



UNITED STATES COMMISSION ON CIVIL RIGHTS

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

May 13, 2010

**VIA E-MAIL AND REGULAR MAIL**

Faith Burton, Esq.  
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United States Department of Justice  
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Jacqueline Coleman Snead, Esq.  
Senior Trial Counsel  
Federal Programs Branch  
United States Department of Justice  
20 Massachusetts Avenue, NW  
Washington, DC 20001

Re: Outstanding Discovery Issues

Dear Ms. Burton and Ms. Snead:

Thank you for agreeing to meet yesterday to discuss outstanding discovery issues with regard to the Commission's enforcement report on the New Black Panther Party litigation and enforcement of 11(b) of the Voting Rights Act. The purpose of this letter is to summarize our discussions.

As discussed, the Commission's demands and objections relating to outstanding discovery issues are set out in detail in the correspondence between the parties, as well as the instructions relating to the initial discovery requests themselves. As you might recall, the original discovery requests of December 8, 2009 were accompanied with an offer to meet to discuss any outstanding discovery issues, a meeting that was not held until yesterday.

As to our discussions, this is to confirm that we have received the unredacted Declarations prepared with regard to the New Black Panther Party litigation. The Department has asked that these Declarations not be published by the Commission until we have received permission of the Declarants. We request that the Department move expeditiously on this matter and reserve the right to contact the Declarants directly, some of whom have already indicated they have no objections.

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Second, this is to confirm that you have provided a revised disk containing copies of those documents which were provided by the Department to the Commission on April 16, 2010. Previously, the Department had raised concerns over the privacy interests of various low-level Department personnel identified in e-mail traffic and such. It is my understanding that the revised disk is identical to the one previously provided, with the exception that these low-level personnel have had their names redacted, and that the Department is no longer asking that the material not be published.

Third, this is to confirm your representation that there has been no formal assertion of executive privilege with regard to any of the items sought by the Commission pursuant to its discovery requests. As discussed, this matter needs to be clarified. In its response to the Commission's discovery requests, the Department claimed deliberative process privilege with regard to the materials sought. As recognized by the courts, the deliberative process privilege is a subset of executive privilege and "does not shield documents that simply state or explain a decision the government has already made or protect the material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *See In re Sealed Case*, 326 U.S. App. D.C. 276, 284, 121 F.3d 729, 737 (1997).

As discussed, it is difficult to see how the Department can raise the deliberative process privilege if it has not formally invoked executive privilege as required by Supreme Court authority and followed the requirements for its assertion. As suggested, it is requested that the Department provide a written statement as to its position relating to whether either or both executive privilege and/or deliberative process privilege are being asserted in this matter and that it provide said statement before Mr. Perez appears before the Commission.

The above confusion is compounded by the fact that the Department did not honor the Commission's instruction relating to the assertions of privilege. In this regard, the complete terms of instruction number 10 of the Commission's discovery requests is set forth below.

State the basis for any objection to responding to any discovery request, together with any legal authorities or precedents upon which DOJ relies to support said objection. In the event that the Department objects to only part of a discovery request, the Department is required to furnish all information requested by the discovery request that is not included within the partial objection.

If any claim of privilege is raised relating to any document or information request, identify with specificity the privilege asserted, any legal authorities relied upon, and indicate whether any privilege so asserted can be addressed by agreements of confidentiality between the parties. If any

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claim of executive privilege is raised, identify the highest official within the Department connected with the specific document or information, and indicate whether the President of the United States has specifically exercised said privilege.

In addition, 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.

It is again requested that the Department specify each and every assertion of privilege in conformance with the above instruction and provide the required privilege log. In the absence of such response, the Department's statutory duty to comply fully with the Commission's request must be honored.

As indicated, we would especially request that the Department expedite the release of witness statements by the 12 individuals identified in the Appendix to the Commission's letter of May 9, 2010. While you have indicated that such statements might contain observations of attorneys or otherwise alleged privileged information, we are requesting that a review of these statements be made as soon as possible and that the Department take steps to provide the information, whether in redacted form or not.


At the same time, it is also requested that the Department expedite its response to the inquiry of whether other instances of voter intimidation have been received with regard to the New Black Panther Party. It is the Commission's belief that such information, to the extent that it exists, would supply valuable context to the investigation of the Philadelphia incident.

Finally, you indicated that the Department is working on a full response to the Commission's letter of May 9, 2010. In doing so, it is again requested that the Department provide a full explanation as to whether a special counsel will be appointed and, if not, why not. Where, as here, the parties have substantive differences as to the types of information that are relevant and protected, the appointment of a Special Counsel would serve the interests of both parties in resolving any disputes.

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As indicated above, this letter is not meant to be an exclusive list of all items and issues that exist relating to the Commission's discovery requests. Nonetheless, it is hoped that this correspondence will help expedite the resolution of the current discovery disputes between the parties. Please do not hesitate to contact me should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'David P. Blackwood', written in a cursive style.

David P. Blackwood  
General Counsel

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