



UNITED STATES MISSION TO THE UNITED NATIONS

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NEW YORK, N.Y. 10017-3505

March 1, 2017

Ms. Marissa Jackson
General Counsel
Mayor's Office for International Affairs
Two United Nations Plaza, 27th Floor
New York, NY 10017

Dear Marissa:

We are writing to follow up on the letter to you from Mr. Jim Donovan dated February 24, 2017, regarding the possible public release by the City of New York of information regarding the cause and manner of death of the former Russian Permanent Representative to the United Nations, Ambassador Vitaly Churkin. We thank you and Commissioner Penny Abeywardena for the additional time to respond to the new information we received from your office on Tuesday, February 28. We are more convinced now than before that there are important policy and legal considerations that counsel in favor of nondisclosure of this information.

First, it is important to note at the outset that, based on the information provided to the U.S. Mission by the City, it is not clear to us that it is mandatory for the city of New York to disclose the cause and manner of death of an accredited diplomat. The U.S. Mission appreciates the opportunity to review the Decision and Order of the Supreme Court, Appellate Division, in *Tims v. City of New York, et al.* In that case, the Court considered whether the Office of the Chief Medical Examiner (OCME) was prohibited from disclosing the cause and manner of death of the deceased, upon inquiry. The Court held that OCME is not required by City Charter § 557(g) to keep certain information confidential and that it *may* be released. It does not follow logically from this decision that the disclosure of such information is mandatory. We urge the City to refrain from disclosing information regarding the cause and manner of death of Ambassador Churkin.

Second, the United States does have relevant international legal obligations in this context. As stated in our letter dated February 27, 2017, as an accredited Permanent Representative to the United Nations, Ambassador Churkin enjoys "the same privileges and immunities, subject to corresponding conditions and obligations" as the United States accords to diplomatic envoys accredited it, under Article IV, Section 15 of the United Nations Headquarters

Agreement. We look to customary international law regarding diplomatic missions, which was later codified in the Vienna Convention on Diplomatic Relations, in understanding this text. Under Article 29 of the Vienna Convention, Ambassador Churkin's person enjoys complete personal inviolability from government authorities (including administrative subdivisions). In addition, the United States has an obligation to take all appropriate steps to protect his dignity. As previously stated, it is the United States' considered position that these obligations subsist even after Ambassador Churkin's untimely passing.

The obligations in the Headquarters Agreement and Vienna Convention are similar to those in numerous other multilateral and bilateral international agreements with countries around the world that convey personal inviolability to American diplomats assigned abroad. The U.S. government guards this immunity very closely for American diplomats assigned abroad and takes all appropriate steps to honor this international legal obligation with respect to diplomats serving in the United States. Consequently, as a legal and policy matter, when American diplomats die abroad, the U.S. government resists autopsies by host government authorities on the basis of personal inviolability. The U.S. government's efforts to prevent the conduct of an autopsy by foreign government officials generally prevent a foreign government coming into possession of autopsy information concerning a diplomat, and we also work to prevent unnecessary disclosures regarding the circumstances of their deaths.

As disclosure by the City is discretionary, we do not view release of the information to be legally necessary. In addition, while the Russian Federation did not raise concerns until after an autopsy had already been conducted, the U.S. Mission requests the City of New York's assistance in taking any steps that it can to discontinue voluntary disclosures about the cause and manner of his death, which is information that would not be in its possession had the Russian concerns been raised earlier. City officials have already made voluntary statements reported in the media about Ambassador Churkin's medical history, about which the Russian Permanent Mission in New York and Russian Embassy in Washington, DC have complained, explaining that the information reported was very private in nature and included information about which even they had no knowledge. There is concern that such disclosures or additional disclosures could cause embarrassment to Ambassador Churkin's family or bring him into disrepute.

Additionally, to the extent that this disclosure is an exercise of the jurisdiction of the City of New York, under the United Nations Headquarters Agreement, Permanent Representatives of the Member States of the United Nations enjoy complete immunity from the civil and administrative jurisdiction of the United States (and its administrative subdivisions) except in three very specific exceptions, none of which are applicable in these circumstances.

Unless and until the Russian Federation waives its immunity with respect to him, Ambassador Churkin continues to be immune from the exercise of New York's civil and administrative jurisdiction even though he is deceased.

In light of the legal context, there is a risk that the Russian Federation may formally protest the public disclosure of the cause and manner of Ambassador Churkin's death, or the autopsy itself. Such protests could be lodged bilaterally, or more publically, for example, in the International Court of Justice, or a meeting of the UN Committee on Relations with the Host Country in which the City of New York participates. Such protests could lead to a request for a formal legal opinion on U.S. compliance with its obligations, a referral to the International Court of Justice, or binding arbitration, all of which would entail close scrutiny of the City's actions and whether they were consistent with our obligations.

Third, even if there were a conflict between New York City law and U.S. international obligations, our obligations under the relevant binding treaties would likely prevail. As a general matter, under the U.S. Constitution's Supremacy Clause, treaties and statutes are supreme federal law and apply in the face of inconsistent state or local law. The U.S. Supreme Court has routinely held that self-executing treaties displace conflicting state or local law. *See, e.g., Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) ("The treaty is binding within the State of Washington [and the] rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or State laws."); *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 167-176 (1999) (holding damages actions under New York tort law precluded by treaty).

Separately, the U.S. Supreme Court has held that state law, even in an area generally reserved to state regulation, may be preempted where it creates an obstacle to the achievement of the President's foreign policy as reflected in an international agreement. *See American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) (holding California state insurance regulation preempted by federal foreign policy underlying international agreements settling claims against private insurance companies). Thus, even if the Headquarters Agreement and Vienna Convention were not self-executing, the strong federal policy reflected in the agreements with regard to the conduct of diplomacy and the treatment of diplomats should be understood to preempt a contrary state law. If even provisions of state law must yield in these circumstances, the weaker municipal interest reflected in a policy would seem less able to withstand federal preemption.

We hope this information is helpful to the City. We would welcome an opportunity to discuss our position with relevant City authorities if that would help to successfully resolve the request.

Sincerely,


James B. Donovan,
Minister Counselor for
Host Country Affairs