



UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425
www.usccr.gov

September 21, 2010

VIA E-MAIL AND REGULAR MAIL

Joseph H. Hunt, Esq.
Director, Federal Programs Branch
Civil Division
United States Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20001

Re: United States Commission on Civil Rights Statutory Enforcement Report

Dear Mr. Hunt:

On December 8, 2009, the U.S. Commission on Civil Rights issued discovery requests to the Department relating to the New Black Panther Party (NBPP) litigation. As part of these requests, the Department was asked to identify and state the basis for any and all objections or claims of privilege and to provide specific details as to any information or documents withheld.¹

This demand was followed up by correspondence on behalf of the Commission dated March 30, April 1, April 26, and May 13, 2010. As noted in the letter of March 30, "by failing to provide any supporting context or explanation for the assertion of such privileges, the Department apparently seeks to obfuscate the basis for its refusal to provide the requested information. There is not even a pretense of a credible explanation." Despite the Commission's demands, the Department refused to detail the types of documents it claimed were privileged. By your letter of May 13, 2010, it was

¹ Instruction No. 10 of the discovery request provides, in part:

For all documents or information withheld pursuant to an objection or a claim of privilege, identify:

- A. the author's name and title or position;
- B. the recipient's name and title or position;
- C. all persons receiving copies of the document;
- D. the number of pages of the document;
- E. the date of the document;
- F. the subject matter of the document; and the basis for the claimed privilege.

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asserted: "We do not intend to provide a log of withheld materials; our confidentiality interests in attorney work product are so conventional that we do not see a basis for creating a log of these materials."

Despite the Department's assertions to the Commission, it was learned yesterday that just such an index was provided by the Department to Judicial Watch as a result of a Freedom of Information Act (FOIA) lawsuit. The log provided to Judicial Watch, known as a *Vaughn* index, provides exactly the type of information originally requested by the Commission.

The Department's statutory duty to cooperate with the Commission has no exceptions and is broader than the requirements of FOIA. However, the Commission's requests for information to federal agencies, based upon a statutory mandate of cooperation, are ultimately dependent upon the Department for enforcement.² FOIA requests, on the other hand, are ultimately reviewable by the courts. Accordingly, it is telling that the Department cynically refused to provide requested information to the Commission, but subsequently acknowledged the validity of the requests by providing much of the same information to a third party, Judicial Watch. The only difference is that potential judicial scrutiny exists with regard to a FOIA lawsuit.

It is requested that the Department immediately provide to the Commission a privilege log directly responsive to the Commission's discovery requests. It also is requested that the Department immediately provide copies of any responses it has provided to any individual, organization, or entity requesting information about the New Black Panther Party litigation, and the related decision making process, pursuant to FOIA. This request includes not only summaries and *Vaughn* indices, but any underlying documents that have been released.

Lastly, it is requested that the Department indicate, no later than September 24, 2010, whether it wishes to revise its discovery responses and the testimony provided on behalf of the Department in light of the index provided in the Judicial Watch litigation.

Sincerely,



David P. Blackwood
General Counsel

² Under the terms of 42 U.S.C. § 1975a(e)(2): "In case of contumacy or refusal to obey a subpoena, the Attorney General may in a Federal court of appropriate jurisdiction obtain an appropriate order to enforce the subpoena." This provision arguably leaves the Commission without recourse in the event, as here, the Department refuses to provide subpoenaed information.

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cc: Chairman Gerald A. Reynolds
Vice Chair Abigail Thernstrom
Commissioner Todd F. Gaziano
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Commissioner Peter N. Kirsanow
Commissioner Arlan D. Melendez
Commissioner Ashley L. Taylor, Jr.
Commissioner Michael J. Yaki
Martin Dannenfels, Staff Director

Faith Burton, Esq.