



UNITED STATES COMMISSION ON CIVIL RIGHTS

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

December 8, 2009

VIA HAND DELIVERY

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  
on the Implication of DOJ's Actions in the New Black Panther Party  
Litigation for Enforcement of Section 11(b) of the Voting Rights Act

Dear Mr. Hunt:

Reference is made to your letter of November 24, 2009, relating to the above-noted matter.

Pursuant to your request that future communications from the U.S. Commission on Civil Rights ("the Commission") be directed to you, enclosed please find a set of Interrogatories and Requests for Production of Documents relating to the above-noted matter. These requests are accompanied by a subpoena directed to the Department.

In your letter, you seem to contend that there is a question of the Commission's authority to issue subpoenas to the Department or its employees. In this regard, your attention is directed to 42 U.S.C. § 1975a(e)(2). This provision grants the Commission the authority to issue subpoenas for the attendance of witnesses and the production of written documents or other materials. This provision in no way prohibits or excludes requests directed to federal agencies or their employees.<sup>1</sup> Indeed, you should be aware that, as recently as 2004, the Commission issued a subpoena, signed by then-Chair Mary Frances Berry, directed to R. Alex Acosta of the Civil

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<sup>1</sup> A conflict of interest may exist with regard to the Department's enforcement of Commission subpoenas directed to the Department of Justice. Under 42 U.S.C. § 1975a(e)(2), the decision whether to initiate a judicial action to enforce a subpoena issued by the Commission rests in the discretion of the Attorney General. This would put the Attorney General in the untenable position of seeking an action against a Department under his supervision. Accordingly, in the event a conflict develops, it is suggested that the agency heads consult as to possible alternative methods to resolve such dispute.

Rights Division.<sup>2</sup> In that instance, the Department met with staff from the Commission and fully cooperated in producing the requested information.

In the present case, beginning in June 2009, the Commission has consistently requested the voluntary production of information from the Department, without any success. It was only after the Department, by letter dated September 9, 2009, formally indicated that no information would be forthcoming (pending completion of an investigation by the Office of Professional Responsibility), and subsequently ignored the Commission's letter of September 30, 2009, that subpoenas were issued by the Commission. While your letter refers to an ongoing "dialogue" between the Department and the Commission, it is the dearth of cooperation on the part of the Department that has resulted in the Commission's need to issue subpoenas.

There is particularly no justification for the ongoing delay in producing documents relating to past voter intimidation investigations. Despite DOJ's contention that there are few reported cases, the Commission has repeatedly explained its need for documents relating to all past investigations, filings, settlements, consent decrees, etc. in order to assess whether the DOJ's actions in the NBPP case constitute a change of policy.

In making the attached interrogatory and document requests, we are both mindful of the sensitivity of the subject matter involved and aware that, in response to similar requests, the Department has raised various concerns and matters of privilege. While such considerations carry weight, cooperation with Commission investigations is a mandatory statutory obligation. *See* 42 U.S.C. § 1975b(e) ("All federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."). Moreover, due to the unique investigative role of the Commission – akin to that of a congressional committee<sup>3</sup> – disclosure to the Commission of the information sought is both proper and required.

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<sup>2</sup> Indeed, in discussing the Commission's policies with regard to subpoenas, Ms. Berry has stated:

We [the Commission] subpoena everyone who comes before us, and we do that even though some people are willing.

Transcript of Commission Meeting of January 11, 2002, p. 7.

<sup>3</sup> Numerous courts have likened the Commission's investigatory function to that of a congressional oversight committee. *See Hannah v. Larche*, 363 U.S. 420, 489-90 (1960) (The concurrence noted that the Commission was "charged with responsibility to gather information as a solid foundation for legislative action," and that the hearing in question was "in effect a legislative investigation.") (Frankfurter, J, concurring). More explicitly, "Congress has entrusted the Commission with [the role of] investigating and appraising general conditions and reporting them to Congress so as to inform the legislative judgment. Resort to a legislative commission as a vehicle for proposing well-founded legislation and recommending its passage to Congress has ample precedent." *Id.* at 492-93. (Frankfurter, J, concurring). *See also Berry v. Reagan*, No. 83-3182, 1983 WL 538, \*2 (D.D.C. 1983) ("[I]n making investigations and reports thereon for the information of Congress under [the Commission's statute], in aid of the legislative power, it acts as a legislative agency.") (internal citation omitted). *See also Buckley v. Valeo*, 424 U.S. 1, 137 (1976) (Powers and functions that "are essentially of an investigative and informative nature" fall "in the same general category as those powers which Congress might delegate to one of its own committees.")

In this regard, production of the requested documents and information to the Commission is in keeping with the practice of disclosure to congressional committees over the years.

[I]n the last 85 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice activities. These investigations have encompassed virtually every component of the DOJ, and all officials, and employees, from the Attorney General down to subordinate level personnel.

CRS Report for Congress, *Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice*, p. 2 (Oct. 3, 2007).<sup>4</sup> As the CRS notes, “[a]n inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern.” *Id.*

In addition, while the Commission’s investigation primarily concerns the Department’s policies, procedures, standards and actions in enforcing section 11(b) of Voting Rights Act, the fact that the Attorney General has referred this matter to the Office of Professional Responsibility (OPR) raises questions regarding the possibility of misconduct, as have related press reports. As reflected on the agency’s website, “OPR reviews allegations of attorney misconduct involving violation of any standard imposed by law, applicable rules of professional conduct, or Departmental policy.” Given the nature of OPR’s jurisdiction, any perceived misconduct within its purview relating to matters of civil rights enforcement strengthens the requisite nature of the Commission’s discovery requests and weakens any claim that matters must be protected from review. *See In re Sealed Case*, 121 F.3d 729, 738 (D.D.C. 1997); CRS Report at 31.

As to possible concern regarding revelations of government decision-making considerations, press reports indicate that the Department consulted with outside third parties, such as Kristen Clarke of the NAACP Legal Defense Fund. No privilege exists that would allow disclosure by the Department of information to an outside group, but prohibit same to an investigatory agency with a statutory mandate.<sup>5</sup>

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<sup>4</sup> Because the closest corollary to a Commission investigation is an investigation by a congressional committee, the CRS memorandum is uniquely instructive in analyzing other possible objections to the disclosure of information.

<sup>5</sup> To the extent that the Department does seek to assert any privilege, the attached discovery requests require that each and every assertion of an alleged privilege identify with specificity the nature of the privilege raised, the basis for the assertion, and any legal authorities in support thereof. In addition, the instructions require that the Department indicate whether any claim of executive privilege has been specifically authorized by the President. *See* Instruction No. 10.

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But to the extent that some documents or other communications may involve internal pre-decisional deliberative discussions, it should be understood that: (1) as between the Commission and the Department the only legal privilege that exists is the President's constitutionally-based executive privilege,<sup>6</sup> (2) the executive privilege must be invoked by the President, or possibly by a Department Head on the President's behalf, (3) the President should not routinely invoke executive privilege, and may not do so to shield potential wrongdoing, and (4) the President's executive privilege is not absolute and should not be read broadly to frustrate the core functions of an investigative agency.

With regard to documents or communications that arguably might fall within the President's executive privilege, we ask that you confirm early on whether the President has chosen to invoke executive privilege to shield particular information from the Commission. If not, there is no reason to argue about what is and is not subject to that privilege.

Lastly, you have requested information relating to the Commission's deliberation regarding this matter. In this regard, please be informed that the Commission's authorization of the subpoenas occurred on October 30, 2009, but the Commission has discussed and approved previous information requests at several of its meetings, as reflected in previous letters to the Department. Copies of the applicable transcript(s) will be provided under separate cover when finalized. As to coordination with the Department regarding information that might eventually become publicly disclosed, please be informed that affected agencies are given the opportunity to review Commission reports prior to their release pursuant to the agency's internal Administrative Instruction 1-6.

We look forward to working with the Department to facilitate the provision of the requested materials to the Commission, while at the same time addressing any legitimate confidentiality concerns. To that end, it is requested that you please contact the undersigned to schedule a meeting in the next two weeks to (i) identify those discovery requests as to which there is no dispute; (ii) resolve any legitimate concerns that might exist; and (iii) reschedule the previously-noted depositions of Department personnel. In addition, prior to any such meeting, it is requested that you please identify any specific instance in which the pendency of an OPR investigation

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<sup>6</sup> With regard to the existence of other common-law privileges, the Department's Office of Legal Counsel has opined that with regard to inter-branch investigations "the interests implicated by the attorney-client privilege generally are subsumed under a claim of executive privilege . . . , and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege." 6 U.S. Op. Off. Legal Counsel 481, n.24 (Aug. 2, 1982). Attorney-client privilege "is not usually considered to constitute a separate basis [from executive privilege] for resisting congressional demands for information." 10 U.S. Op. Off. Legal Counsel 68, 78 (April 28, 1986). Indeed, Congress has never taken the position, nor have the courts held, that congressional investigators must recognize the attorney-client privilege when conducting an investigation that involves the executive branch. Whether to recognize such a claim rests within the sound discretion of the congressional committee. From a separation of powers perspective, the President's claim of privilege is even weaker with respect to the Commission, half of whose Commissioners are appointed by the President.

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precluded the disclosure of requested information from Congress or an independent federal agency.

Thank you for your anticipated cooperation.

Sincerely,

David P. Blackwood  
General Counsel

Attachments

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 Dannenfels, Staff Director