

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPEN TECHNOLOGY FUND, et al.
Plaintiffs-Appellants,

v.

MICHAEL PACK, in his official
capacity as Chief Executive Officer and
Director of the U.S. Agency for Global
Media,

Defendant-Appellee.

Case No. 20-5195

DECLARATION OF NATHANIEL KRETCHUN

I, Nathaniel Kretchun, declare as follows:

1. I am the Vice President for Programs of the Open Technology Fund.
2. I am not a lawyer.
3. I offer this declaration to inform the Court about an incident that occurred earlier today. The head lawyer of the U.S. Agency for Global Media arrived at our offices this morning to conduct an inspection—an inspection that she insisted (in an email sent late last night) OTF had no choice but to agree to. When she arrived, before I was able to come down to meet her, she tried to pressure the security guard in our office building to allow her and one of her colleagues to gain entry into our offices. After I escorted them in, the agency's lawyer questioned me, including asking several questions related to this litigation, without OTF's counsel present. She also asked questions relating to the citizenship status of OTF employees

and contractors, which I found particularly alarming because some of our employees and partners work for free expression in repressive regimes, and their personal safety could be placed in jeopardy. Based on the position in which he held his phone throughout much of the inspection, I believe that the lawyer's colleague was continuously recording during their visit. This incident is described in further detail below.

4. On Tuesday, July 21, 2020 at 11:26 pm, OTF received an email from Mora Namdar, the Acting Vice President for Legal, Compliance, and Risk at the United States Agency for Global Media. Ms. Namdar's email stated that—despite COVID-19—if OTF did not permit agency representatives to physically inspect OTF's offices the following day, the agency would consider this failure to be a “material breach[] of the Grant Agreement” between the agency and OTF. I now understand that Ms. Namdar is a licensed attorney, that her full name is Morvared Namdarkhan, that she is a member of the Texas and District of Columbia bars, and that she is a lawyer for the agency in this matter. A true and correct copy of Ms. Namdar's July 21, 2020 email, as well as the rest of the email chain regarding the inspection, is attached to this declaration as **Exhibit A**.

5. Laura Cunningham, OTF's Acting CEO and President, responded this morning in an email on which I was copied. Ms. Cunningham stated that “[d]espite the health risks due to the COVID-19 pandemic,” OTF “agreed to facilitate an in-

person inspection of our office.” Ms. Cunningham informed Ms. Namdar that I would meet her at our office at 11:30am. Ms. Cunningham requested that both OTF’s and the agency’s litigation counsel be copied on all communications going forward. In keeping with that request, Ms. Cunningham cced the agency’s litigation counsel, Department of Justice attorneys Thomas Byron, Gerard Sinzdak, and Stephen Ehrlich.

6. On Wednesday, July 22, 2020, I went to OTF’s office to enable representatives from the U.S. Agency for Global Media to gain entry for their inspection and waited for them in the office.

7. Ms. Namdar and Jonathan Bronitsky, the agency’s director of public affairs, arrived to conduct the inspection. OTF has been informed by an employee of our leasing agent AdvantEdge, that when Ms. Namdar and Mr. Bronitsky arrived, they pressured her to let them into our office suite and filmed her while doing so. She later told me that she felt extremely uncomfortable that she and asked them to stop.

8. When I learned Mr. Namdar and Mr. Bronitsky had arrived, I went down to the lobby of our building to escort them to our office.

9. Once they entered the suite, they immediately began taking pictures. I questioned whether that was within scope of an inspection. Ms. Namdar said curtly that it was and asserted “I can inspect anything.” She took multiple pictures of

brainstorming Post-It notes from our most recent OTF retreat. But she stopped before taking pictures of all the boards with Post-It notes. This left me to suspect that the pictures were less about documenting the content and more an intimidation tactic.

10. Ms. Namdar then began filming and narrating, noting that she was in the OTF office space. She then left our office suite and went into the building's common space, continuing to film, despite the fact I repeatedly told her she was no longer in OTF's space. Based on the position in which he held his phone throughout much of the inspection, I believe Mr. Bronitsky was continuously recording.

11. Ms. Namdar asked several questions while she was in our office space. Some were about the office space and our lease terms. For example, she asked how many people had access to our office space; what the building's policies are for receiving mail; and about the other tenants in the building. I did not know the answer to most of these questions.

12. Many of Ms. Namdar's questions, however, were not related to the office space. Ms. Namdar asked several questions about the number of OTF team members, their employment status, and whether they are American citizens. I was particularly alarmed that Ms. Namdar asked questions about the citizenship status of OTF employees and contractors, some of whom work for free expression in repressive regimes and whose personal safety could be placed in jeopardy.

13. Ms. Namdar said that she will eventually conduct “formal interviews” with staff, including myself. But she asked about my role and duties “informally for now.” I described in detail some of OTF’s processes for application intake and review, some of the areas in which we work, and some of the coordination we do with the State Department and other partners. I also went into depth on some of the technical approaches we take to censorship challenges in Iran and China. Ms. Namdar seemed largely uninterested in the substance of the work and said she had other questions that she would prefer to ask.

14. Ms. Namdar and Mr. Bronitsky also asked several questions that appeared to be directly related to this lawsuit that concerned whether OTF has somehow been “authorized” by the U.S. Agency for Global Media. For example, they asked multiple times why OTF was spun out of Radio Free America, which had initially incubated the programs that led to OTF, and who authorized OTF’s formation. They also repeatedly asked what OTF does that Radio Free America, a broadcasting organization, and the Office of Internet Freedom, an office within the Agency for Global Media, could not do. In addition, they asked for the number of contracts we have and the vendors for those contracts.

15. Before asking these questions, Ms. Namdar did not tell me that she is a lawyer or that she represents the Agency for Global Media in this matter. But I am aware (and was aware at the time) that Ms. Namdar is an attorney and that she holds

the position of Acting Vice President for Legal, Compliance and Risk at the agency. This made me uncomfortable as several lines of questioning she pursued seemed potentially germane to ongoing litigation, and OTF had no counsel present. As a non-lawyer, and as someone who was not heavily involved in OTF's formation, I was unsure how to answer several of her questions. And I felt uncomfortable doing so. But I felt I had no choice but to try because Ms. Namdar's July 21, 2020 email appeared to threaten OTF's grant funding if we did not comply with her inspection or her requests to interview personnel.

16. Before leaving, Ms. Namdar asked a question that I perceived as an attempt to test my loyalty. She asked whether, when this litigation is over and a new CEO is in place, I would be willing to work with him and accept him. I answered that OTF cares deeply about its mission, the communities we serve, and the cause of internet freedom.

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing declaration is true and correct. Dated this 22nd day of July, 2020, and executed in Washington, DC.

/s/ Nathaniel Kretchun
Nathaniel Kretchun

Exhibit A



Nat Kretchun <nat@opentech.fund>

USAGM inspection

5 messages

Morvared Namdarkhan <MNamdarkhan@usagm.gov>

Tue, Jul 21, 2020 at 2:02 PM

To: "nat@opentech.fund" <nat@opentech.fund>, "lauren@opentech.fund" <lauren@opentech.fund>, "heidi@opentech.fund" <heidi@opentech.fund>

Cc: Emily Pauline Newman <ENewman@usagm.gov>, Diane Cullo <DCullo@usagm.gov>, Michael Pack <MPack@usagm.gov>, Jonathan Bronitsky <JBronitsky@usagm.gov>

Nathaniel, Lauren, and Heidi,

We haven't yet had the pleasure of meeting, but I hope this email finds you all well. As you know, CEO Pack is the Senate-confirmed head of USAGM. As OTF is a grantee of USAGM, it is obligated to abide by the executed Grant Agreement between USAGM and OTF.

To that end, I understand that USAGM representatives attempted to visit and inspect the OTF space located at [2021 L Street NW, Suite 300, Washington D.C., 20036](#), and were denied entry on both July 7th 2020 and July 8th 2020. In fact, security told them that OTF had specifically instructed that USAGM personnel be barred from entering the OTF space. This is a violation of the Grant Agreement. Under Article XII (g) of the Grant Agreement, it specifically states: ***"To ensure the continuous cooperative planning and operations hereunder, the Non-Federal Entity shall permit USAGM or its authorized representatives, including the Inspector General, to visit the Non-Federal Entity's facilities and to inspect the facilities, activities and work pertinent to the grant, both in the United States and abroad, and to interview personnel engaged in the performance of the grant to the extent deemed necessary by USAGM."***

This email serves as formal notice to OTF and Nathaniel Kretchun, as you, Mr. Kretchun, are the listed point of contact for the provisions of the Grant Agreement. As USAGM representatives, both Dr. Jonathan Bronitsky and I will be present to inspect OTF offices located at [2021 L Street NW, Suite 300, Washington D.C., 20036](#) tomorrow at 11:30 am ET. We expect to be provided access. If there are any other locations out of which OTF operates, whether in the U.S. or abroad, please identify them now as we would like to inspect these facilities as well. Additionally, we will interview all personnel when we inspect the offices tomorrow. If this interview process cannot be done in person tomorrow, it can instead be done electronically. By close of business today, please provide a list of all OTF employees, their titles, and their contact information so that we can schedule these interviews.

Also, I know you have had previous points of contact at USAGM, but from this point forward, all communication with OTF employees and representatives should be directed only to me. If you have any questions, please don't hesitate to reach out.

Best,

Mora Namdar, Esq

Senior Advisor to the CEO

Acting Vice President for Legal, Compliance, and Risk

U.S. Agency for Global Media

3300C

w) 202-920-2008

c) 202-227-1946



U.S. Agency for Global Media | Broadcasting Board of Governors

330 Independence Ave. SW | Washington, DC 20237

<http://usagm.gov>

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Pre-decisional and Deliberative Communication

Heidi Pilloud <heidi@opentech.fund>
To: Laura Cunningham <laura@opentech.fund>
Cc: Nat Kretchun <nat@opentech.fund>, Lauren Turner <lauren@opentech.fund>

Tue, Jul 21, 2020 at 2:24 PM

Heidi Pilloud
Chief Financial Officer
Open Technology Fund
e: heidi@opentech.fund
m: +1.202.471.0420

Begin forwarded message:

[Quoted text hidden]

Laura Cunningham <laura@opentech.fund>
To: MNamdarkhan@usagm.gov
Cc: Emily Pauline Newman <ENewman@usagm.gov>, Diane Cullo <DCullo@usagm.gov>, Michael Pack <MPack@usagm.gov>, Jonathan Bronitsky <JBronitsky@usagm.gov>, Heidi Pilloud <heidi@opentech.fund>, Nat Kretchun <nat@opentech.fund>, Lauren Turner <lauren@opentech.fund>

Tue, Jul 21, 2020 at 6:38 PM

Dear Mora,

I hope you're doing well. It's a pleasure to be introduced. We're looking forward to working with you going forward.

As I'm sure you're aware, the D.C. Circuit Court of Appeals has [granted OTF's motion for injunction pending appeal](#), and ordered that: "The officers and directors of OTF that were in those roles prior to the government's actions on June 17, 2020, shall continue in their normal course throughout the pendency of this appeal." Therefore, please do include me as OTF's Acting CEO and President on all correspondence with OTF going forward .

I'm also very sorry for the confusion regarding USAGM's previous inspection requests. OTF had previously been in touch with Michael Williams about these requests and had explained that, out of respect for the health and well-being of our staff during the COVID-19 pandemic and consistent with DC guidance, OTF has instituted a full work from home protocol so none of our staff are currently working from the office. Therefore, a visit to our office is not possible at this time; however, we are more than happy to arrange a physical inspection of our office once DC enters Phase 3 of reopening.

I do understand that our grant agreement allows USAGM employees the right to physical inspection of our premises. As we told Michael previously, we certainly don't dispute that and are being as cooperative as we can be under the highly unusual COVID-19 circumstances. We are happy to allow for physical inspection once DC enters Phase 3 of reopening. In addition to COVID considerations, allowing non-OTF employees into our space without one of us present presents other liability issues that we are not able to take on. And, as a practical business matter, that is not a privilege we would extend to anyone. While the grant agreement allows for physical inspection, it does not require us to grant that right when it is not possible for a member of our team to be present. Therefore, we are unable to authorize a visit by USAGM personnel or representatives to our office tomorrow. You should not expect that security will escort you through our premises.

More importantly, the nature of our operations does not lend itself to a very interesting office environment; however, if there is an acute concern regarding our physical office space that has led you to make this request for an immediate physical inspection, I'm happy to address those concerns to the extent I'm able to virtually. Otherwise, let's plan to arrange for an office inspection as soon as safer times permit.

While the current health situation prevents us from meeting in person, we are very much looking forward to connecting with and briefing USAGM's new leadership on OTF's important work to support internet freedom globally. I would be happy to organize a virtual meeting for you and our team at your convenience. Please let me know when you're available to connect and the specific topics you'd like to discuss, and I will organize a meeting accordingly.

Very best,
Laura

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Laura Cunningham
Acting CEO and President
Open Technology Fund
Laura@opentech.fund
+1 202 352 6432



Morvared Namdarkhan <MNamdarkhan@usagm.gov>

Tue, Jul 21, 2020 at 11:26 PM

To: "laura@opentech.fund" <laura@opentech.fund>

Cc: Emily Pauline Newman <ENewman@usagm.gov>, Diane Cullo <DCullo@usagm.gov>, Michael Pack <MPack@usagm.gov>, Jonathan Bronitsky <JBronitsky@usagm.gov>, Heidi Pilloud <heidi@opentech.fund>, Nat Kretchun <nat@opentech.fund>, Lauren Turner <lauren@opentech.fund>

Hi Laura,

It's a pleasure to connect with you as well.

I understand the unique situation involving COVID-19, and many people, including many on our team, continue to be present at work every day to ensure that U.S. taxpayer dollars are well spent and that critical missions are achieved. Of course, every precaution is taken at numerous government, non-profit,

and private entities around the country to make sure that work can be done in a safe environment. Indeed, with pressing matters, many don't have the luxury to choose not to come into work.

That being said, the Grant Agreement does not provide accommodation for rejecting inspection of the space by authorized USAGM personnel due to COVID-19, or, frankly, any other reason enumerated in your email. It is not required that any member of OTF be present during an inspection, although we would welcome that. To reiterate what I clarified in my previous email, Article XII (g) of the Grant Agreement, specifically states: ***“To ensure the continuous cooperative planning and operations hereunder, the Non-Federal Entity shall permit USAGM or its authorized representatives, including the Inspector General, to visit the Non-Federal Entity’s facilities and to inspect the facilities, activities and work pertinent to the grant, both in the United States and abroad, and to interview personnel engaged in the performance of the grant to the extent deemed necessary by USAGM.”***

This clause clearly does not restrict our right to inspect OTF facilities to when OTF personnel chooses to be at the space nor does it give OTF the option to reject an inspection by USAGM personnel due to extenuating circumstances, no matter how unique they are.

We also requested a list of all OTF facilities, which has not been provided. Please provide this information without delay. We would like to further inspect any other OTF facilities that exist.

Additionally, the second part of my request to your colleagues also remains unaddressed. USAGM has the right to interview personnel, which we plan to do tomorrow. We are happy to do that electronically, but we must be provided with the required personnel information, including contact information, in order to properly schedule and conduct those interviews.

To be clear, any denial of USAGM authorized representatives from the OTF facility tomorrow at 11:30 am ET and any failure to provide the information required to perform personnel interviews will serve as material breaches of the Grant Agreement. OTF has already breached the Grant Agreement by denying our personnel the right to inspect the facility on both July 7th 2020 (more than 10 business days ago) and July 8th 2020.

We hope that OTF chooses to comply with the obligations in the Grant Agreement to ensure continuous cooperative planning and support for internet freedom projects.

Best,

Mora Namdar, Esq
Senior Advisor to the CEO
Acting Vice President for Legal, Compliance, and Risk
U.S. Agency for Global Media
3300C
w) 202-920-2008
c) 202-227-1946

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Pre-decisional and Deliberative Communication

On Jul 21, 2020, at 6:38 PM, Laura Cunningham <laura@opentech.fund> wrote:

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[Quoted text hidden]

<image001.png>

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330 Independence Ave. SW | Washington, DC 20237
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Pre-decisional and Deliberative Communication

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U.S. AGENCY FOR GLOBAL MEDIA **image001.png**
9K

Laura Cunningham <laura@opentech.fund>

Wed, Jul 22, 2020 at 11:12 AM

To: MNameDarkhan@usagm.gov

Cc: Emily Pauline Newman <ENewman@usagm.gov>, Diane Cullo <DCullo@usagm.gov>, Michael Pack <MPack@usagm.gov>, Jonathan Bronitsky <JBronitsky@usagm.gov>, Heidi Pilloud <heidi@opentech.fund>, Nat Kretchun <nat@opentech.fund>, Lauren Turner <lauren@opentech.fund>, stephen.ehrlich@usdoj.gov, H.Thomas.Byron@usdoj.gov, Gerard.J.Sinzdak@usdoj.gov, Deepak Gupta <deepak@guptawessler.com>, greg@guptawessler.com, neil@guptawessler.com

Dear Mora,

I appreciate USAGM's continued interest in OTF, and I am looking forward to sharing with you more about our important work.

Despite health risks due to the COVID-19 pandemic that we have previously noted, I understand that this physical inspection of OTF's offices is an urgent priority for USAGM. Therefore, our VP for Programs Nat Kretchen has kindly volunteered to meet you and Jonathan at OTF's office at 11:30am today to facilitate your inspection. As we noted previously, OTF's only office is located [2101 L St NW, Suite #300, Washington, DC 20037](#).

In advance of the inspection, we would also appreciate it if you could provide more details about the purpose of the inspection and how long you expect the inspection will take. In particular, could you please clarify the grant-related purpose for this urgent inspection so that we can ensure we can prepare accordingly.

Although we have agreed to facilitate an in-person inspection of our office, I would ask that you continue to take our staff's health risks seriously and abide by DC's [guidance regarding Phase 2 precautions](#), including wearing a mask and social distancing while in our office.

In addition, as I stated in my previous email, I would be very happy to arrange a virtual meeting for you with our staff as you've requested. We are very much looking forward to connecting with and briefing USAGM's new leadership on OTF's important work to support internet freedom globally. Again, please let me know your availability and I will arrange the meetings that you've requested accordingly.

Lastly, in light of the D.C. Circuit's injunction, we think it would be best to copy both parties' litigation counsel on communications going forward.

Very best,
Laura

[Quoted text hidden]

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Laura Cunningham
President
Open Technology Fund
Laura@OpenTech.Fund

[Quoted text hidden]