
Metro Desk at the *Times*, where I am the Albany Bureau Chief, and am myself a
Petitioner in this action. I make this Affidavit upon personal knowledge and in support of
Petitioners’ Verified Petition in this action.

The Malatras-Howe Emails FOIL Request

2. On June 3, 2016, on behalf of The Times Company, I submitted a
Freedom of Information Law (“FOIL”) request to the New York State Executive

Chamber (the “Chamber”), seeking: “Any e-mail correspondence between state operations director Jim Malatras and lobbyist Todd R. Howe, of WOH Government Solutions, both to and from these email addresses – Jim.Malatras@exec.ny.gov and thowe@woh-solutions.com – between the dates of January 1, 2011 through to June 1, 2016” (the “Malatras-Howe Emails Request”). A true and correct copy of the Malatras-Howe Emails Request is attached hereto as Exhibit A.

3. On August 8, 2016, the Chamber denied the request, stating that any responsive records, if they exist, are exempt from disclosure by New York Public Officers Law § 87(2)(e), which applies to records “compiled for law enforcement purposes.” A true and correct copy of the denial is attached hereto as Exhibit B.

4. The Times Company filed an administrative appeal of the denial on my behalf on August 31, 2016. The Times Company maintained that the records requested were not “compiled for law enforcement purposes” and that the records did not satisfy any of the other requirements of § 87(2)(e). A true and correct copy of the appeal is attached hereto as Exhibit C.

5. On September 19, 2016, the Chamber denied the appeal. The appeal denial relied principally on a single exemption from FOIL’s disclosure mandate: the exemption for records compiled for law-enforcement purposes that “if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings.” N.Y. PUB. OFF. LAW § 87(2)(e)(i). The Chamber cited a subpoena from federal prosecutors in Manhattan and “an additional independent investigation.” It claimed to be cooperating in both investigations at the time I filed the Malatras-Howe Emails Request. The Chamber also claimed that it “reserved the right” to assert FOIL exemptions codified at Public Officers Law §§ 87(2)(e)(ii), 87(2)(e)(iii), and 89(2)(b). It did not actually invoke those

exemptions or explain their applicability. A true and correct copy of the appeal denial is attached hereto as Exhibit D.

The Percoco Emails FOIL Request

6. On June 3, 2016, on behalf of The Times Company, I submitted a second FOIL request to the Chamber, this one seeking: “Any e-mail correspondence – either incoming or outgoing – between the following email: perc15@aol.com; and these members of Executive Branch staff, and their respective emails (listed below): Jim Malatras, Director of State Operations: Jim.Malatras@exec.ny.gov; Former Deputy Director of State Operations for Policy Andrew Kennedy: Andrew.Kennedy@exec.ny.gov; William Mulrow, Secretary to the Governor, Bill.Mulrow@exec.ny.gov. This request is for emails between the dates of January 1, 2014 through to January 8, 2016” (the “Percoco Emails Request”). A true and correct copy of the the Percoco Emails Request is attached hereto as Exhibit E.

7. From my reporting, I know that Joseph Percoco is a former executive deputy secretary to Governor Andrew Cuomo and that he used the email address perc15@aol.com during the relevant time period.

8. On September 7, 2016, the Chamber asked me to “clarify and narrow” my request. Specifically, the Chamber asked that I “identify the specific topics or search terms so that [the Chamber FOIL officer could] continue a search for responsive records.” A true and correct copy of the correspondence is attached hereto as Exhibit F.

9. I complied with the Chamber’s request on September 15, 2016, when I sent by email a list of specific search terms. A true and correct copy of my email is attached hereto as Exhibit G.

10. Despite my willingness to narrow my search terms, on October 4, 2016, the Chamber denied the Percoco Emails Request in full. In the denial, the Chamber stated that any responsive records, “if they exist,” are exempt from disclosure by New York Public Officers Law § 87(2)(e), which applies to records “compiled for law enforcement purposes.” A true and correct copy of the denial is attached hereto as Exhibit H.

11. On October 5, 2016, the Times Company filed an administrative appeal of the denial on my behalf. The Times Company maintained that the records requested were not “compiled for law enforcement purposes” and that the records did not satisfy any of the other requirements of § 87(2)(e). A true and correct copy of the appeal is attached hereto as Exhibit I.

12. The Chamber denied the appeal on October 21, 2016. The Chamber’s denial relied principally on a single exemption from FOIL’s disclosure mandate: the exemption for records compiled for law-enforcement purposes that “if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings.” N.Y. PUB. OFF. LAW § 87(2)(e)(i). The Chamber cited a subpoena from federal prosecutors in Manhattan and “an additional independent investigation.” It claimed to be cooperating in both investigations at the time I filed the Percoco Emails Request. The Chamber also noted that federal prosecutors in Manhattan and the New York Attorney General’s Office had filed complaints “in connection with the subject matter of the investigation[s],” which the Chamber said further supported its denial. In addition to § 87(2)(e)(i), the Chamber claimed that it “reserved the right” to assert FOIL exemptions codified at Public Officers Law §§ 87(2)(e)(ii), 87(2)(e)(iii), and 89(2)(b). It did not actually invoke those exemptions or explain their applicability. A true and correct copy of the appeal denial is attached hereto as Exhibit J.

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13. The Times Company and I seek the requested record for use in *Times* coverage of New York politics. By withholding the records, the Chamber is hindering the newsgathering efforts of the *Times*.

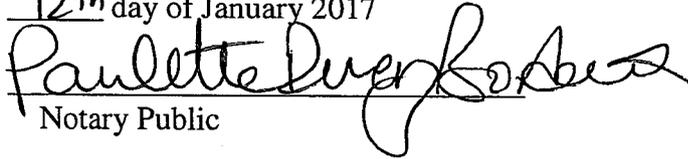
14. The Times Company and I seek these records solely for journalistic purposes and not for commercial use and agree not to use them for solicitation or fund-raising purposes.

WHEREFORE, I respectfully request that the Court grant the Verified Petition.



JESSE MCKINLEY

Sworn to before me this
12th day of January 2017



Notary Public

Paulette Duren-Bordeaux
Notary Public, State of New York
01DU6333909
Qualified in Kings County
Commission Expires December 07, 2019